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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# AFFAIRE DU DÉTROIT DE CORFOU

**PROCÉDURE ORALE (PREMIÈRE PARTIE)**

# III

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# THE CORFU CHANNEL CASE

**ORAL PROCEEDINGS (FIRST PART)**

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# AFFAIRE DU DÉTROIT DE CORFOU

# THE CORFU CHANNEL CASE

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# 1950

# AFFAIRE DU DÉTROIT DE CORFOU

ARRÊTS DES 25 MARS 1948, 9 AVRIL ET 15 DÉCEMBRE 1949

**VOLUME III**

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# 1950

# THE CORFU CHANNEL CASE

JUDGMENTS OF MARCH 25th, 1948, APRIL 9th AND DECEMBER 15th, 1949

**VOLUME III**

DEUXIÈME PARTIE

# PROCÉDURE ORALE

## A. — SÉANCES PUBLIQUES

*tenues au Palais de la Paix, La Haye,*
*du 26 février au 5 mars 1948.*

PART II

# ORAL PROCEEDINGS

## A.—PUBLIC SITTINGS

*held at the Peace Palace, The Hague,*
*from February 26th to March 5th, 1948.*

# MINUTES OF THE SITTINGS HELD FROM FEBRUARY 26th TO MARCH 5th, 1948

## (PRELIMINARY OBJECTION)

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## YEAR 1948

### FIRST PUBLIC SITTING [1] (26 II 48, 4 *p.m.*)

*Present : President* GUERRERO ; *Vice-President* BASDEVANT ; *Judges* ALVAREZ, FABELA, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO ; M. DAXNER, *Judge* ad hoc ; *Registrar* HAMBRO ; Mr. BECKETT, *Agent for the Government of the United Kingdom ;* Sir Hartley SHAWCROSS, Professor LAUTERPACHT, Professor WALDOCK, Mr. WILBERFORCE, Mr. Mervyn JONES, Mr. REED, *Counsel for the Government of the United Kingdom ;* M. KAHREMAN YLLI, *Agent for the Government of the People's Republic of Albania ;* Professor VOCHOČ, Professor LAPENNA, *Counsel for the Albanian Government.*

The PRESIDENT, in opening the hearing, said that the Court had before it at present two cases, namely :

(1) The Corfu Channel case, in which a preliminary objection had been raised upon which the Court would presently hear argument ;

. . . . . .

The President stated that the Court was assembled that day to hear the Parties in the Corfu Channel case between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of Albania, concerning the preliminary objection raised by the latter Government.

This case, which the Government of the United Kingdom had brought before the Court by an application dated May 22nd, 1947, citing Article 40 (1) and Article 36 (1) of the Court's Statute, related to a dispute arising between the British and Albanian Governments as a result of the explosion of mines in the waters of the Corfu Channel, causing loss of life and damage to British ships.

The Parties had respectively appointed :

*The British Government :*

Mr. W. E. Beckett, C.M.G., K.C., Legal Adviser to the Foreign Office, as Agent, and

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[1] Fifth meeting of the Court.

The Right Hon. Sir Hartley Shawcross, K.C., M.P., Attorney-General,
Professor H. Lauterpacht, Professor of international law at the University of Cambridge,
Professor H. Waldock, Professor of international law at the University of Oxford,
Mr. R. O. Wilberforce and Mr. J. Mervyn Jones } members of the English Bar,
Mr. M. E. Reed, of the Attorney-General's Office, as Counsel.

*The Albanian Government:*

H.E. M. Kahreman Ylli, Albanian Minister in Paris, as Agent, and

M. V. Vochoč and M. I. Lapenna } Professors of international law,

as Counsel.

The President noted that the Agents and representatives of the Parties were present in Court.

He further mentioned that the Albanian Government, having no judge of its nationality in the Court, had availed itself of the right conferred upon it by Article 31 of the Statute and had designated, as judge, M. Igor Daxner, doctor of laws, President of the National Court of Slovakia.

The President then called upon M. Igor Daxner, in accordance with Article 5 of the Rules of Court, to make the solemn declaration provided for by Article 20 of the Statute.

Dr. Igor DAXNER having made this declaration, the PRESIDENT placed it on record, and declared him duly installed in his functions as judge for the purposes of the case before the Court.

The President stated that, as the Parties had not notified the Court of any agreement reached between them regarding the order in which their representatives should be called upon to speak, the Court had decided, in accordance with Article 51 of the Rules, to hear first the Agent for the Albanian Government, that Government having raised the preliminary objection which the Court had to consider at that stage of the proceedings.

Nevertheless, the Parties' Agents having asked him, before the opening of the actual hearings, to allow them to say a few words on a subject quite distinct from the case before the Court, and as Counsel for the Government of the United Kingdom had been the first to make this request, the President said that he would first call upon him to address the Court.

Sir Hartley SHAWCROSS made the speech reproduced in the annex [1].

The PRESIDENT then called upon the Agent for the Albanian Government to address the Court.

M. KAHREMAN YLLI made the speech reproduced in the annex [1].

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[1] Not reproduced. [*Note by the Registrar.*]

The PRESIDENT was sure that, after listening to these very cordial congratulations addressed to the Court, he would be representing the unanimous feeling of his colleagues in thanking Sir Hartley Shawcross and M. Kahreman Ylli most heartily for their kind words.

As the moment had arrived for the Court to proceed with the business before it, the President called upon the Agent for the Albanian Government to make his statement. He asked him, in order to facilitate interpretation, to break off his statement from time to time at suitable moments.

M. KAHREMAN YLLI, Agent for the Albanian Government, made the speech reproduced in the annex [1], after which he asked the President to allow M. Vochoč, Counsel for the Albanian Government, to address the Court.

The PRESIDENT called on Professor VOCHOČ.

The latter began his statement (see annex [2]), which, as he had not concluded when the Court rose, he would continue on Friday, February 27th, at 10.30 a.m.

The Court rose at 6.20 p.m.

(*Signed*) J. G. GUERRERO,
President.

(*Signed*) E. HAMBRO,
Registrar.

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## SECOND PUBLIC SITTING [3] (27 II 48, 10.30 *a.m.*)

*Present:* [See first sitting.]

The PRESIDENT, in opening the hearing, called on Counsel for the Albanian Government.

Professor VOCHOČ continued his argument (annex [4]).

At the request of the PRESIDENT, Professor Vochoč broke off his speech.

The President adjourned the hearing at 12.30 p.m., stating that it would be resumed at 4 p.m.

(The hearing was resumed at 4 p.m.)

The PRESIDENT invited Professor VOCHOČ to proceed with his argument.

The latter made the speech reproduced in the annex [5].

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[1] See p. 15.
[2] „ „ 19.
[3] Sixth meeting of the Court.
[4] See p. 25.
[5] „ „ 35.

The PRESIDENT asked Professor Vochoč if he intended to conclude his argument the following morning.

Professor VOCHOČ replied in the affirmative.

The PRESIDENT then asked him how long he would take to conclude his argument.

Professor VOCHOČ replied that he would speak in French for about one hour more.

The PRESIDENT then asked the British Agent if he was prepared to speak as soon as Professor Vochoč had concluded his speech.

The BRITISH AGENT replied in the affirmative.

The hearing was adjourned at 6.50 p.m. and would be resumed on Saturday, February 28th, at 10.30 a.m.

[*Signatures.*]

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## THIRD PUBLIC SITTING [1] (28 II 48, 10.30 *a.m.*)

*Present :* [See first sitting.]

The PRESIDENT, in opening the sitting, called on Counsel for the Albanian Government.

Professor VOCHOČ continued and concluded his statement (annex [2]).

The PRESIDENT asked the Agent for the United Kingdom whether he was ready to address the Court.

Mr. BECKETT stated that Sir Hartley Shawcross, Counsel for the United Kingdom Government, would open the proceedings.

Sir Hartley SHAWCROSS began his statement (annex [3]).

(The hearing was adjourned at 12.45 p.m. and resumed at 4 p.m.)

Sir Hartley SHAWCROSS continued his statement (annex [4]).

The PRESIDENT declared that the hearings would be resumed on Monday, March 1st, at 10.30 a.m.

The Court rose at 6.5 p.m.

[*Signatures.*]

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[1] Eighth meeting of the Court.
[2] See p. 46.
[3] „ „ 51.
[4] „ „ 59.

## FOURTH PUBLIC SITTING [1] (1 III 48, 10.30 *a.m.*)

*Present:* [See first sitting.]

The PRESIDENT called upon Counsel for the United Kingdom Government.

Sir Hartley SHAWCROSS commenced the statement reproduced in the annex [2].

(The hearing was adjourned at 12.45 p.m. and resumed at 4 p.m.)

At the conclusion of his own statement (annex [3]) Sir Hartley SHAWCROSS asked the Court to allow Mr. Beckett, Agent for the United Kingdom Government, to speak.

Mr. BECKETT began the statement reproduced in the annex [4].

The PRESIDENT declared that the hearings would be suspended and resumed to-morrow, March 2nd, at 10.30 a.m.

The Court rose at 6.15 p.m.

[*Signatures.*]

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## FIFTH PUBLIC SITTING [5] (2 III 48, 10.30 *a.m.*)

*Present:* [See first sitting.]

The PRESIDENT, in opening the hearing, called on the Agent for the British Government.

Mr. BECKETT continued his argument (annex [6]).

(The hearing was adjourned at 12.35 p.m. and resumed at 4 p.m.)

The PRESIDENT having called on the Agent for the British Government, Mr. BECKETT continued and concluded his argument (annex [7]).

The PRESIDENT was happy to note that both Parties had presented their arguments very fully. Although proceedings on a preliminary objection were much shorter than those on the merits of a case, the Court was quite prepared to hear a reply, if such were the wish of the Albanian delegation. He suggested that, in view of the other cases on the Court's agenda, such a reply should be as short as possible.

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[1] Tenth meeting of the Court.
[2] See p. 75.
[3] „ „ 91.
[4] „ „ 97.
[5] Eleventh meeting of the Court.
[6] See p. 105.
[7] „ „ 117.

M. KAHREMAN YLLI expressed the Albanian desire to say a few words in answer to a number of points raised by the British. He requested that the next meeting of the Court be on Monday, March 8th. He understood that the British Agent had no objection to this date.

The PRESIDENT said the Court would meet immediately and decide this point. It seemed difficult to him to postpone hearings till Monday; for ,in that case, the reply and rejoinder would probably last till the end of next week. The Court's decision would be communicated in a few moments to the Agents by the Registrar.

Mr. BECKETT said he took note of the President's remarks regarding a reply and rejoinder and that they were in accordance with what the British understood to be the practice of the Court. As for the Albanian request, he did not oppose it; he simply placed himself at the disposal of the Court.

The PRESIDENT stated that within a half-hour the Agents would know the Court's decision regarding the interval sought.

The Court rose at 17.45 p.m.

[*Signatures.*]

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## SIXTH PUBLIC SITTING [1] (5 III 48, 10 *a.m.*)

*Present:* [See first sitting.]

The PRESIDENT, in opening the hearing, called on the Agent for the Albanian Government to present his reply.

M. KAHREMAN YLLI began his argument (annex [2]). He then asked the President to allow Professor Vochoč, Counsel for the Albanian Government, to speak.

The PRESIDENT called on Professor VOCHOČ.

The latter began the speech reproduced in the annex [3].

(The hearing was adjourned from 12.20 p.m. to 3.30 p.m.)

The PRESIDENT having called on COUNSEL FOR THE ALBANIAN GOVERNMENT, the latter continued and concluded his reply (annex [4]).

The PRESIDENT asked the British Agent if he wished to present his rejoinder at once.

Mr. BECKETT replied in the affirmative stating that the rejoinder of the United Kingdom would be presented by Sir Hartley Shawcross.

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[1] Thirteenth meeting of the Court.
[2] See p. 128.
[3] „ „ 135.
[4] „ „ 143.

The PRESIDENT thereupon called on Sir Hartley SHAWCROSS, who presented the rejoinder of the Government of the United Kingdom (annex [1]).

At the conclusion of this rejoinder, the PRESIDENT asked the Agent for the Albanian Government if the submissions which he had made in his Preliminary Observations of December 9th, 1947, were his final submissions.

M. KAHREMAN YLLI replied in the affirmative.

The PRESIDENT then asked the Agent for the United Kingdom, whether the submissions made in the Observations of January 19th, 1948, were his final submissions.

Mr. BECKETT replied in the affirmative.

The PRESIDENT then declared the hearings closed and informed the Agents of the Parties that they would be notified in due time of the date on which the Court would deliver judgment at a public sitting.

The Court rose at 6 p.m.

[*Signatures.*]

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[1] See p. 147.

**ANNEXES AUX PROCÈS-VERBAUX**

EXPOSÉS ORAUX DE FÉVRIER-MARS 1948

**(EXCEPTION PRÉLIMINAIRE)**

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**ANNEXES TO THE MINUTES**

ORAL STATEMENTS OF FEBRUARY-MARCH 1948

**(PRELIMINARY OBJECTION)**

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## 1. — EXPOSÉ DE M. KAHREMAN YLLI

(AGENT DU GOUVERNEMENT ALBANAIS)

A LA SÉANCE PUBLIQUE DU 26 FÉVRIER 1948, APRÈS-MIDI

Monsieur le Président, Messieurs les Juges,

La solution des problèmes internationaux en général qui viennent devant la Cour internationale de Justice, dépend essentiellement de la prédisposition des nations pour le règlement pacifique des différends et du respect formel de l'égalité souveraine des États. En effet, le but noble qu'est la paix et le respect du principe de l'égalité des nations sont étroitement liés, parce qu'une solution juste serait difficilement imaginable sans l'application rigoureuse de ce principe.

Vouloir régler pacifiquement les différends, c'est avoir comme point de départ la considération que les États, petits ou grands, sont pleinement égaux dans le libre exercice de leur souveraineté.

Le Gouvernement albanais part de ce point de vue, et c'est dans le respect formel de ces principes qu'il envisage la solution des différends internationaux. Dans le différend existant entre le Gouvernement de la République populaire d'Albanie et le Gouvernement du Royaume-Uni, le Gouvernement albanais a adopté, dès le début, une attitude conforme au droit international, en témoignant chaque fois de la bonne volonté en vue d'une solution pacifique. Tout en n'étant pas membre des Nations Unies ni partie au Statut de la Cour, l'Albanie a répondu volontairement aux invitations chaque fois que des invitations lui ont été adressées à cet effet.

Nous avons manifesté le désir de nous conformer aux prescriptions de la Charte et du Statut, quant au différend actuel. Nous avons déclaré et nous répétons que nous acceptons la résolution du Conseil de Sécurité invitant les Gouvernements de l'Albanie et du Royaume-Uni à soumettre immédiatement le différend à la Cour internationale de Justice conformément à son Statut.

En déférant à la résolution du Conseil de Sécurité, le 9 avril 1947, le Gouvernement albanais a entendu s'en tenir et s'en tient pleinement aux termes et à l'esprit de cette recommandation, et par suite aux

dispositions du Statut de la Cour. Mais le Gouvernement britannique, dépassant la recommandation du Conseil de Sécurité du 9 avril 1947 et les dispositions du Statut de la Cour auxquelles cette recommandation se réfère expressément, a présenté à la Cour une requête, préférant ainsi une citation unilatérale et arbitraire en violation flagrante et en contradiction ouverte avec les principes du droit international en général et les dispositions du Statut de la Cour en particulier. Le principe de la souveraineté exige qu'aucun État ne puisse être traduit devant la Cour sans son consentement.

L'Albanie n'a signé aucun traité ou convention avec le Gouvernement britannique prévoyant de soumettre leur différend à la Cour internationale de Justice. Elle n'a pas non plus signé la clause facultative de l'article 36 du Statut de la Cour. En conséquence, l'Albanie ne peut être citée directement et sans un compromis préalable, et par suite le Gouvernement britannique n'a pas pu, par sa requête, saisir valablement la Cour dans l'affaire concernant les incidents du canal de Corfou. Conformément à la recommandation du Conseil de Sécurité du 9 avril 1947 et conformément aux dispositions du Statut de la Cour, la seule voie légale par laquelle la Cour doit être saisie dans ce cas est le compromis. Le Gouvernement du Royaume-Uni a non seulement violé le principe fondamental et général du droit international public concernant l'acceptation préalable de la juridiction de la Cour, mais il a violé aussi la lettre et l'esprit de la Résolution du 9 avril 1947.

Dans ces conditions, l'Albanie aurait été dans son droit de ne pas répondre du tout à la requête du Gouvernement britannique et de ne point notifier à la Cour son agent.

Mais, malgré l'absence de toute convention ou de tout traité, le Gouvernement albanais, convaincu de sa juste cause, ne négligera aucune occasion de témoigner de sa bonne volonté et de son dévouement aux principes d'une collaboration amicale entre les nations et du règlement pacifique des différends. Dès qu'il a eu communication de la requête britannique, le Gouvernement albanais a manifesté son intention d'être prêt à se présenter devant la Cour, sous réserve de la façon dont le Gouvernement britannique s'est adressé à cette Cour.

Par sa réponse, le Gouvernement albanais a fait preuve d'un État qui cherche à tout prix la solution juste et pacifique des différends et en même temps il a fait preuve de respect quant à l'autorité et l'importance de la Cour internationale de Justice. C'est dans cet esprit que, malgré l'irrégularité de la requête britannique et étant donné que la Cour n'avait pas rejeté cette requête *ex officio*, l'Albanie notifia de se présenter devant la Cour pour exposer son point de vue devant vous, Monsieur le Président et Messieurs les Juges.

Le Gouvernement de la République populaire d'Albanie l'a déclaré par sa lettre du 2 juillet dernier et le déclare par ma voix devant cette Haute Cour, qu'il accepte librement et de bonne volonté la Résolution du Conseil de Sécurité du 9 avril 1947, et il est prêt à procéder avec le Gouvernement britannique à l'établissement du compromis nécessaire pour soumettre valablement le différend à la Cour, puisque l'Albanie, comme elle l'a déclaré, accepte la juridiction de la Cour, et elle désire que le différend trouve une solution devant cette Haute Cour.

Mais l'Albanie n'accepte pas et ne peut accepter d'être traitée d'inférieure et contrainte de se soumettre à une procédure judiciaire injuste, contraire à ses droits et à ses intérêts.

En effet, ce n'est pas une pure formalité à remplir que nous demandons ; le problème se pose sur un plan beaucoup plus large et plus profond. D'abord parce que le seul instrument valable en droit, dans le cas qui nous occupe, est le compromis, et ensuite parce que le compromis, par son essence en tant qu'instrument juridique, renferme un ordre d'idées inhérentes et inséparables très importantes pour l'ensemble du différend.

Ici il s'agit d'intérêts substantiels très importants. Il n'est donc pas question de l'acceptation de la juridiction de la Cour, encore moins du prétendu abus de procédure dont on fait allusion quelque part dans les Observations du Gouvernement britannique. Ici, il s'agit de la requête britannique, qui est dans ce cas une voie de procédure contraire au droit international et aux dispositions des articles 36 et 40 du Statut de la Cour, et je me demande, Monsieur le Président, sur quelle base légale, sur quel texte ou sur quelle disposition en vigueur a été fondée cette requête. A notre avis, qui nous paraît juste et logique, le seul fondement était la volonté du Gouvernement britannique d'imposer à l'autre Partie une procédure qui n'est certainement pas la bonne, une procédure qui passe outre la résolution du Conseil de Sécurité, qui passe outre les dispositions du Statut de la Cour et qui, enfin, ne tient aucun compte des droits légitimes de l'autre Partie.

Et c'est précisément pour cela que le Gouvernement albanais, tout en acceptant la juridiction de la Cour dans cette affaire, a fait les réserves les plus expresses quant au procédé illégal adopté par le Gouvernement britannique, parce qu'il est inadmissible qu'on nous impose une procédure qui ne tient pas compte de nos droits, de notre dignité et de notre qualité en tant que Partie égale devant la Cour. Devant la Cour internationale de Justice l'égalité des parties est une condition *sine qua non*. La rupture avec ce principe crée une situation qui ne répond plus à l'article 35, 2, du Statut de la Cour et qui ne répond plus au principe général de l'égalité.

Il ne doit y avoir dans ce différend ni défendeur ni demandeur ; il est absolument nécessaire d'écarter toute possibilité pour une Partie d'imposer sa volonté à l'autre. Le Gouvernement albanais insiste fermement pour que l'égalité des Parties soit respectée sans autre devant cette haute institution. S'écarter d'un tel principe, c'est créer un cas sans précédent qui n'a pas seulement des conséquences d'un caractère procéduriel, d'ailleurs très importantes, mais aussi des conséquences d'un caractère moral et substantiel. Nous ne pouvons nous engager dans une telle voie.

L'Albanie, par l'expérience même de son histoire, a appris à apprécier hautement le grand principe du respect des droits des nations, et elle s'intéresse vivement à l'existence et au développement du droit international comme de la coopération entre les peuples et du progrès humain.

L'Albanie s'attache d'autant plus à ces principes parce que, petite nation, elle voit en eux des moyens importants pour sauvegarder ses intérêts et se défendre contre toute atteinte portée à ses droits.

C'est en effet par la méconnaissance de ces principes dans le monde que l'Albanie a tant souffert dans le passé. Mais l'Albanie n'a jamais cessé d'y être fermement attachée. Pour la sauvegarde de ses intérêts, pour qu'elle vive indépendante et souveraine, pour que le monde vive dans une paix juste et durable, l'Albanie n'a pas épargné le sang de ses meilleurs fils durant la dernière guerre.

En défendant ses intérêts et ses droits légitimes en tant que petite nation, elle est convaincue d'apporter une contribution efficace et solide à la collaboration mondiale.

Mais en témoignant de cet esprit de compréhension et de ce désir du règlement pacifique des différends, elle ne peut pas oublier de prêter l'attention voulue à la sauvegarde de ses droits, en utilisant les moyens juridiques, conformément au droit international. Elle a fait valoir ces moyens devant cette Haute Cour, devant laquelle elle a estimé un devoir de se présenter, sachant servir en même temps la cause de la justice internationale et en étant pleinement consciente de la portée et de l'importance de cette première affaire que la nouvelle Cour serait appelée à juger.

La lettre du 2 juillet adressée à la Cour indique clairement cet état d'esprit, à savoir prédisposition du Gouvernement de la République pour une solution juridique pacifique du différend, tout en faisant explicitement les réserves les plus expresses quant à la façon dont le Gouvernement britannique avait porté l'affaire devant la Cour.

En effet, nous avions, au moment de la réception de la requête britannique, entière liberté et droit de l'ignorer complètement comme entachée de nullité absolue. Toutefois, nous n'avons pas voulu donner l'impression que nous nous instituions juges dans notre cause. C'est pourquoi nous avons déclaré être prêts à nous présenter devant la Cour, en même temps apposant immédiatement des réserves les plus expresses à cette déclaration et indiquant les objets de ces réserves que nous ferons valoir devant la Cour.

Notre position est ainsi claire, et j'ajoute même que c'était la seule attitude, conforme au bon sens et au droit, qu'on pouvait adopter à la suite de la requête britannique.

Par sa lettre, le Gouvernement albanais s'est réservé le droit de revenir le cas échéant sur l'irrégularité de la requête britannique.

Il a utilisé ce droit normal conformément aux dispositions du Règlement de la Cour (art. 62), en déposant dans le délai légal l'exception préliminaire qui constitue l'objet de nos débats et que nous soutenons aujourd'hui devant cette Haute Cour.

Pour développer plus longuement notre thèse sur l'exception, je demande, Monsieur le Président, de bien vouloir donner la parole au conseil du Gouvernement de l'Albanie, M. le professeur Vochoč.

## 2. — EXPOSÉ DE M. VOCHOČ

(CONSEIL DU GOUVERNEMENT ALBANAIS)

AUX SÉANCES PUBLIQUES DES 26, 27 ET 28 FÉVRIER 1948

[*Séance publique du 26 février 1948, après-midi.*]

Monsieur le Président, Messieurs de la Cour,

C'est à mon tour de dire tout d'abord l'émotion profonde qui m'anime quand j'ai le privilège insigne de prendre la parole lors de la première audience de la Cour internationale de Justice.

Il est bien entendu que je me rends compte que ce n'est pas à nos modestes mérites que revient ce grand honneur. C'est en vertu des principes séculaires de la procédure contentieuse qu'il en est ainsi.

En effet, nous apprenions déjà à l'école : *exceptione reus fit actor.* Le Gouvernement britannique a présenté à la Cour une requête contre le Gouvernement albanais. Le Gouvernement albanais a soulevé l'exception préliminaire contre cette requête. C'est à moi que reviennent l'honneur et la responsabilité de présenter à la Cour plus amplement les motifs et les raisons de notre exception et de tâcher de justifier nos conclusions demandant à la Cour qu'il lui plaise de dire et juger que ladite requête britannique est irrecevable parce qu'entachée de nullité.

Il est peut-être utile de commencer ma tâche par le commencement, et de voir tout d'abord comment la requête a dû se présenter à l'esprit du Gouvernement britannique quand il s'est décidé à adresser sa requête à la Cour.

Le Gouvernement britannique a dû voir tout d'abord ce que la requête doit contenir, il a donc dû regarder de plus près l'article 32 du Règlement de la Cour, et plus particulièrement son paragraphe 2.

C'est ce paragraphe qui prescrit ce que la requête doit indiquer et contenir lorsqu'une affaire est portée devant la Cour par une requête.

La requête doit indiquer, déjà d'après le Statut, la partie requérante et la partie contre laquelle la demande est formée ainsi que l'objet du différend. Mais, « autant que possible », la requête doit contenir en outre « la mention de la disposition par laquelle le requérant prétend établir la compétence de la Cour ».

Formulant sa requête, le Gouvernement du Royaume-Uni s'est donc vu obligé de dire aussi sur quelle base il a la prétention de s'adresser à la Cour. Le Gouvernement britannique fut ainsi amené à se prononcer sur l'article 36 du Statut de la Cour par rapport à l'affaire présente.

Si nous lisons le paragraphe premier de l'article 36 du Statut, paragraphe d'importance si capitale, il semble qu'il y a trois bases possibles sur lesquelles pourrait se fonder la compétence de la Cour.

Il y a en premier lieu le fait que « la compétence de la Cour s'étend à toutes les affaires que les parties lui soumettront ». Cette disposition ne se prêtait pas évidemment à servir au Gouvernement britannique en l'occurrence, c'est-à-dire aux fins de sa requête.

Si les parties veulent soumettre une affaire à la Cour, il faut qu'elles le fassent d'accord, qu'elles procèdent ensemble. C'est en tout cas le

sens propre de cette disposition. Le paragraphe premier de l'article 36 parle ici des « parties ». Si une partie seule voulait soumettre une affaire à la Cour, il ne s'agirait plus « des parties » prévues au paragraphe premier de l'article 36 : ce serait quelque chose de tout à fait autre.

Nous reviendrons plus amplement au cours de nos explications présentes sur cette question, qui présente un intérêt assez important. Pour le moment, nous nous bornerons à constater que ladite disposition du paragraphe premier de l'article 36, concernant la soumission de l'affaire à la Cour par les parties, n'aurait pu être invoquée par le Gouvernement britannique que dans le cas d'une entente préalable entre lui et le Gouvernement albanais, ce qui, jusqu'à présent, ne s'est pas produit.

Il restait au Gouvernement britannique à voir s'il lui était possible d'invoquer une autre disposition du paragraphe premier de l'article 36 du Statut.

La question était donc pour lui la suivante : s'agit-il, dans l'affaire présente, d'un cas « spécialement prévu dans la Charte des Nations Unies et dans les traités et conventions en vigueur » ? Nous pouvons passer rapidement sur la disposition mentionnée *in fine* dans ce passage. Il n'était pas possible au Gouvernement britannique, quand il formulait sa requête, de trouver un seul traité, une seule convention dont le Gouvernement albanais ferait partie, qui aurait stipulé pour une affaire ou pour une catégorie d'affaires la compétence de la Cour dans les rapports entre le Gouvernement albanais et le Gouvernement britannique.

On voit donc que le choix à faire, au mois de mai dernier, pour le Gouvernement britannique était bien étroit. Il ne lui restait qu'à voir s'il pouvait tenter sa chance avec la prescription que contient le nouvel article 36 du Statut de la Cour internationale de Justice.

Le Gouvernement britannique a dû voir s'il ne pouvait pas invoquer la Charte des Nations Unies, c'est-à-dire une disposition de cette Charte qui aurait prévu spécialement un cas auquel la compétence de la Cour s'étend.

C'était la dernière disposition du premier paragraphe de l'article 36 qu'il aurait pu choisir. Il n'y en avait pas d'autre.

Le Gouvernement britannique a fait ce choix que nous trouvons étonnant. Sa requête dit textuellement que le Gouvernement du Royaume-Uni soutient que « la Cour est compétente en vertu de l'article 36, paragraphe 1, de son Statut, attendu qu'il s'agit d'un cas spécialement prévu dans la Charte des Nations Unies ».

Ainsi, ce serait les dispositions de la Charte qui donneraient à l'affaire présente sa base que l'article 32, paragraphe 2, du Règlement de la Cour exige.

Quels sont le sens et la portée d'une telle disposition ?

Il devrait s'agir ici d'une disposition de la Charte de San-Francisco prévoyant la juridiction obligatoire de la Cour pour des cas déterminés. Il n'est pas question de cas où les États sont libres d'aller ou non devant la Cour. De tels cas sont déjà couverts par la première phrase du paragraphe premier de l'article 36 : « la compétence de la Cour s'étend à tous les cas que les parties lui soumettent ».

Par contre, « un cas spécialement prévu dans la Charte des Nations Unies », au sens de l'article 36 du Statut, pourrait être seulement un cas où l'État est obligé de se présenter devant la Cour, et cela parce que quelqu'un est en droit de le lui demander, de l'exiger.

Il n'est pas question ici de se demander tout d'abord si l'on veut ou non, pour l'affaire donnée, accepter la juridiction de la Cour non plus que de négocier, de poser des conditions, de compromettre, etc. Dans un cas spécialement prévu par la Charte dont parle le nouveau paragraphe premier de l'article 36, l'État devrait se présenter devant la Cour de plein droit, sans autre façon de procéder.

Il s'agirait bien ici de l'application du principe de la juridiction obligatoire, et le Gouvernement britannique, dans sa requête du 13 mai dernier, a indiqué un cas de juridiction obligatoire qui serait spécialement prévu, par la Charte des Nations Unies, comme la disposition prétendue de la compétence de la Cour pour l'affaire présente.

Toujours en suivant les prescriptions du paragraphe 2 de l'article 32 du Règlement, le Gouvernement britannique a été obligé d'indiquer les motifs dans sa requête, car il ne pouvait pas se contenter d'indiquer la disposition sans autre explication.

Ces motifs sont au nombre de trois et sont mentionnés dans la requête par les mots et dans l'ordre suivants :

« *a*) Le Conseil de Sécurité des Nations Unies, à l'issue des débats au cours desquels il s'est occupé du différend en vertu de l'article 36 de la Charte, a décidé, par une résolution .... de recommander, *tant au Gouvernement du Royaume-Uni qu'au Gouvernement albanais*, de porter le présent différend devant la Cour internationale de Justice ; *b*) le Gouvernement albanais a accepté l'invitation qui, en vertu de l'article 32 de la Charte, lui avait été adressée par le Conseil de Sécurité de participer à l'examen du différend et il a accepté la condition qu'avait posée le Conseil de Sécurité, lors de l'envoi de son invitation, à savoir que l'Albanie accepterait dans le cas présent toutes les obligations qu'aurait à assumer dans un cas de même ordre un Membre des Nations Unies.... ; *c*) l'article 25 de la Charte dispose que les Membres de l'Organisation conviennent d'accepter et d'appliquer les décisions du Conseil de Sécurité, conformément à la présente Charte. »

Tels sont les motifs avancés par la requête britannique à l'appui de la juridiction obligatoire de la Cour prétendue en vertu des dispositions spéciales de la Charte.

Si nous procédons à l'analyse de ces motifs — et cela tout d'abord avec le désir de les comprendre autant que possible —, ce qui nous frappe tout d'abord, c'est que la requête ne cite aucune disposition, aucun texte précis qui serait « spécialement prévu » dans la Charte.

Pourtant, il nous semble que l'article 36 du Statut parle bien clairement, et sans doute avec une intention bien arrêtée, « des cas spécialement prévus dans la Charte ».

Nous comprenons les mots « spécialement prévus » comme prévoyant les cas par un texte précis, exprès. Il s'agit en effet, en l'occurrence, d'une matière très grave en ce qui concerne les États, et sûrement des cas de ce genre dont doit sortir la compétence obligatoire de la Cour ne peuvent pas être définis par un texte quelconque, par un texte vague. Il faudrait bien un texte « spécial », une disposition stipulant expressément, nettement, clairement, excluant tout doute possible, que la juridiction obligatoire de la Cour s'applique à des cas définis dans la Charte.

Or, ce qui saute tout d'abord aux yeux, en parcourant les motifs de la requête britannique, c'est que ceux-ci n'indiquent aucunement une telle disposition précise de la Charte.

« Un cas spécialement prévu dans la Charte » serait, d'après la requête, un cas qui commence par une recommandation du Conseil de Sécurité, prise d'après le chapitre VI de la Charte, et qui, par l'entremise de l'article 32 de la Charte (parce qu'il s'agit d'un État non membre), aboutirait à l'article 25 de la Charte, c'est-à-dire aboutirait à l'article qui traite de l'obligation des États Membres de l'Organisation des Nations Unies d'exécuter les décisions du Conseil conformément aux dispositions de la Charte.

Évidemment, il est difficile de dire qu'il s'agirait ici d'un texte couvrant « un cas spécialement prévu dans la Charte ». Ayant lu et relu les trois motifs allégués par le Gouvernement britannique, on se demande toujours où se trouve ce cas spécialement prévu dans la Charte et où il se cache.

Si un tel cas est vraiment présent dans la combinaison préconisée par la Grande-Bretagne des trois articles de la Charte (article 36, paragraphe 3, article 32 et article 25), on ne pourrait le découvrir que par un raisonnement. Mais ce n'est pas « un cas spécialement prévu ».

Ce raisonnement nous semble être à peu près le suivant : La recommandation lancée par le Conseil de Sécurité le 9 avril dernier au sens de l'article 36, paragraphe 3, de la Charte vaut une décision du Conseil, ayant, d'après l'article 25 de la Charte, force obligatoire et pour le Gouvernement britannique et pour le Gouvernement albanais. Le Gouvernement du Royaume-Uni et le Gouvernement albanais sont donc obligés d'aller devant la Cour.

Il nous faut constater que ce n'est pas le Gouvernement britannique lui-même qui aurait donné, jusqu'à présent, une telle explication coordonnée et systématique de ces trois articles de la Charte invoqués par lui par rapport à l'affaire présente. Le Gouvernement britannique s'est borné, dans sa requête, tout simplement à indiquer les trois motifs précités et à ne rien dire de plus précis en ce qui concerne le jeu combiné desdits trois articles.

Les Observations du Gouvernement britannique en date du 20 janvier dernier, déjà en réponse à notre question préliminaire, passent encore ces motifs plutôt sous silence. C'est seulement dans la fin de leur paragraphe 12 que le Gouvernement britannique s'est réservé, le 20 janvier dernier, « le droit d'invoquer, s'il y a lieu, à l'appui de la compétence de la Cour, en l'espèce, les motifs énoncés dans sa requête initiale ».

Nous sommes, bien entendu, très curieux d'entendre un peu plus, de la part des éminents représentants du Gouvernement britannique, concernant ces motifs. En attendant, nous sommes obligés de procéder par nos propres moyens, par nos propres lumières.

Avant de procéder à l'analyse détaillée de la construction juridique élaborée par le Gouvernement britannique dans sa requête du 13 mai, et qui s'appuie sur le jeu combiné prétendu des trois articles de la Charte, nous prenons la liberté de nous arrêter un instant pour contempler l'aspect d'une certaine grandeur qui se dégage de cette construction.

En supposant pour le moment que cette construction est solide, que les articles de la Charte en question contiennent, en effet, ces dispositions et ont cette portée que le Gouvernement britannique croit pouvoir y discerner, il s'agirait sans aucun doute de dispositions parmi les plus importantes et les plus audacieuses que la collaboration entre les États et leur organisation internationale eussent jusqu'à présent produites.

Si le Conseil de Sécurité pouvait vraiment, avec force obligatoire, mener les États en litige devant la Cour de Justice, il s'agirait d'un énorme pouvoir du Conseil de Sécurité. Seul le chapitre VII de la Charte, qui prévoit l'action du Conseil de Sécurité en cas de menace contre la paix, de rupture de la paix et d'actes d'agression, le surpasserait.

Pour caractériser l'ampleur de ce pouvoir prétendu du Conseil de Sécurité, on peut dire brièvement que deux choses d'une grande importance se réaliseraient simultanément.

D'une part — et ceci semble bien encore, de ces deux choses, la moins importante —, l'organisation internationale serait avancée d'un grand pas vers cet idéal que beaucoup de personnes — mais certainement pas toutes — considèrent comme la solution de la question de la paix et de la guerre, c'est-à-dire vers la solution judiciaire des différends entre les États, vers l'idéal de la juridiction complète et obligatoire dans le droit international. Jusqu'à ce jour, la juridiction obligatoire des États, malgré le son que rend le mot « obligatoire », est toujours basée nécessairement sur le consentement des États; il faut toujours des traités et des conventions. Dans le cas que nous envisageons, si la construction britannique répondait à la réalité, ce serait toujours encore la juridiction obligatoire acceptée librement par les États, en ce sens que cette juridiction ne pourrait exister sans que l'État en question soit au préalable Membre des Nations Unies et, partant, ait accédé à la Charte. Mais une telle obligation, découlant *ipso facto* de la Charte même, serait sans doute quelque chose d'autre que des manifestations de volonté créant la juridiction obligatoire formulée par des traités et conventions d'une durée limitée et, comme il arrive, sous des réserves très importantes. Ceci vaut en principe également pour la clause facultative, qui, elle aussi, dépend de la volonté des États d'une durée limitée et sujette à des réserves.

Dans le cas envisagé, la juridiction obligatoire de la Cour serait acceptée par les États Membres des Nations Unies pour la durée de la Charte ou, au moins, pour la durée de leur participation à l'Organisation des Nations Unies comme Membres.

Mais il y aurait encore un rôle très important à jouer pour le Conseil de Sécurité dans cette juridiction obligatoire. Il suffirait que le Conseil prît une résolution valable, c'est-à-dire par la majorité nécessaire, pour obliger n'importe quel État dans n'importe quelle affaire juridique d'aller devant la Cour. Ce serait un procédé extraordinaire pour forcer les États à aller devant la Cour sans avoir aucun égard à leur volonté individuelle et sans aucun égard à la question de savoir s'ils se sont engagés ou non à accepter la juridiction obligatoire par un autre traité ou convention ou même par la clause facultative. Même les États qui n'auraient aucun engagement préalable de cette sorte, devraient toujours aller devant la Cour si le Conseil de Sécurité, procédant suivant les articles 36, paragraphe 3, et 25 de la Charte combinés, prenait une telle décision. Un État Membre des Nations Unies ne pourrait pas invoquer qu'il n'a assumé aucune obligation par un traité ou convention quelconque d'aller devant la Cour, qu'il n'a pas souscrit à la clause facultative. Un État Membre ne pourrait non plus invoquer les réserves qu'il a faites ayant souscrit à certains engagements de la juridiction obligatoire. Bref, tous les États, grands et petits, obligés ou non d'aller devant la Cour, devraient forcément le faire aussitôt que le Conseil de Sécurité aurait pris une décision au sens de l'article 36, paragraphe 3,

et de l'article 25 de la Charte, ainsi que le Gouvernement britannique, dans sa requête, le fait prévoir.

Nous résumons nos impressions de cette construction juridique bâtie par le Gouvernement britannique pour les fins de la présente affaire, en disant que le monde aurait, cette fois-là, un gouvernement, un directoire, au moins pour les affaires juridiques et leur renvoi devant la Cour.

Nos doutes concernant cette construction fabuleuse commencent au vu du simple fait que, jusqu'à présent, jusqu'au mois de mai de l'année dernière, personne n'en a entendu rien dire.

Nous avons, nous autres, un peu suivi la Conférence de San-Francisco, nous efforçant, nous aussi, dans la mesure de nos moyens, d'aider à la collaboration internationale. Mais il faut avouer que, jusqu'à présent, personne ne nous a rien dit concernant cette juridiction obligatoire du Conseil de Sécurité.

A cet égard, nous pouvons nous référer au Gouvernement britannique lui-même. Ayant signé la Charte de San-Francisco, le Gouvernement britannique l'a soumise à son Parlement ; il a expliqué à celui-ci et à son opinion publique ce qui est arrivé, et dans quel sens l'organisation internationale a été développée, et dans quelles conditions la Charte a été signée. Or, cet excellent commentaire officiel du Gouvernement britannique, publié par le *Stationery Office*, sur la Charte des Nations Unies, ne mentionne rien, ne contient aucun mot sur les pouvoirs extraordinaires du Conseil de Sécurité, sur sa décision en matière de juridiction obligatoire. Je me réfère particulièrement aux pages 8 et 9 de ce commentaire officiel, qui traitent du chapitre VI de la Charte et de l'article 25 de la Charte en particulier. Il y a seulement une fois où le commentaire mentionne la force obligatoire du Conseil de Sécurité pour les États, mais il s'agit bien d'une décision prise en vertu du chapitre VIII de la Charte. Ainsi, le Gouvernement du Royaume-Uni lui-même n'a pas encore annoncé au monde la chose la plus avancée qui se serait passée à San-Francisco et qu'il invoque à son intention dans l'affaire présente contre nous.

Il n'existe pas, d'ailleurs, d'autre gouvernement au monde qui aurait trouvé dans la Charte le sens que la requête britannique du 13 mai y trouve. Nous avons pris connaissance des débats qui se sont déroulés devant le Comité parlementaire du Congrès américain en juillet 1945. Nous aurons encore l'occasion de citer certaines des opinions prononcées à cette occasion. Pour le moment, nous pouvons constater que personne n'a parlé aux États-Unis du pouvoir extraordinaire du Conseil de Sécurité par la combinaison prétendue des articles 36 et 25 de la Charte. Au contraire, on a affirmé de façon toute particulière à cette occasion : « vous ne pouvez pas traîner un État devant la Cour sans sa volonté ». Il en est ainsi pour le reste du monde. Je me réfère encore seulement au débat qui s'est déroulé en automne dernier à la Commission VI, lors de la dernière Assemblée des Nations Unies, à New-York.

C'est aussi dans le même sens que, depuis, ces questions ont été traitées par les auteurs.

En résumé, la thèse britannique s'appuie contre nous sur trois motifs qui semblent, *prima facie*, n'être établis que pour les besoins de la cause. Jamais aucun État n'a accepté une chose telle que la juridiction obligatoire de la Cour en vertu d'une décision du Conseil de Sécurité.

[*Séance publique du 27 février 1948, matin.*]

Monsieur le Président, Messieurs de la Cour,

Nous nous sommes arrêtés hier au moment de commencer l'analyse des trois motifs indiqués par la requête britannique à l'appui de la prétendue disposition qui serait contenue dans la Charte des Nations Unies et qui fonderait la base de la juridiction obligatoire, pour l'Albanie, dans la présente affaire.

Au premier des motifs par lequel le Gouvernement britannique, dans sa requête du 22 mai dernier, pose la question : « Quelle est la nature juridique d'une recommandation prise par le Conseil de Sécurité ? Une telle obligation oblige-t-elle les parties ? », je réponds qu'il semble bien, encore une fois, que poser la question, c'est la résoudre. Aussi, je n'abuserai pas du temps précieux de la Cour pour traiter cette question plus en détail.

Même si la jeune existence des Nations Unies n'avait pas encore fourni l'expérience nécessaire et — je le dis avec certains regrets — déjà abondante que les recommandations prises soit par le Conseil de Sécurité, soit par l'Assemblée, n'ont pas de force obligatoire pour les parties auxquelles elles s'adressent, il y a ici toute la grande expérience et, peut-on dire, toute la jurisprudence de la Société des Nations, pour nous informer que les recommandations du Conseil de Sécurité n'ont pas *ipso facto* de force obligatoire.

Le terme « de recommander » de la Charte se rattache bien aujourd'hui au terme employé jadis par le Pacte de la Société des Nations. Parmi les documents que nous nous sommes permis de soumettre à la Cour, nous avons inclus, sous l'annexe 3, un document du Conseil de la Société des Nations, datant déjà de 1920, d'où il ressort de façon frappante que le terme « *recommendation* », employé en anglais, n'a pas, en français, d'autre signification que celle de « vœu ».

Avant de terminer ces remarques concernant la nature non obligatoire des recommandations, je me permets de me servir encore seulement de l'autorité particulière qui se rattache même aux *obiter dicta* de la Cour permanente de Justice.

C'est surtout dans l'avis consultatif n° 12 concernant la fameuse question de la frontière de l'Irak, que la Cour s'est prononcée avec toute la netteté voulue, sur ce point que le Conseil ne fait que de « simples » recommandations qui, même si elles sont faites à l'unanimité, ne tranchent pas obligatoirement le différend. Cette opinion de la Cour permanente se trouve plus amplement traitée aux pages 27 et 28 de l'avis.

La recommandation ne peut donc jamais être comprise comme une « décision », si l'on entend par le terme « décision » un acte, une déclaration de volonté à laquelle il faut obéir, qui a force obligatoire et exécutoire.

Toutefois, il nous semble bien que la requête du Gouvernement britannique arrive à traiter la recommandation du Conseil de Sécurité comme étant, *ipso facto*, une décision. J'ai déjà dit hier que le Gouvernement britannique a jusqu'à présent omis d'expliquer d'une façon plus claire comment ce nouveau mystère de la transsubstantiation se matérialise.

Je me permets d'affirmer que ce n'est pas possible. La recommandation du Conseil de Sécurité n'est pas *ipso facto* une décision au sens de l'article 25 de la Charte.

Tout d'abord, c'est le texte même de la Charte qui nous aide considérablement à comprendre qu'il en soit ainsi, en faisant lui-même la distinction entre « décision » et « recommandation ». L'article 94, paragraphe 2, de la Charte stipule que le Conseil de Sécurité « peut faire des recommandations ou décider des mesures à prendre pour faire exécuter l'arrêt ». De même, les articles 39 et 40 de la Charte prévoient que « le Conseil de Sécurité fait des recommandations ou décide quelles mesures seront prises.... ».

Le Pacte de la Société des Nations employait déjà les deux mêmes termes à la fois et distinguait bien entre « décision » et « recommandation ». C'est ainsi que l'article 5 du Pacte prévoyait « les décisions de l'Assemblée ou du Conseil prises à l'unanimité », tandis que quelques autres dispositions du Pacte parlaient, d'autre part, des « recommandations ».

Il s'est présenté aussi, au cours de l'activité de la Société des Nations, sous le régime du Pacte, plusieurs fois la question de savoir où commence et où finit la force obligatoire des actes dénommés, en l'occurrence, les décisions du Conseil ou de l'Assemblée. C'était, par exemple, lors de la Première Assemblée en 1920, la question de savoir quelle portée aura la « décision » de l'Assemblée quant au Statut de la Cour qui lui était soumis pour approbation. L'opinion se faisait jour alors qu'il suffit tout simplement d'un vote unanime de l'Assemblée pour que le Statut soit adopté et la Cour constituée. C'est cela « la décision ». Dans le débat, d'autres orateurs, par exemple M. Politis (Grèce), croient « que la divergence d'opinion provient d'un malentendu. L'Assemblée peut sans doute prendre les décisions liant les États, mais seulement dans les limites de ses pouvoirs statutaires définis par le Pacte. » La Cour voudra bien trouver cette explication de M. Politis dans l'annexe 10 que nous lui avons soumise.

Et c'est de nouveau dans le même sens que la question de la portée des décisions du Conseil de Sécurité au sens de l'article 25 de la Charte s'est posée à la Conférence de San-Francisco.

Cet article 25 de la Charte (article 4 du chapitre VI des propositions de Dumbarton Oaks) se trouve dans le chapitre concernant les principales fonctions et pouvoirs du Conseil de Sécurité. Il a fait tout d'abord, au sein du comité compétent de la Conférence, l'objet d'un intéressant amendement belge. La délégation belge était préoccupée de savoir si par un tel libellé de l'article 4 de Dumbarton Oaks (*Dumbarton Proposals*) — aujourd'hui l'article 25 — carte blanche n'était pas donnée au Conseil de Sécurité, et elle proposait de limiter la portée de l'article 25 au chapitre qui porte aujourd'hui le n° VII, concernant l'action en cas d'agression, de menace contre la paix. La délégation du Canada suivit dans la discussion dans le même ordre d'idées. Le délégué canadien a posé la question de savoir si « le Conseil de Sécurité pourra ou non demander à un Membre d'engager une action militaire qui n'est pas prévue dans le ou les accords spéciaux auxquels ce Membre sera partie en vertu du paragraphe 5 de la section B du chapitre VIII » (aujourd'hui chapitre VII). Alors, c'est d'abord le délégué de la Grande-Bretagne, suivi par le délégué des États-Unis, qui donne des assurances apaisantes, tant à la délégation belge, à la délégation canadienne qu'à d'autres

délégations qui abondaient dans le même sens. Je cite le procès-verbal de la Conférence :

« Le délégué des États-Unis insiste à nouveau sur le fait que la Charte doit être interprétée dans son ensemble et qu'aucun paragraphe ne peut être isolé du reste du document. Il y a des dispositions spéciales qui dépasseraient les dispositions générales, et la réponse à la question posée est un « non » catégorique. »

L'amendement belge ne fut pas adopté, mais la discussion au sein du Comité respectif de la Conférence de San-Francisco témoigne d'une façon très sûre que tout le monde était bien d'accord que l'article 25 de la Charte n'est nullement une carte blanche donnée au Conseil de Sécurité par les Membres des Nations Unies. Le délégué des États-Unis ainsi que le délégué du Royaume-Uni étaient les premiers à souligner l'importance de la règle que « *special provisions override general provisions* », que la *lex specialis derogat legi generali*. Ils ont mis bien en relief la signification du texte de l'article 25 de la Charte, qui dit : « conformément à la présente Charte ».

Nous n'insisterons plus sur cette portée de l'article 25 de la Charte qui, à notre avis, ne peut être mise sérieusement en doute. Nous nous bornons seulement à attirer l'attention sur le fait que dans le même sens abonde le rapport officiel sur la Conférence de San-Francisco soumis par M. Stettinius à M. le Président des États-Unis, que dans le même sens se prononce le commentaire officiel publié par le *Stationery Office* de Londres, qui contient les opinions officielles du Gouvernement britannique et ne parle pas non plus de l'article 25 dans le sens de « décisions obligatoires », et mentionne par contre des « *specific obligations* » sous le chapitre VI. Et peut-être nous sera-t-il permis de citer un livre qui constitue un des premiers commentaires de la Charte et qui est l'œuvre de deux auteurs qui participèrent à la Conférence de San-Francisco, l'un comme secrétaire de la commission pour le règlement pacifique des différends, l'autre comme membre de la délégation norvégienne. Ce livre s'intitule : « Charter of the United Nations.— Commentary and Documents », de Goodrich et Hambro.

Sous l'article 25, à la page 122 de cet ouvrage, nous trouvons le commentaire suivant : « .... The precise extent of this obligation of Members can be determined only by reference to other provisions of the Charter, particularly Chapters VI, VII, VIII and XII. Decisions of the Security Council take on a binding character only as they relate to the prevention or suppression of breaches of the peace.

« The word « decisions » as used in this Article clearly does not include recommendation which the Security Council is empowered to make under Articles 36, 37 and 38. It was made clear in the discussions at San Francisco, as it should be apparent from the wording of the Charter, that such recommendations have no binding force. »

Ce que nous venons de dire d'une façon générale quant à la portée de l'article 25 de la Charte, nous avons la bonne fortune de pouvoir l'appliquer et de l'illustrer encore d'une façon très concrète en ce qui concerne plus spécialement le chapitre VI de la Charte — le règlement pacifique des différends internationaux — et encore plus spécialement en ce qui concerne l'article 36, paragraphe 3, qui fait partie de ce chapitre et qui se rapporte justement à l'affaire qui nous occupe en ce moment.

C'est encore une fois la délégation belge qui a bien mérité d'éclaircir la portée des articles de la Charte, négociés à San-Francisco, en demandant « une réponse plus précise à sa question, déjà posée, à savoir si le terme « recommandé » au chapitre VIII, section A — chapitre VI de la Charte d'aujourd'hui —, comporte des obligations pour des États qui sont parties à un litige ou signifie seulement que le Conseil offre un avis qui peut on non être accepté ». Le délégué du Royaume-Uni, le premier, et, après lui, le délégué des États-Unis, ont donné de nouveau à cet égard des assurances, de sorte que le délégué de la Belgique a déclaré : « Puisqu'il est maintenant clairement entendu qu'une recommandation faite par le Conseil sous la section A du chapitre VIII n'entraîne aucun effet obligatoire, il [le délégué belge] accepte de retirer son amendement. » La commission a considéré ce point comme tout à fait important, et c'est pourquoi le rapporteur de la commission, M. Arkadiev, a été mandé par la commission d'en faire mention expresse dans son rapport. Dans le rapport de M. Arkadiev, membre de la délégation soviétique, élu en séance publique le 18 juin à San-Francisco, nous trouvons que « le Conseil de Sécurité peut, dans des cas envisagés, *recommander* les termes d'un règlement de même que les procédures et les méthodes d'agissement. Au cours de la discussion d'un amendement proposé par le délégué de la Belgique, les délégués du Royaume-Uni et des États-Unis ont donné l'assurance que toutes les recommandations de la part du Conseil de Sécurité n'obligeraient nullement les parties. »

Nous pourrions encore citer un grand nombre de documents qui tous abondent dans le même sens.

J'ai déjà cité le rapport de M. Stettinius à M. le Président Truman. Le rapport du Gouvernement du Canada sur la Conférence de San-Francisco, signé par le premier ministre Mackenzie King, s'exprime dans le même sens (voir l'annexe 5 des documents soumis par nous à la Cour). Nous avons aussi soumis à la Cour la déclaration très énergique faite à cet égard par le sénateur Connally, qui, on le sait, était parmi les premiers délégués des Etats-Unis à la Conférence de San-Francisco.

Je me permets seulement encore de mentionner qu'à l'annexe 7 de nos documents nous avons cité un article de M. Clyde Eagleton, professeur de l'Université de New-York, publié dans l'*American Journal of International Law*. Nous avons tâché d'éviter des citations trop nombreuses. Mais nous avons fait exception pour l'article de M. Clyde Eagleton, parce qu'il était membre de la délégation des États-Unis à côté de M. Harold Stassen dans la commission de la Conférence de San-Francisco qui a élaboré le chapitre VI de la Charte d'aujourd'hui. Du document que nous avons soumis, il ressort clairement que le Conseil de Sécurité n'a aucun pouvoir de régler obligatoirement un différend sous le couvert du chapitre VI de la Charte.

Et tout ceci a été confirmé expressément par rapport au paragraphe 3 de l'article 36 de la Charte.

Ce paragraphe est la base de notre affaire actuelle, parce que c'est la base d'où est sortie la recommandation que le Conseil de Sécurité a faite au Gouvernement du Royaume-Uni et à l'Albanie le 9 avril dernier.

Le rapporteur du comité chargé de la question à San-Francisco au sujet du projet de cet article de la Charte « souligne que cet article, d'une façon définitive, ne comporte pas le principe de la compétence obligatoire ; de plus, il n'autorise le Conseil à porter devant la

Cour aucun différend justiciable. Le Conseil lui-même ne possède, conformément à cet article, aucun droit de ce genre. On rappelle simplement au Conseil qu'en règle générale les différends justiciables devraient être portés devant la Cour. Le Conseil n'est pas autorisé à insister pour que les parties dans un tel différend les portent devant la Cour. Cette disposition est compatible en tout point avec l'article 36 du Statut de la Cour adopté au Comité IV/1. »

Dans cet ordre d'idées, la délégation norvégienne, pour marquer encore, par une expression bien placée, qu'il en est ainsi, a fait accepter son amendement au texte du paragraphe 3 de l'article 36 de la Charte, amendement qui tend à y ajouter les mots : « par les parties ». Si bien que le texte définitif dit ce qui suit : « les différends doivent être soumis à la Cour, conformément à son Statut, et par les parties ». Le rapport a spécifié que cette modification a été apportée pour qu'on comprenne nettement que « le Conseil de Sécurité n'a pas le droit ni le devoir de déférer un différend justiciable à la Cour internationale de Justice ».

Je passe d'autres témoignages, mais tout de même je crois utile de m'arrêter encore aux déclarations particulières faites dans le même sens par M. Hackworth, qui présidait la Commission de la Conférence de San-Francisco qui s'occupait du Statut.

C'est au mois de juillet 1947 que M. Hackworth, après M. Pasvolsky, a été mandé à comparaître devant la commission qui s'occupait de la Charte de San-Francisco en vue de sa ratification par le Congrès des États-Unis. Il y a fait des déclarations catégoriques (voir nos documents, annexe n° 7). Il a été catégorique parce qu'il se trouvait devant quelques sénateurs qui ne voulaient pas croire qu'il n'y avait rien de changé dans le monde par suite de l'article 36, paragraphe 3, de la Charte des Nations Unies, et prétendaient qu'un État peut être poursuivi sans son consentement devant la Cour et, spécialement, que le Conseil de Sécurité possède le pouvoir de citer les États devant la Cour. Les réponses de M. Hackworth aux sénateurs étaient toujours dans le même sens : « le Conseil de Sécurité n'a pas un droit quelconque de jeter les parties litigieuses devant la Cour » ; « le Conseil peut faire des recommandations aux parties d'aller devant la Cour, mais les États ne sont pas du tout obligés de suivre les recommandations du Conseil dans cette direction ». Et encore : « il n'y a aucune loi possible pour le Conseil d'obliger les États d'aller devant la Cour ».

Il nous reste à voir encore le troisième élément de ladite construction britannique contenue dans la requête du 13 mai dernier, c'est-à-dire quelle importance peut avoir pour l'affaire présente l'article 32 de la Charte.

La fonction de cette disposition de la Charte semble bien de permettre, d'une part, à l'Albanie, d'autre part, au Conseil de Sécurité, de traiter ensemble une affaire où le Gouvernement albanais est mis en cause. En vertu de cet article, l'Albanie est habilitée à participer aux discussions du Conseil de Sécurité.

La question se pose de savoir s'il découle de ce statut assumé par l'Albanie *ad hoc* et aux fins de la discussion devant le Conseil de Sécurité, des conséquences en ce qui concerne la position du Gouvernement albanais envers la Cour.

Pour nous, nous n'en voyons aucune.

L'article 32 de la Charte est une disposition qui ne touche en rien l'article 35, paragraphe 2, du Statut et l'article 36 du Règlement de

la Cour qui traitent de la façon dont un État non membre des Nations Unies peut acquérir le droit d'ester en justice devant la Cour.

Tout ceci nous semble allant tellement de soi que vraiment j'hésite à poursuivre encore ce point. Toutefois, je me permets encore de placer sous les yeux de la Cour un des passages du rapport de M. Beelaerts van Blokland, rapporteur du Comité d'Experts, sur les conditions d'accès à la Cour internationale de Justice d'États non parties au Statut de la Cour. Je cite de la page 154 du supplément n° 6 aux *Procès-verbaux officiels du Conseil de Sécurité* de la première année, seconde série : « Il importe de souligner que le simple dépôt d'une déclaration (déclaration au sens de l'article 36 du Règlement de la Cour) ne suffit pas pour conférer compétence à la Cour dans un litige déterminé. Un État partie au Statut ne peut se voir, sans son consentement, traduit devant la Cour par un État non partie au Statut. L'accord de volonté des deux parties en litige est nécessaire, qu'il vise un cas particulier ou qu'il s'exprime d'une manière générale en vue de différends à naître pour que la Cour puisse être saisie d'une affaire. »

Je viens de terminer l'analyse des articles 36, paragraphe 3, 32 et 25 de la Charte qui sont les motifs produits par le Gouvernement du Royaume-Uni à l'appui de la prétendue disposition conformément à l'article 32 du Règlement de la Cour.

Je conclus qu'aucun de ces trois motifs invoqués par le Gouvernement britannique, ni l'article 36, paragraphe 3, ni l'article 25, ni l'article 32 de la Charte, ne fournissent aucune base pour la prétendue disposition qu'il s'agissait, dans l'affaire présente, « d'un cas spécialement prévu dans la Charte des Nations Unies » dont parle l'article 36 du Statut de la Cour.

Le résultat absolument négatif de l'analyse que nous avons entreprise pour comprendre les trois motifs invoqués par le Gouvernement britannique à l'appui de la prétendue disposition dont fait état sa requête, nous a surpris, je l'avoue, un peu nous-mêmes.

Nous avons donc été amenés à nous poser à nous-mêmes la question de savoir comment s'expliquer cette nouvelle disposition de l'article 36, ajoutée à l'article 36 de la Cour permanente. Qu'est-ce que cette expression « un cas spécialement prévu par la Charte des Nations Unies » pour être soumis à la compétence de la Cour internationale de Justice ?

Le résultat de nos recherches à cet égard nous a amenés à dire que le « cas spécialement prévu dans la Charte des Nations Unies » mentionné dans l'article 36 du Statut de la Cour n'existe pas. La requête britannique du 13 mai se réclamait bien d'une lettre mort-née à cet égard. C'est le secret de l'échec si complet de la tentative que la requête a entreprise pour se baser sur la nouvelle disposition de l'article 36 du Statut.

La chose s'est passée à peu près de la façon suivante : une conférence des juristes des Nations Unies fut convoquée un peu avant l'ouverture de la Conférence de San-Francisco à Washington. M. Hackworth présidait cette conférence. Ces juristes prévoyaient alors — ou quelqu'un parmi eux prévoyait, c'était même peut-être le Gouvernement américain lui-même — que la Charte future des Nations Unies contiendrait une clause concernant la juridiction obligatoire pour les États par rapport à la compétence du Conseil de Sécurité. Le rapport qui, à la suite des travaux de cette conférence, fut présenté le 26 avril 1945,

par M. Jules Basdevant, membre du comité, éclaire l'intention des auteurs au sujet de ces trois mots interpolés dans l'article 36 du Statut de la Cour permanente : « *in the Charter of the United Nations* ». Le rapport de M. Basdevant au sujet du projet de Statut de la Cour et au nom du Comité des Juristes s'exprime ainsi : « ce texte reproduit l'article 36 du Statut avec une addition pour le cas où la Charte des Nations Unies viendrait à faire quelque place à la juridiction obligatoire ».

Or, pour comprendre ce qui s'est passé au sujet de cette proposition à la Conférence de San-Francisco, il est bon de ne pas perdre de vue le fait qu'il y avait à la conférence deux comités qui s'occupaient de cette question. C'était le Comité 1 de la Commission IV présidé par M. Hackworth, dont la tâche était d'élaborer le Statut de la Cour, et le Comité 2 de la Commission III, qui s'occupait du chapitre VI de la Charte sur le règlement pacifique des différends internationaux. Au mois de mai, pendant les premières semaines de la Conférence, les comités en question ne surent pas exactement lequel d'entre eux devait s'occuper spécialement de la question. C'est seulement vers la fin du mois de mai que le Comité 2 de la Commission III, le Comité du chapitre VI de la Charte, fut assuré que le Comité 1 de la Commission IV ne serait pas saisi du paragraphe 6 de ce chapitre VI, c'est-à-dire des propositions de Dumbarton Oaks, c'est-à-dire du rôle que le Conseil de Sécurité pourrait avoir à jouer en vue de faire soumettre les différends justiciables à la Cour internationale de Justice. Le Comité 2 de la Commission III a terminé ses travaux au commencement de juin, et M. Basdevant, en tant que membre de la délégation française faisant partie de ce même Comité 2 de la Commission III et spécialement aussi de son sous-comité, savait donc déjà, au début de juin, qu'il n'y aurait rien dans la Charte de cette juridiction obligatoire qu'on prévoyait peut-être encore au mois d'avril à Washington. C'est dans ces conditions que nous voyons M. Basdevant apparaître dans la commission de M. Hackworth, pour proposer le 6 juin 1945 d'éliminer les mots : « *in the Charter of the United Nations* », « étant donné qu'il paraît que la Charte ne confère à la Cour aucune juridiction dans aucun cas ». Toutefois, cette proposition de M. Basdevant ne fut pas agréée par le Comité 1 de la Commission IV, c'est-à-dire par la Commission du Statut de la Cour. Dans nos documents (annexe 1) soumis à la Cour le 20 janvier, nous avons cité la phrase suivant immédiatement la proposition de M. Basdevant, qui dit que : « toutefois, une autre opinion a été exprimée, savoir que le paragraphe 6 du chapitre VII *a*) de la Charte se réfère à la soumission obligatoire des affaires à la Cour par le Conseil de Sécurité. Pour cette raison, il a été agréé que le passage ne sera pas barré. »

J'ai déjà cité auparavant le rapport de M. Arkadiev concernant les travaux du Comité 2 de la Commission III. J'ajoute maintenant qu'il a été également précisé dans ce rapport que « l'article 5, qui est une nouvelle version de la première phrase de l'ancien paragraphe 6, ne traite que de l'action du Conseil de Sécurité lorsque celui-ci formule ses recommandations en vertu de l'article 4. Il tient compte du fait que le Comité IV/1 a examiné la question de la juridiction de la Cour internationale et a recommandé l'acceptation du principe de la clause facultative. »

Je me permets de résumer cette histoire en deux mots : c'est la Commission du Statut de la Cour qui avait entre autres également la charge de l'article 36 du Statut avec les mots nouvellement ajoutés « dans la Charte des Nations Unies ». Elle travaillait sans la liaison nécessaire avec le Comité 2 de la Commission III, et c'est ainsi qu'une erreur de rédaction s'est produite. Il est très compréhensible que dans la hâte des dernières semaines de la Conférence de San-Francisco le Comité de coordination et le Comité de rédaction n'aient plus eu le temps nécessaire d'examiner ce point de plus près.

Nous avions besoin de faire la démonstration qui précède pour nous préparer les bases d'une meilleure discussion de la requête comme moyen de saisir la Cour. La situation est celle-ci, à ce qu'il nous semble : si la prétendue disposition invoquée par le Gouvernement britannique à l'appui de sa requête n'existe pas, le Gouvernement britannique n'était pas fondé à saisir la Cour par la requête.

Le Gouvernement du Royaume-Uni ne trouvait pas nécessaire de consacrer à la question de l'admissibilité, de la recevabilité de sa requête, l'attention que cette question méritait, encore même dans son Mémoire présenté à la Cour au 1er octobre dernier, suivant l'ordonnance de M. le Président de la Cour du 31 juillet dernier. A la suite de notre exception du 1er décembre dernier, le Gouvernement britannique se trouvait cette fois-ci bien obligé d'examiner d'un peu plus près la question. Ses Observations du 20 janvier s'attachent maintenant surtout à la question de savoir comment sauver la requête si elle n'est pas en ordre. Les arguments avancés à cet égard par les Observations du Gouvernement du Royaume-Uni du 20 janvier dernier sont au nombre de trois. Je me permettrai de les examiner un par un :

1) D'après les Observations, l'initiative qu'a prise le Gouvernement du Royaume-Uni en vertu de la recommandation du Conseil de Sécurité du 9 avril dernier aurait été fondée, en premier lieu, sur le désir exprès du Conseil de Sécurité recommandant une action immédiate.

En effet, il se trouve dans la recommandation le mot « immédiatement » ; on recommande aux Gouvernements de soumettre immédiatement leurs différends à la Cour.

Mais, sûrement, la question se pose de savoir si une telle disposition est vraiment le pivot autour duquel tourne toute la procédure de l'affaire. Si c'était vrai, le mot « immédiatement » primerait n'importe quelle autre disposition relative à l'affaire, soit qu'elle se trouve dans la Résolution du 9 avril soit, ce qui est encore plus important, dans le Statut de la Cour. Or, il n'y a sûrement nulle part aucune disposition qui autoriserait les États à passer outre au Statut de la Cour et à son Règlement uniquement parce qu'un tiers, en l'occurrence le Conseil de Sécurité, veut bien leur conseiller de s'adresser à la Cour « immédiatement ».

2) Le deuxième argument avancé par les Observations du 20 janvier dit que le Gouvernement britannique a pris son initiative de porter l'affaire devant la Cour par la requête parce que (je cite) : « .... deuxièmement, la résolution dont il s'agit [Résolution du 9 avril du Conseil de Sécurité], sans faire allusion à la conclusion d'un compromis, s'est bornée à recommander aux deux Gouvernements de soumettre le litige à la Cour. Le Gouvernement du Royaume-Uni s'est rallié sans réserve

à cette décision, et il a supposé que le Gouvernement albanais adopterait la même attitude. »

Or, en ce qui concerne ces arguments, nous contestons tout d'abord que la recommandation du Conseil du 9 avril se soit bornée à recommander aux Gouvernements de soumettre le litige à la Cour. Les Observations ne citent pas la recommandation correctement. La recommandation recommande au Gouvernement du Royaume-Uni et au Gouvernement albanais, *expressis verbis*, à soumettre à la Cour leur différend « en conformité du Statut de la Cour ».

Or, d'après le Statut, il y a deux voies pour aller devant la Cour, soit par notification du compromis, soit par une requête.

Pourquoi, de ces deux voies à choisir, le Gouvernement britannique a-t-il choisi justement la requête ? Si la recommandation ne fait pas allusion à un compromis, elle ne fait pas plus allusion à la requête.

Encore, le Gouvernement britannique a « supposé que le Gouvernement albanais adopterait la même attitude ».

A cet égard, il y a lieu de faire remarquer : jusqu'à présent le Gouvernement du Royaume-Uni a supposé systématiquement que le Gouvernement albanais fera toujours le contraire de ce qu'il devrait, d'après lui, faire. Pourquoi, en l'occurrence, suppose-t-il que le Gouvernement albanais adopterait la même attitude ?

3) Enfin, nous arrivons au troisième motif, le plus important, des Observations du 20 janvier à l'appui de la requête britannique du 13 mai. Ce troisième motif contient une tentative de justification qui s'efforce de sauver la requête par des raisons tirées de la prétendue nature juridique de la requête. Cet argument est libellé dans les Observations (par. 9, lit. *e*) de la façon suivante :

« Rien dans le Statut ni dans le Règlement de la Cour n'interdit formellement l'instance par voie de requête, même si la compétence de la Cour est établie en vertu, soit d'un renvoi devant la Cour du différend par les parties, soit d'un compromis. En conséquence, le Gouvernement du Royaume-Uni, en introduisant la présente affaire devant la Cour par voie de requête, a, de l'avis de ce Gouvernement, agi correctement. »

Or, la requête serait le moyen d'introduire l'instance même au cas du compromis. L'argument employé ici nous paraît trop important pour notre exception préliminaire pour que je puisse omettre de développer plus amplement comment ce point de vue du Gouvernement britannique est encore et surtout à cet égard erroné.

Le terme « requête », pour dénommer le moyen formel de porter l'affaire devant la Cour, n'a pas une longue existence. Nous le cherchons en vain dans les actes de la Conférence de La Haye de 1899 et de 1907. M. de Lapradelle, comme rapporteur du Comité consultatif des Juristes en juin et juillet 1920, préparant le Statut de la Cour permanente, explique dans son rapport cet état de choses. Il dit : « Le projet de la Cour de Justice arbitrale de 1907 n'avait attaché qu'une attention réduite à un point aussi particulier. » Il s'agissait de la question de savoir de quelle manière la Cour est saisie. M. de Lapradelle continuait : « mais dès l'instant que la constitution de la Société des Nations permettait la création d'une Cour vraiment permanente, de tels détails devaient être directement abordés ». Le projet du Comité de Juristes de 1920 a donc consacré un article spécial à la manière dont la Cour doit être

saisie. Son article 38, qui serait aujourd'hui l'article 40 du Statut, prescrit : « la Cour est saisie par une requête adressée au Greffe » ; en anglais : « *written application* ».

Comme il est connu, ce projet des juristes de 1920 prévoyait, dans son article 34 (aujourd'hui article 36 du Statut), la juridiction obligatoire entre les États Membres de la Société des Nations pour les différends d'ordre juridique. C'était là le trait saillant de ce projet. La requête serait donc, d'après ce projet, le moyen par excellence unilatéral.

Comme on le sait, le Conseil de la Société des Nations et la Première Assemblée de 1920 ont complètement modifié le projet des juristes sur ce point capital. A la suite de cette nouvelle rédaction définitive du Statut, la compétence de la Cour permanente n'est pas obligatoire, même pour les différends d'ordre juridique.

Il est pour nous intéressant de noter qu'avec la disparition de la juridiction obligatoire du Statut, disparaît aussi, dans l'article 38 du projet des juristes, la requête comme étant le seul moyen formel de saisir la Cour, et la notification du compromis apparaît à côté de la requête ainsi que l'article 40 du Statut de 1920 en témoigne.

Comme il est connu, la formule de la première phrase de l'article 40 du Statut provient de M. Fromageot, membre de la délégation française à la Première Assemblée et membre de la Troisième Commission à l'Assemblée, qui avait pour tâche d'élaborer le texte définitif du Statut. On trouve, à la page 368 des procès-verbaux de la Troisième Commission, comment la discussion concernant l'article 40 d'aujourd'hui, article 38 à cette époque, s'est poursuivie :

« La commission s'est rendu compte que deux cas peuvent se présenter : comment porter l'affaire devant la Cour ?

1°) La Cour est saisie unilatéralement par une des parties. Dans ce cas, c'est la partie demanderesse qui saisit la Cour ;

2°) Il y a un accord spécial entre les parties. Dans cette éventualité, l'une des parties s'adresse à la Cour et celle-ci décide si la requête est recevable. »

Ainsi la discussion a commencé.

Or, M. Fromageot trouvait qu'il serait dangereux de permettre d'employer la requête même dans le cas d'un compromis. « La liberté d'un État d'accepter ou non d'aller devant la Cour peut se trouver compromise par la requête. » Il a donc proposé la rédaction suivante : « La Cour est saisie, selon les cas, soit par notification du compromis, soit par une requête adressée au Greffe. Dans les deux cas, l'objet du différend entre les parties en cause doit être indiqué. »

Lesdits procès-verbaux éclairent bien la question de savoir comment il faut comprendre cette expression : « selon les cas ».

Il y a le cas où il existe un accord spécial entre les parties et le cas où la Cour peut être saisie unilatéralement par l'une des parties.

Dans le premier cas, il y a notification du compromis. Dans le deuxième cas, et seulement dans ce cas, il y a la requête.

Je n'abuserai pas du temps de la Cour en citant les nombreux auteurs qui commentent l'article 40 du Statut dans le même sens que celui que je viens d'indiquer. Je me borne seulement à citer le grand spécialiste de la Cour permanente de Justice, le juge Manley O. Hudson. Dans son ouvrage consacré à la Cour permanente (édition 1934, p. 168), il dit au sujet de la discussion de l'article 38 que nous venons de citer :

« The text was redrafted and given its final form by the sub-committee of the Third Committee of the Assembly, in order to distinguish between cases submitted by the unilateral action of a State and cases submitted by the agreement of two or more States. »

Depuis, nous pouvons bien l'affirmer, c'est toujours ainsi qu'on comprend et qu'on applique l'article 40 du Statut, et c'est surtout aux travaux mêmes de la Cour internationale de Justice que nous voulons nous référer à cet égard.

[*Séance publique du 27 février 1948, après-midi.*]

Monsieur le Président, Messieurs de la Cour,

J'ai dit ce matin qu'il fallait se tourner aussi vers les travaux de la Cour permanente de Justice internationale pour bien comprendre le sens de la requête comme moyen technique d'introduire l'instance devant la Cour.

Je ne pense pas ici aux arrêts, aux avis consultatifs de la Cour permanente. En effet, il me semble que les affaires ont toujours été poursuivies devant la Cour permanente soit par le compromis, soit par la requête, selon le cas. S'il y avait des cas où la question de recevabilité s'était posée, elle s'est posée pour d'autres raisons.

Mais il est encore une autre source pour connaître la doctrine de la Cour permanente relativement à la requête comme moyen approprié d'introduire l'instance devant la Cour. Nous pensons aux délibérations de la Cour permanente consacrées, depuis 1922 jusqu'à 1936, à l'élaboration et la revision de son Règlement. C'est un grand document que contiennent les publications de la Cour permanente se rapportant à la revision de son Règlement entreprise par elle en 1926, 1931, et de 1934 à 1936, et encore, bien entendu, à la session préliminaire de la Cour pour élaborer son Règlement en 1922.

Or, dans cette mine d'or que représentent ces travaux de la Cour, on trouve que plusieurs membres de la Cour permanente, des noms bien connus dans le droit international, ont professé d'une façon systématique l'idée qu'il faut bien distinguer entre la notification de compromis et la requête.

C'est ainsi que M. Anzilotti a déclaré en 1922 : « Je désire faire une distinction nette entre le cas où la procédure débute par une requête ou bien par la notification d'un compromis. » Et, encore cette année même, c'était M. Huber qui estimait que « la première question à résoudre est de savoir si une affaire peut être portée devant la Cour par requête lorsque les parties n'ont pas accepté la juridiction obligatoire de la Cour. Personnellement, il est d'avis que ce n'est pas possible. » (P. 201, Règlement 1922.)

En 1922, la Cour n'avait pas encore eu l'occasion d'approfondir cette question. Je me permets de faire la remarque qu'aussi pour la Cour et son Règlement vaut que c'est l'expérience qui lui confère de l'ampleur et de la certitude.

Mais au cours de la revision du Règlement en 1926, nous rencontrons déjà dans les discussions des membres de la Cour des éclaircissements importants et approfondis en ce qui concerne la requête comme moyen technique de porter une affaire devant la Cour. Je me réfère notamment aux pages 177 et suivantes du volume consacré à la revision du Règlement de la Cour en 1926.

La Cour s'occupait surtout de la question de savoir comment introduire une procédure en interprétation. Je crois que c'était l'article 60 du Statut qui à ce moment était en discussion. Il s'agissait de savoir si on peut introduire une telle procédure par requête. Nous avons soumis à la Cour, par l'annexe n° 12, la partie principale de la discussion que j'évoque en ce moment. On peut y voir que M. John Bassett Moore s'est demandé « si la Cour, dans son Règlement, ne s'est pas servie du mot « requête » exclusivement là où elle possède juridiction obligatoire ». C'est surtout M. Hammarskjöld, le grand savant qui excellait dans la connaissance détaillée de tout le mécanisme de la Cour, qui a donné la réponse à la question de M. Moore.

Je cite textuellement :

« Le Greffier croit, à la question de terminologie soulevée par M. Moore, que la Cour, se basant sur l'article 40 du Statut, a toujours appelé « requête » la pièce introductive d'instance déposée par une partie prétendant qu'il y avait juridiction obligatoire sur l'objet du litige. Le terme correspondant en anglais a été « *application* ». Dans l'autre éventualité, le terme français a été « compromis », et l'expression anglaise correspondante « *special agreement* ». »

Nous croyons pouvoir affirmer non seulement que la réponse de M. Hammarskjöld était correcte, mais qu'en effet on ne trouve pas d'opinion contraire. On peut trouver dans lesdits documents de la Cour certaines autres observations qui se rapportent à certains détails et à certaines nuances de la question de la portée du terme « requête » au sens technique. Nous dénommerions ces opinions « des remarques marginales ». Ainsi, par exemple, il est vrai que le mot « requête » n'est pas employé dans le Statut ou Règlement de la Cour seulement exclusivement dans le sens de l'article 40 du Statut. Voir la requête pour demander l'avis consultatif. Mais, d'une façon générale, le fait est, d'après nous, certain que pour introduire l'instance selon la procédure contentieuse, la requête est le moyen, au sens de l'article 40 du Statut, réservé pour les affaires de juridiction obligatoire. C'est pour cette raison qu'elle est le moyen unilatéral. Nous avons essayé de nous frayer un chemin à travers ces quelques milliers de pages que constituent les travaux de la Cour se rapportant à son Règlement. Nous n'avons pas trouvé l'ombre d'une opinion contraire en ce qui concerne ledit caractère de la requête.

La revision du Règlement de la Cour entreprise de 1934 jusqu'à 1936, sous la présidence de sir Cecil Hurst, a été sans doute la plus importante de toutes. D'ailleurs, la Cour internationale de Justice en a tiré profit pour son Règlement aujourd'hui en vigueur. Or, lors de cette dernière revision, la Cour s'est occupée, sous divers rapports, de la requête. Tous les juges, notamment MM. Anzilotti, van Eysinga, Fromageot, Guerrero, Negulesco, Rolin-Jaequemyns, mentionnent la requête comme une pièce unilatérale et supposant la juridiction obligatoire. Je cite encore une fois M. Anzilotti : « M. Anzilotti [à la page 139 du document de 1936] insiste de nouveau sur la différence qui sépare la requête du compromis. Tandis que ce dernier est l'œuvre commune des deux parties, la requête, en revanche, est l'œuvre d'une seule partie. »

Lors de cette dernière revision de son Règlement de 1934 à 1936, la Cour eut l'occasion de s'occuper de la requête surtout à propos de la grande question que constitue le problème du *forum prorogatum*.

On trouve dans ce document de la Cour publié en 1936 surtout la page 69 et les suivantes qui se rapportent à ces problèmes.

La question s'est présentée sous l'angle suivant : Comment faut-il procéder, si les dispositions prétendues par la requête en ce qui concerne sa base paraissent douteuses ou même inexistantes ?

C'est encore M. Hammarskjöld qui a décrit aux membres de la Cour la manière dont celle-ci procède en pareille occurrence. On trouve son explication à la page 845 du volume de 1936 : « Le Greffier indique que si la requête était présentée en vertu d'un acte autre que la clause facultative, connue de la Cour et dans lequel le gouvernement cité aurait accepté la juridiction obligatoire de la Cour, elle serait sans aucun doute transmise automatiquement ; si elle invoquait quelque clause de ce genre inconnue de la Cour, le requérant serait vraisemblablement invité à fournir des explications. Il ne faut pas oublier que le Gouvernement cité peut, au reçu de la requête, être disposé à accepter la juridiction *ad hoc* de la Cour, même s'il n'est pas obligé de le faire. C'est là un motif pour notifier les requêtes dans tous les cas. »

Ces explications du savant Greffier de la Cour permanente éclairent la question comment et pourquoi la Cour peut se trouver en état de recevoir, et même, en ce qui la concerne, de transmettre des requêtes dont la base paraît être douteuse sinon manquant de tout fondement.

La requête présuppose une disposition de la juridiction obligatoire. Néanmoins, il arrive qu'une requête saisisse la Cour d'une affaire sans que cette condition soit remplie. Comment, alors, procéder ? Les explications de M. Hammarskjöld indiquent assez clairement que la Cour permanente professait, en pareil cas, un certain penchant pour le *forum prorogatum*. On pourrait expliquer peut-être de différentes manières ce penchant de la Cour permanente. C'est dans cette salle même qu'un jour l'*attorney-general* sir Douglas Hogg a déclaré : « I am conscious that even in the most eminent tribunal there must be an inclination so to construe the powers of the Court as to render its jurisdiction as extensive as possible. I am familiar with the maxim *boni judicis est ampliare jurisdictionem*. » Ce serait une explication. Mais il y a d'autres explications possibles. Les procès-verbaux des délibérations de la Cour permanente elle-même témoignent du souci de la Cour d'assurer à sa juridiction l'accès « libre et facile », ainsi que cela a déjà été proclamé à La Haye en 1907. Naturellement, ici, se pose la question : jusqu'où est-il permis à la Cour d'aller pour permettre et faciliter *forum prorogatum* sur une requête qui primitivement manque de fond ?

Nous croyons que c'est ici le cas où vaut la maxime *Est modus adhibendus in rebus* : c'est le cas de la mesure à appliquer.

Dans les délibérations de la Cour pour la revision de son Règlement en 1926, M. Fromageot a envisagé même le cas d'un *forum prorogatum* qui se réaliserait par des requêtes présentées unilatéralement par l'une et l'autre partie, sans leur entente préalable. Les collègues de M. Fromageot ont trouvé qu'une telle hypothèse dépassait les limites du *forum prorogatum*. Notre document, que nous nous sommes permis de placer sous les yeux de la Cour en annexe n° 14, se réfère, entre autres, à cette hypothèse.

Certains auteurs pensent que la Cour est allée peut-être, dans son Arrêt 12, le plus loin sur le chemin du *forum prorogatum* pour admettre sa juridiction sur de simples actes concluants. Peut-être les opinions

dissidentes des juges M. Huber et M. Nyholm ont-elles rendu service en montrant à cette occasion le signe du *red light* sur ce chemin.

Pour les besoins de notre présente démonstration, nous croyons être fondés à tirer de tous ces travaux importants de la Cour permanente que nous avons examinés tout à l'heure les conclusions suivantes :

1) Tout d'abord, il y a un principe majeur qui reste toujours entièrement en vigueur. C'est que la juridiction de la Cour ne repose au fond que sur la volonté des parties. Tôt ou tard, au cours d'une instance, il est toujours nécessaire de voir de plus près si et comment une telle volonté existe et comment elle a été formée.

2) La requête, considérée sous l'angle de ce principe majeur, reste toujours le moyen technique approprié prévu par le Règlement pour porter devant la Cour les affaires de la juridiction obligatoire unilatéralement.

S'il arrive que le consentement fondé dans l'obligation acceptée d'avance de la juridiction obligatoire de la Cour vienne à manquer, un tel élément constitutif pour la requête peut être fourni postérieurement.

C'est ainsi que, dans un cas donné, nous pouvons arriver, le cas échéant, au *forum prorogatum*.

Mais, 3) il faut absolument et toujours qu'un tel consentement intervienne au moins postérieurement. Sinon, la requête, étant par sa nature le moyen unilatéral, n'est pas validée, reste infirme et frappée de nullité. Les conséquences nécessaires s'imposent alors : la requête est irrecevable.

En résumant par ces trois principes les renseignements que nous croyons pouvoir tirer des travaux de la Cour permanente, il ne nous paraît pas nécessaire de nous attarder davantage sur le témoignage que nous pourrions gagner dans le même sens d'autres sources que de la Cour permanente elle-même. Toutefois, nous demandons encore la permission de citer les opinions de deux auteurs éminents :

Le premier est, encore une fois, M. Hammarskjöld, parlant comme membre de l'Institut de Droit international, en 1927. C'est dans l'*Annuaire de l'Institut* de cette année, page 821, que nous trouvons quelques remarques pénétrantes de l'ancien Greffier de la Cour à l'égard de la requête. Nous nous bornons à citer la phrase suivante : « En parlant de la Cour permanente de Justice internationale, on entend, le plus souvent, par « juridiction obligatoire », juridiction par requête unilatérale. Partout où la compétence de la Cour sur requête unilatérale n'est pas expressément prévue, un compromis est aussi nécessaire pour saisir la Cour que pour saisir un tribunal arbitral quelconque. »

Et je demande encore la permission de citer, à l'appui de la thèse que j'expose, l'opinion de M. l'agent britannique lui-même présent ici.

M. l'agent britannique, parlant en qualité de professeur à l'Académie de Droit international, dans ce Palais même, en 1932, disait exactement ceci : « Le Règlement de la Cour a prévu deux moyens d'intenter une action devant la Cour : *a*) par voie de requête unilatérale ; *b*) par le dépôt d'un compromis. La première méthode ne peut être employée que lorsque la compétence de la Cour pour le litige en question est une compétence obligatoire. La deuxième méthode, si les parties sont d'accord pour l'utiliser, peut être employée au lieu de la requête dans le cas où la Cour a compétence obligatoire, et de toute façon lorsque la Cour n'a que compétence facultative. »

On ne saurait mieux dire. Mais s'il en est ainsi, si vraiment il n'y a que ces deux moyens possibles, alors il nous semble que *tertium non*

*datur*. A cet égard, il faut faire observer que les Observations du Gouvernement britannique du 20 janvier font encore état dans le paragraphe 9 *d*) *in fine* « d'un renvoi devant la Cour ». De deux choses l'une. Un renvoi devant la Cour d'une affaire peut avoir lieu sur la base d'un compromis ou sur la base d'une requête, mais acceptée *a posteriori* par les parties. Il n'y a pas une troisième solution.

Nous concluons de toutes ces explications déjà longues que, aucune disposition établissant la compétence de la Cour dans l'affaire présente n'existant au moment où la requête a été présentée devant la Cour au mois de mai de l'année dernière, la requête manquait d'une base nécessaire quelconque et est par conséquent irrecevable.

Il y avait seulement un moyen, mais il ne dépendait que du Gouvernement albanais.

Bien entendu, c'est nous, Gouvernement albanais, qui pourrions toujours encore sauver la requête irrecevable. Il dépendait de notre bonne volonté de jeter la planche de salut à la requête se débattant sur la mer houleuse. Mais, usant du droit de tous les plaideurs dans tous les temps, nous nous sommes refusés et nous nous refusons de tendre cette planche de salut.

Le Gouvernement albanais, dès le commencement, s'est refusé à consentir que l'affaire en cause soit portée devant la Cour par la requête et se refuse encore maintenant *a posteriori* de valider la requête par sa volonté.

Dans sa lettre du 2 juillet, le Gouvernement albanais s'est déclaré prêt, malgré l'erreur et l'irrégularité commises par le Gouvernement britannique, à aller devant la Cour. Mais il a ajouté : « Toutefois, le Gouvernement albanais fait les réserves les plus expresses sur la façon dont le Gouvernement britannique a saisi la Cour en application de la recommandation du Conseil, et surtout quant à l'interprétation qu'il a voulu donner de l'article 25 de la Charte par rapport au caractère obligatoire des recommandations du Conseil de Sécurité. »

En s'accrochant à une lettre née morte parce que rien ne lui répond dans la Charte ; en se servant à tort de la requête, moyen formel de la juridiction obligatoire de la Cour, le Gouvernement du Royaume-Uni s'est mis dans des difficultés évidentes. Il les aurait évitées s'il avait suivi la recommandation du Conseil de Sécurité du 9 avril dernier.

En effet, d'après le texte de la recommandation, le différend doit être soumis « par les parties à la Cour internationale de Justice et conformément aux dispositions du Statut de la Cour ». Il nous semble bien que le Gouvernement du Royaume-Uni a dû regarder bien plus près le sens propre de ces mots « les parties » et « conformément au Statut de la Cour ».

Or, d'après nous, le Gouvernement du Royaume-Uni ne l'a pas fait. Au lieu de suivre la recommandation du Conseil de Sécurité du 9 avril dernier, le Gouvernement du Royaume-Uni l'a violée. Cette violation de la recommandation du Conseil de Sécurité commise par le Gouvernement britannique, c'est la question que je me permettrai de soumettre maintenant à la Cour.

Tout d'abord, je veux encore une fois mentionner que le Conseil de Sécurité, d'après le texte de sa Résolution du 9 avril, recommande « aux Gouvernements du Royaume-Uni et de l'Albanie de soumettre immédiatement ce différend à la Cour internationale de Justice, conformément aux dispositions du Statut de la Cour ».

Cette recommandation du 9 avril a pour auteur, voire même rédacteur, sir Alexander Cadogan, le représentant du Gouvernement britannique au Conseil de Sécurité. Sir Alexander Cadogan, en proposant cette recommandation, le 3 avril dernier, au Conseil de Sécurité, s'est visiblement inspiré du texte même, des mots, des tournures de phrase du paragraphe 3 de l'article 36 de la Charte.

S'il en est ainsi, les mots qui se rencontrent dans la recommandation : « recommande aux Gouvernements du Royaume-Uni et de l'Albanie » — ces mots concrétisent dans la recommandation les termes « *by the parties* » que contient l'article 36, paragraphe 3, de la Charte.

Le terme « les parties » signifie qu'il en faut au moins deux, donc, que ces parties doivent procéder à leurs fins respectives ensemble, d'accord.

Dans notre affaire, le contraire a été fait : le Gouvernement du Royaume-Uni a procédé jusqu'à présent tout seul.

La Cour voudra bien comprendre que ces mots « par les parties » ont une certaine importance pour notre cause. Aussi je prie la Cour de m'excuser en me considérant obligé d'expliquer maintenant un peu plus amplement que l'expression « les parties », au pluriel, signifie que ces parties doivent procéder ensemble, d'un commun accord, et jamais une de ces parties seule.

Heureusement pour nous, ce terme « *the parties* » a fait déjà l'objet de différentes interprétations, de différentes pratiques dans le droit international et dans les actes diplomatiques. Il y a eu même une occasion mémorable où le sens de ce terme que je discute maintenant a été âprement discuté.

Je me permets, dans cet ordre d'idées, de citer tout d'abord la deuxième phrase de l'article 14 du Pacte de la Société des Nations. L'article dit : « Le Conseil est chargé de préparer un projet de Cour permanente de Justice internationale et de le soumettre aux Membres de la Société. Cette Cour connaîtra de tous différends de caractère international que les parties lui soumettront. » On voudra bien remarquer les mots « différends .... que les parties lui soumettront ».

Ces mots et cette phrase se répètent dans l'article 36, paragraphe premier, du Statut de la Cour permanente de Justice internationale, et les mêmes mots et la même phrase reviennent aujourd'hui dans le paragraphe 3 de l'article 36 de la Charte. La seule différence phraséologique entre le paragraphe 3 de l'article 36 de la Charte, l'article 36 du Statut de la Cour et le paragraphe 14 du Pacte de la Société des Nations consiste en ceci que ce ne sont pas les parties qui soumettent leurs différends à la Cour mais que les différends sont soumis par les parties à la Cour.

L'histoire que nous avons en vue par rapport au terme « les parties » commence lors de l'élaboration du Pacte de la Société des Nations. Je prends les renseignements suivants dans le rapport du juge de la Cour permanente, M. Negulesco (p. 782 du volume concernant la revision du Règlement de la Cour de 1936).

D'après M. Negulesco, il y avait, lors de l'élaboration du Pacte, un texte proposé par le président Wilson et lord Robert Cecil. Par voie d'amendement, M. Larnaude, délégué français, proposait pour l'article 14, entre autres dispositions, que la Cour pourrait juger « tous différends que, avec l'assentiment de la Cour et du Conseil exécutif, l'une quelconque des parties désirerait lui voir soumettre ». Or, cette proposition

fut modifiée dans ce sens que le consentement des deux parties serait nécessaire. C'est dans cet esprit que le Comité de rédaction a établi le texte définitif et que naquit le terme « les parties » dans la deuxième phrase de l'article 14 du Pacte.

Une année après, ce contenu du terme « les parties » de l'article 14 fut scruté dans la mémorable occasion que je viens de mentionner. Je fais allusion au Comité consultatif des Juristes chargé de préparer un projet pour l'établissement de la Cour permanente de Justice internationale visée à l'article 14 du Pacte.

M. de Lapradelle, rapporteur du Comité, consacra à la question qui se posait alors au sein de ce savant Comité les lignes suivantes en ce qui touche le sens propre des mots « les parties » de l'article 14 : « Une opinion s'est fait jour au sein du Comité, d'après laquelle, conformément à l'article 14 du Pacte, la Cour pouvait être saisie non par « les parties » mais par « une partie », le mot « partie » étant pris ici dans son sens le plus général, comme exprimant non seulement toutes les parties mais chacune d'elles. Mais une telle interprétation semblait excessive à tous les autres membres du Comité. » Le membre unique du Comité dont il s'agit était M. Loder, le premier Président de la Cour permanente. Comme on le sait, M. Loder professait des idées très avancées en faveur de la compétence obligatoire de la Cour, même sur la demande unilatérale de chaque État. Il a tenté d'y amener et d'en convaincre ses collègues du Comité. Du texte de l'article 14 du Pacte, pour M. Loder, « il ne découle pas évidemment que, pour obtenir justice contre son adversaire, on devra acquérir préalablement son consentement gracieux, le texte ne le dit pas. Pour le lui faire dire, il faut tenir le raisonnement suivant : l'article dit : « les parties lui soumettront », c'est donc qu'il en faut au moins deux et qu'elles doivent se présenter ensemble, d'où un accord préalable nécessaire. Mais on peut tout aussi bien donner à ces mots le sens le plus simple, le plus naturel et le plus banal aussi, savoir que la Cour connaîtra de tous les litiges que les parties, c'est-à- dire la partie A, ou la partie B, ou la partie C, lui soumettront à l'avenir. A quoi bon, autrement, créer cette Cour pour constituer une doublure de la Cour d'Arbitrage, pour conserver un état de choses déplorable ? », etc.

Cette opinion de M. Loder fut vigoureusement combattue au sein du Comité en premier lieu par lord Phillimore.

Nous avons reproduit l'opinion de lord Phillimore, qui présente pour nous, en l'occurrence, une certaine valeur, dans le document annexe n° 2.

Selon lord Phillimore — je cite le procès-verbal — : « l'article 14 ne peut signifier qu'une chose : l'accord des deux parties est nécessaire pour qu'une affaire puisse être portée devant la Cour. Le langage juridique anglais ne se sert du pluriel, en parlant des parties, que pour désigner les deux parties en litige. Son interprétation se trouve corroborée par plusieurs juristes anglais et par des membres de la Section juridique de la Société des Nations. »

Nous pouvons laisser à ce moment le Comité des Juristes de 1920 parce que la question a été tranchée avec une autorité singulière au Conseil de la Société des Nations. M. Balfour s'exprima alors de la façon suivante au sujet de l'article 14 : « L'article 14 .... envisage clairement : *a*) que la Cour ne connaît que le différend que les parties décident de leur plein gré de lui soumettre. » M. Balfour avait évidemment en vue l'opinion de M. Loder, en ajoutant : « Il n'est jamais entré dans

l'intention des auteurs de cet article que l'une des parties au différend dût contraindre l'autre partie à aller devant le tribunal. »

C'est dans le sens expliqué par M. Balfour que l'article 36, paragraphe premier, du Statut de la Cour internationale de Justice fut finalement rédigé. Et tout le monde est d'accord que les mots de l'article 36, paragraphe premier : « la compétence de la Cour s'étend à toutes les affaires que les parties lui soumettront » signifient que les parties soumettent l'affaire d'accord, que l'une d'elles n'a pas le droit d'assigner unilatéralement l'autre. S'il n'en était pas ainsi, toute la portée de l'article 36, paragraphe premier, serait renversée.

J'invoque l'autorité de M. le juge Huber, qui s'exprime à cet égard, à la page 52 de l'Arrêt n° 12 de la Cour permanente, de la façon suivante : « Soumission par les parties signifie, dans l'article 36 du Statut, soumission par un accord — acte bilatéral — intervenu entre elles en vue d'un cas spécial ; le cas typique, mais pas nécessairement le seul de cette espèce, est le compromis proprement dit. Pour qu'un État puisse soumettre une affaire par un acte unilatéral, il faut qu'un accord antérieur lui confère cette faculté. »

Nous sommes donc arrivés assez aisément à la conclusion que le terme « les parties », au pluriel, conformément à l'article 14 du Pacte de la Société des Nations et à l'article 36 du Statut, veut toujours dire inévitablement et selon les opinions les mieux autorisées, que les parties doivent procéder d'accord.

S'il en est ainsi, voyons comment les choses se présentent encore dans le Statut et le Règlement de la Cour, parce que, naturellement, ces deux instruments parlent sans cesse des deux parties ; et si notre explication est exacte, nous devons trouver confirmation de notre thèse que les parties doivent toujours procéder d'accord, à la fois dans le Statut et dans le Règlement de la Cour elle-même.

Or, il nous semble bien qu'en analysant les cas où le Statut ou le Règlement de la Cour prévoient ce terme « les parties », c'est bien toujours dans le sens « les deux parties ensemble » que Statut et Règlement emploient ce terme. Il se peut que le Statut ou le Règlement de la Cour disent dans le texte même qu'il s'agit « d'un commun accord » par les parties, ainsi que le dit, par exemple, l'article 31 du Règlement. Mais ce qui est plus intéressant pour nous, c'est de pouvoir affirmer qu'il en est de même si le terme « les parties » survient seul.

C'est toujours dans le sens que « les parties » doivent procéder d'accord, et non individuellement l'une ou l'autre, que le Statut ou le Règlement emploient ce pluriel.

Nous nous permettons de donner quelques preuves d'exemples de nos affirmations à cet égard.

Voyons par exemple l'article 39 du Statut, dans son paragraphe 3 : « La Cour, à la demande de toute partie, autorisera l'emploi par cette partie d'une langue autre que le français ou l'anglais. » C'est le texte d'aujourd'hui, plus précisément le texte depuis 1931. Au commencement, en 1920, le Statut primitif ne disait pas « à la demande de toute partie », mais « à la demande des parties ». Voici pourquoi le texte a été modifié. Un incident se produisit à la huitième séance publique de l'année 1923, dans ce Palais même, au cours des débats de l'affaire du vapeur *Wimbledon*. Voir la page 17 du volume I, Série C, des Actes et Documents de la Cour. « Le Président, en donnant la parole à M. Schiffert, représentant du Gouvernement allemand, expose que, à la

requête de la partie défenderesse, la Cour a autorisé M. Schiffert à employer devant elle la langue allemande », etc. M. Basdevant, qui était l'agent français dans l'affaire, se lève et prie la Cour de bien vouloir remarquer que, d'après les termes de l'article 39 du Statut de la Cour, c'est à la requête des parties (ce mot étant au pluriel) que la Cour peut autoriser l'emploi d'une langue autre que le français ou l'anglais. Il en conclut que la requête devait être faite après accord entre les parties, et il désire en conséquence faire des réserves de principe au sujet de la solution que la Cour a admise ; cependant, en l'occurrence, il admet qu'il y avait de bonnes raisons pour permettre à l'agent allemand d'employer sa propre langue. Le Président, au nom de la Cour, prend acte des observations de M. Basdevant. » A la suite de cet incident, en 1929, le Comité des Juristes, s'occupant de la revision du Statut de la Cour, a modifié le texte primitif de l'article 39. C'est aujourd'hui « à la demande de toute partie » que la Cour autoriserait l'emploi d'une autre langue que le français ou l'anglais. L'ancien texte, en effet, « les parties », ne supposait pas la demande de chaque partie individuellement.

Un autre exemple de ce sens collectif du terme « les parties » nous est présenté par l'article 46 du Statut ayant trait à la publicité des audiences. D'après le texte français du Statut, il faut que « les deux parties » demandent que le public ne soit pas admis. Mais il est intéressant de noter que le texte anglais dit simplement « *the parties* » dans le même sens, couvrant ainsi nécessairement aussi l'accord commun des deux parties.

Un autre exemple de cette lecture du terme « les parties » peut être trouvé dans les dispositions du Règlement de la Cour prévoyant l'institution des assesseurs. L'article 7 du Règlement de la Cour de 1936 prévoyait l'institution d'assesseurs « si les parties sont d'accord ». Mais le Règlement de la Cour internationale de Justice a pris une autre disposition. L'article 7 prévoit « la demande que présenterait une partie », « *the request of a party* ». En 1936, les parties devaient procéder d'accord, aujourd'hui, une seule peut soumettre la demande. Ces deux situations différentes sont exprimées, en 1936 par les termes « les parties », aujourd'hui par les termes « une partie ».

Encore dans le même ordre d'idées, il est instructif de suivre la fonction du terme « les parties » dans les dispositions du Statut et du Règlement qui s'occupent des Chambres spéciales. Nous pensons aux Chambres prévues par les articles 26, 28 et 29 du Statut et les articles 71 et 72 du Règlement. Ces dispositions ont été bien remaniées depuis le Statut de 1922. Celui-ci prévoyait la demande « des parties » pour instituer la procédure devant la Chambre. La documentation y afférente prouve que le terme « les parties » veut dire les parties d'un commun accord. Cette documentation se rapporte aux articles 26 et 27 du Statut de 1922. Aujourd'hui, l'article 26 du Statut prévoit que les Chambres statueront « si les parties le demandent ». Or, à ces dispositions se réfère l'article 71, paragraphe premier, du Règlement d'aujourd'hui, qui les règle en détail et qui précise donc toujours dans notre sens que « il est fait droit à cette demande s'il y a accord entre les parties ». Le Règlement de la Cour aujourd'hui comprend donc que le terme « les parties » signifie « les parties d'accord ».

D'après l'article 29 du Statut, la Cour compose une Chambre, mais lorsque « les parties le demandent » ; cette disposition a fait l'objet d'une délibération de la Cour, notamment en 1926. A cette époque, le

Président de la Cour — je crois que c'était M. Huber — a relevé à cet égard : « s'il n'y a pas accord entre les parties, il ne saurait s'agir d'une « demande des parties » ». Ce point de vue, d'ailleurs, a été manifesté de même en d'autres occasions.

Enfin, en dernier lieu, nous voulons mentionner dans cet ordre d'idées l'article 72 du Règlement de la Cour. Comme l'article précédent, celui-ci prévoit également une démarche commune, ou du moins un accord entre les parties dans le but qu'il règle. Entre autres dispositions, l'article 72 prévoit que la Chambre peut, à la demande des parties, autoriser la présentation d'une deuxième pièce écrite lors de la procédure écrite devant la Chambre de procédure sommaire. Lorsqu'on a préparé ce texte au cours de la revision du Règlement en 1936, on a proposé de dire expressément : « la Chambre peut donner suite à un accord entre les parties ». Mais, sans changer l'intention de cette disposition, le texte définitif dit tout simplement « à la demande des parties ».

Lors de la discussion concernant ce point de l'article 72, le jonkheer van Eysinga se demandait, à propos de la rédaction primitive de ces dispositions :

« Au point de vue de la rédaction, il est dit à la deuxième phrase du deuxième alinéa : « Toutefois, la Chambre peut, soit pour donner suite « à un accord entre les parties.... » A-t-on visé là un accord formel présenté par exemple dans un document particulier ? » — M. van Eysinga demandait cette précision parce que le texte pourrait être ainsi interprété. « Ne serait-il pas préférable de recourir à la formule qu'emploie le Statut dans plusieurs articles (notamment à l'article 27) lorsqu'il veut exprimer l'idée que les deux parties sont d'accord pour présenter une demande, et de dire simplement « si les parties le désirent » ou « lorsque les « parties le demandent » ? »

Il est instructif de suivre à la page 672 et aux suivantes du document concernant la revision de 1936 les délibérations de la Cour au sujet de ce terme « les parties ». Tous les juges qui participent aux discussions sont d'accord que les mots « les parties » veulent dire « l'accord des deux parties » ; la seule question est pour eux de savoir comment l'accord doit être exprimé. Fidèles à leur procédé général souple et libéral, ils ne veulent pas que le mot « accord » signifie un accord trop formel. Ainsi, « M. Guerrero, Vice-Président, souligne que, dans l'esprit du Comité de rédaction, le mot « accord » ne comporte pas nécessairement l'existence d'un instrument préalablement signé par les parties, mais bien une simple entente entre ces dernières ». Mais c'est tout l'enjeu des délibérations de la Cour concernant la formule à employer. Il n'est pas question que quelqu'un doute que si l'on dit simplement, comme le texte définitif le dit : « à la demande des parties », il y ait quelque chose d'autre qu'un accord entre les parties.

La recommandation du Conseil de Sécurité du 9 avril dernier a donc donné au Gouvernement albanais et au Gouvernement du Royaume-Uni des indications très nettes sur les moyens de mettre son bon conseil en œuvre. D'une part, les deux parties doivent procéder d'un commun accord, c'est le sens des mots « *by the parties* » ; et, d'autre part, elles doivent procéder « conformément au Statut de la Cour ».

Voyons maintenant encore d'un peu plus près comment les deux Gouvernements doivent s'y prendre pour soumettre l'affaire à la Cour conformément au Statut.

Les deux parties peuvent s'adresser à la Cour seulement dans le cas où elles sont arrivées *a priori* ou *a posteriori* à un accord. Dans l'affaire présente, c'est bien de la nécessité d'un accord préalable qu'il s'agit.

Arrivés à ce résultat, nous éprouvons bien le sentiment que nous nous trouvons dans une partie du droit international bien connue. En effet, nous nous trouvons ici au chapitre du compromis. Nous n'en sommes d'ailleurs nullement surpris : il n'y a pas d'autre voie pour l'affaire présente. Quelle autre façon de procéder la recommandation du 9 avril dernier aurait-elle pu proposer aux Gouvernements du Royaume-Uni et de l'Albanie ? Tous les maîtres du droit international, toute l'histoire diplomatique des nations, toutes les cours d'arbitrage, et plus récemment encore, mais avec une autorité particulière, la Cour permanente de Justice internationale, n'enseignent que cette vérité fondamentale : que les États sont libres de se décider à aller ou de ne pas aller devant les juges pour chercher une solution arbitrale ou judiciaire ; le choix d'une telle solution dépend entièrement de leur volonté.

Le professeur A. Pearce Higgins, ancien titulaire de la chaire de droit international de l'Université de Cambridge, dit ceci :

« It is a general rule of international law that a State cannot be compelled to submit any dispute with another State to arbitration or judicial decision. »

A la suite du Pacte de la Société des Nations, le doyen Larnaude s'exprimait ainsi :

« L'arbitrage n'en reste pas moins purement volontaire, c'est sa nature essentielle. Il faut, pour qu'il y ait arbitrage, qu'intervienne ce qu'on appelle un compromis, c'est-à-dire un contrat fait entre les différentes parties en litige. Dans ce contrat on choisit son juge, on indique exactement les questions qui seront soumises à l'arbitrage ; en un mot, on fait une sorte de petit code de procédure à l'usage de ceux qui auront à juger le litige. Mais on ne recourt pas à l'arbitrage contraint et forcé ; sur ce point, le Pacte est formel, et ne fait que confirmer une règle absolument incontestée du droit international. »

Aujourd'hui, à la suite de la Charte des Nations Unies, M. Hackworth s'exprime ainsi devant le Comité des Sénateurs, au mois de juillet 1945 :

« Unless a State has accepted compulsory jurisdiction, it goes into Court only by its own free will, by agreement in advance with the other party to the dispute, to allow the Court to determine the question. If it has accepted compulsory jurisdiction, then it may be brought into Court by the other party to the dispute just as you may bring a suit against me in a Court in the District of Columbia. I have no choice ; you can sue me and I must answer. But under this Statute, if you were a State you could not sue me—another State—unless I agreed with you to go to the Court, or unless I accepted compulsory jurisdiction under the Optional Clause. »

En procédant ensemble, par le compromis, les deux parties vont en même temps donner satisfaction à la disposition de l'article 36, paragraphe 3, de la Charte et donner également satisfaction à la Résolution du Conseil de Sécurité du 9 avril, c'est-à-dire les parties vont procéder devant la Cour conformément au Statut de la Cour.

Le sens de cette disposition de la recommandation ne saurait faire aucun doute. La recommandation avertit ici les Gouvernements britannique et albanais de ne pas vouloir tenter d'aller devant la Cour par un procédé quelconque, mais elle leur recommande d'aller devant la Cour d'après ce que son Statut prévoit et détermine. Nous savons déjà ce que cela veut dire : « Les affaires sont portées devant la Cour, selon le cas, soit par notification du compromis, soit par une requête.... » Nous voilà revenus à l'article 40 du Statut. Il y a deux voies pour porter les affaires devant la Cour, mais ce qui est sûr et certain c'est que *you cannot have it both ways*.

Quelle est celle de ces deux voies prévues par l'article 40 du Statut que la recommandation du 9 avril dernier avait en vue ? La notification du compromis ? La requête ? L'article 40 du Statut nous donne pour guide l'expression « selon le cas ». Ce terme est plus que suffisant. Le Gouvernement albanais n'étant sujet à aucune clause de la juridiction obligatoire, l'affaire présente ne peut pas être portée devant la Cour par la requête. C'est par notification du compromis que l'affaire présente doit être portée devant la Cour. C'est la seule voie qui, en l'espèce, peut être suivie pour donner satisfaction « conformément au Statut de la Cour ».

[*Séance publique du 28 février 1948, matin.*]

Monsieur le Président, Messieurs de la Cour,

J'ai mentionné hier la question du *forum prorogatum* et j'ai cité à ce sujet l'opinion de l'ancien Greffier de la Cour, qui était d'avis que le Gouvernement cité pouvait, au reçu de la requête, être disposé à accepter la juridiction *ad hoc* de la Cour, même s'il n'était pas obligé de le faire.

Je me permets ce matin d'approfondir encore un peu plus cette question et d'examiner de plus près l'attitude de l'État à qui une requête manquant de fond est transmise par la Cour.

Le juge van Eysinga s'est prononcé au sujet de cette question lors de la revision de 1934-1936 du Règlement de la Cour ; voir page 157 du volume concernant la revision de 1936. Il a dit :

« Si un État s'adresse par requête à la Cour et si cette requête est transmise à la partie défenderesse, trois possibilités peuvent se présenter :

« L'État peut se reconnaître astreint à suivre le demandeur devant la Cour parce qu'il y a un lien qui l'y oblige ; ou bien il peut opposer une exception d'incompétence ; ou, enfin, malgré l'absence de lien qui l'oblige à suivre le demandeur devant la Cour, il peut, dans un cas donné, être disposé à venir devant elle. »

Avec tout le respect envers cette opinion du juge van Eysinga, nous croyons qu'il y a encore une autre possibilité qui peut se présenter. L'État à qui la requête manquant de fond a été transmise peut complètement ignorer ce fait de la transmission de la requête. Peut-être n'accusera-t-il même pas réception, peut-être ne nommera-t-il même pas son agent ; et si c'est un État qui n'est pas en droit d'ester en justice, il n'entreprendra rien pour obtenir ce statut.

Sans doute, à considérer, une telle attitude négative de l'État en question ne sonne peut-être pas tout à fait agréablement aux oreilles. Mais il peut s'agir d'intérêts très graves. Le gouvernement d'un pays

quelconque n'est jamais complètement souverain dans ses décisions : il est l'esclave et le serviteur des intérêts de son pays.

Nous devons considérer si et quand le gouvernement est en droit d'ignorer la requête qui lui est transmise.

Une attitude négative envers la requête est, dans certains cas assurément, conforme aux principes du droit général et surtout aussi au Statut de la Cour.

Le Statut lui-même contient l'article 53, qui a été rédigé pour le cas de l'absence de l'État de l'instance. Cet article n'exclut pas qu'une telle attitude négative peut déjà commencer par le fait que l'État à qui la requête est transmise l'ignore complètement.

En différentes occasions, dans les délibérations concernant le Règlement, les membres de la Cour permanente de Justice se sont occupés aussi de cet article. M. Huber a qualifié comme un acte extrêmement important et très avancé que le jugement par contumace, contre un État, ait pu trouver place dans le Statut. Il appréciait cette disposition de telle façon non pas pour marquer son étonnement qu'un État pût ignorer la requête transmise ; mais que le Statut ait trouvé le courage de permettre à la Cour de procéder même en l'absence d'un État.

En tout cas, il semble ressortir de cet état de choses que, dans le domaine international, la question du *contempt of Court* ne se pose pas *ipso facto* si l'État intéressé juge nécessaire de se comporter de cette façon.

Bien entendu, si un État se décide à prendre une telle attitude, il devra avoir des raisons suffisantes pour le faire. Nous croyons pouvoir dire que de telles raisons peuvent exister dans un cas déterminé.

Les actes juridiques sont soumis aussi, même en droit international, aux règles générales de leur validité et de leur nullité. La nullité peut être absolue. L'irrégularité de l'acte peut être si complète que l'acte est inexistant de plein droit.

C'est surtout la doctrine française qui a développé plus particulièrement la théorie des actes nuls et non existants. MM. Basdevant et Politis ont soutenu en 1927, à l'occasion de l'affaire retentissante dite des optants hongrois, la thèse de leur collègue M. Gaston Jèze, appliquée au cas en question, que « l'acte doit être tenu pour inexistant en tant qu'acte juridique. Il n'est pas besoin qu'une autorité publique, un juge constatent cette inexistence. L'acte ne produira aucun des effets juridiques voulus par son auteur. »

M. Anzilotti souligne, dans l'affaire 53 de la Cour permanente, que l'acte inexistant est celui où l'élément essentiel manque.

Or, il nous semble bien que la requête britannique, au moment où elle a été transmise au Gouvernement albanais, a bien pu être considérée par ce Gouvernement comme un acte inexistant et dépourvu d'aucun effet juridique. Des éléments essentiels nécessaires à sa validité manquaient à la requête britannique lorsqu'elle a été transmise au Gouvernement albanais. C'était une pièce unilatérale conçue sans aucun accord avec le Gouvernement albanais. Il n'est même pas nécessaire de mentionner qu'elle se réclamait d'une lettre morte.

Le Gouvernement albanais aurait été dans son droit de la classer tout simplement, et, si la Cour avait voulu procéder dans une telle hypothèse, conformément à l'article 53 du Statut, c'est-à-dire l'Albanie étant absente de l'instance, sans doute aurait-elle mis au bas de la requête, d'une façon bien lisible, le mot « néant ».

Toutefois, la Cour n'aurait même pas pu procéder ainsi, l'Albanie n'étant pas à cette époque un État à même d'ester en justice devant la Cour.

D'autre part, il était possible au Gouvernement albanais, à cette époque-là, de considérer l'attitude à prendre à l'égard de la requête avec une entière liberté de décision et de mouvement. En effet, le Gouvernement albanais ne s'était pas encore, jusqu'au 2 juillet dernier, prononcé sur la question de savoir s'il accepterait ou non la recommandation du Conseil de Sécurité du 9 avril dernier. Même son représentant devant le Conseil de Sécurité s'est prononcé seulement une fois au sujet de cette recommandation, et ce fut dans le sens négatif.

Les choses se présentant ainsi, je crois qu'on n'a pas apprécié suffisamment jusqu'à présent l'attitude prise par le Gouvernement albanais.

Malgré toutes ces conditions de nullité, malgré les circonstances lui laissant toute liberté, le Gouvernement albanais s'est décidé à se présenter devant la Cour. Pour agir ainsi, le Gouvernement albanais considérait des raisons et des motifs d'ordre divers : le respect envers la justice internationale et la confiance dans la Cour, d'une part, et, d'autre part, le désir de contribuer à la collaboration pacifique entre les nations.

Mais tout en déclarant que, pour des raisons de cet ordre, il était prêt à se présenter devant la Cour, le Gouvernement albanais n'entendait pas naturellement passer l'éponge sur le procédé britannique entaché, sous plusieurs chefs, de nullité et de vice de forme.

C'est pourquoi, en même temps qu'il se déclarait être prêt à paraître devant la Cour, le Gouvernement albanais a, dans la phrase suivant immédiatement, formulé les réserves les plus expresses sur la façon dont le Gouvernement britannique a saisi la Cour, en application de la recommandation du Conseil du 9 avril dernier.

La lettre du 2 juillet caractérise elle-même ses réserves comme les plus expresses. De plus, la lettre ne s'est pas contentée de les exprimer sous la forme habituelle, comme par exemple : « sous toutes réserves », mais elle définit exactement l'objet sur lequel les réserves portent, à savoir : « sur la façon dont le Gouvernement britannique a voulu saisir la Cour ».

Ce qui caractérise les Observations du Gouvernement britannique du 20 janvier, c'est qu'elles passent nos réserves sous silence.

Je me permets ici d'attirer l'attention de la Cour sur le paragraphe 9, lit. *g*, des Observations du 20 janvier : « même si — ce qui est contesté par le Gouvernement britannique — la méthode adoptée pour introduire la présente instance comportait une irrégularité quelconque de forme, cette irrégularité a été réparée parce que le Gouvernement albanais par sa lettre du 2 juillet 1947 a renoncé à toute objection et a admis la compétence de la Cour ».

Eh bien, le Gouvernement albanais s'est déclaré textuellement, malgré les irrégularités, prêt à aller devant la Cour, mais en formulant en même temps les réserves les plus expresses sur la façon dont le Gouvernement britannique a voulu saisir la Cour.

On voit bien que le problème que pose notre exception n'est pas simplement le problème de la compétence de la juridiction de la Cour, comme les Observations du Gouvernement du Royaume-Uni voudraient le faire entendre.

Je me permets de me réclamer de l'opinion de M. Witenberg, l'auteur polonais qui a étudié la question de la recevabilité en droit international plus particulièrement. M. Witenberg a professé à La Haye vers 1932 un cours très instructif, et il a publié en 1937 un livre consacré à ces questions. Voici comment il s'exprime :

« La tendance très nette de nombreux tribunaux internationaux est de rattacher à la notion de compétence, les stipulations de toute nature conditionnant l'action en justice comme les règles de forme, de délai, la règle d'épuisement des voies de recours internes, les conditions de nationalité.... Il convient en réalité de lutter contre cette tendance qui, brouillant tout, ne peut que nuire au progrès de l'arbitrage international. En examinant la théorie de la recevabilité des réclamations internationales, on verra que la compétence n'est qu'une des conditions entre diverses autres auxquelles est subordonnée la recevabilité. » (I. C. Witenberg, *L'Organisation judiciaire, la Procédure et la Sentence internationales*, 1937, pp. 100 *et sqq.*)

Je suis ainsi arrivé à la fin des parties que nous considérons comme les plus importantes pour la thèse du Gouvernement albanais.

Je me permets maintenant brièvement de me prononcer au sujet des arrêts de la Cour que les Observations du Gouvernement britannique du 20 janvier citent dans leur paragraphe 10, bien que ce soit plutôt une discussion doctrinale et savante qui pourrait se développer sur les conceptions que l'on pourrait avoir au sujet de ces arrêts.

Nous acceptons naturellement tout ce que la Cour permanente dit dans ces arrêts cités par le Gouvernement britannique. Mais nous faisons observer que, pour la plupart, ces arrêts concernent des points, soit de fait, soit de droit, qui sont différents de notre affaire.

Je me permets à cet égard de faire une remarque au sujet de l'Arrêt n° 2 rendu dans l'affaire de compétence Mavrommatis. A la page 13 de l'édition française des Observations du 20 janvier, le Gouvernement britannique a cité certaines parties de cet arrêt. Dans cette affaire, les instruments en question n'étaient pas encore en vigueur lors de la présentation de la requête à la Cour ; mais il aurait été possible pour la partie demanderesse de présenter à nouveau sa requête dans les mêmes termes, après l'entrée en vigueur du Traité de Lausanne.

Or, il est certain que le Gouvernement britannique ne pourra jamais présenter sa requête dans les mêmes termes aussitôt que notre exception préliminaire aura été acceptée par la Cour. Ce n'est pas *bis in idem*, cela doit être une autre manière de saisir la Cour, par la notification du compromis. Il conclut : l'affaire Mavrommatis, Arrêt n° 2, n'a aucun rapport avec notre affaire.

Je me permets encore de mentionner ici l'Arrêt n° 12 cité sous les paragraphes *a*) et *b*), pages 8 et 9, de l'édition française desdites Observations. Cet arrêt contient également des passages qui, d'après le texte produit par le Gouvernement britannique, sont sans rapport avec notre affaire.

Mais l'Arrêt n° 12, aux pages 24 et 25, contient certains considérants de la Cour permanente qui me semblent autrement importants pour notre affaire que les passages cités par le Gouvernement britannique. L'affaire était simple : l'agent polonais a plaidé l'incompétence alors que les débats oraux sur le fond touchaient presque à leur fin. La Cour a alors dit à l'agent polonais : vous avez introduit votre exception

d'incompétence trop tardivement. L'erreur était de demander une décision sur le fond sans faire de réserves à l'égard de la compétence. La juridiction de la Cour a été acceptée sans autre par le fait d'avoir plaidé le fond sans réserver la question de compétence. L'agent polonais dans l'affaire n° 12 aurait bien sauvegardé les intérêts de son pays en faisant à temps des réserves nécessaires.

Mais c'est ce qu'a fait, *mutatis mutandis*, le Gouvernement albanais. Il a, dans sa lettre du 2 juillet, exprimé sa volonté de paraître devant la Cour, mais en faisant immédiatement les réserves les plus expresses et en définissant l'objet sur lequel elle porte, savoir la façon dont le Gouvernement du Royaume-Uni a tenté de saisir la Cour.

Monsieur le Président, j'arrive à la fin de mes explications.

Ce serait méconnaître la portée de l'exception préliminaire albanaise si l'on voulait la classifier comme de pure forme, comme une chicane procédurière.

Au cours de l'histoire, l'Angleterre a enseigné au monde à respecter *the rule of law*.

Nous sommes sûrs que nos éminents adversaires comprendront le désir que nous avons d'être traités, nous aussi et sur le plan international, *in due process of law*.

Les formes juridiques et surtout la procédure contentieuse ont d'autres raisons que la forme seule. La forme sauvegarde ici de profonds intérêts sociaux et est indispensable à l'organisation durable de la société humaine.

Le refus du Gouvernement albanais d'accepter la requête britannique lui est en effet imposé par des raisons d'une portée matérielle et de politique générale considérables.

C'est, en premier lieu, le souci impérieux de sauvegarder la dignité de l'État albanais.

Un petit État pourrait facilement perdre le respect qui lui est nécessaire dans la famille des nations s'il était permis à n'importe quel État plus puissant de le traiter sans façon.

Ce souci de dignité se rattache étroitement à la nécessité pour le Gouvernement albanais de veiller sur son statut d'égalité parmi les égaux, et ce principe d'égalité s'impose surtout en matière judiciaire. C'est vraiment le seul terrain où l'égalité entre les États peut être respectée entièrement ; mais elle doit l'être *par in pares non habet imperium*. D'ailleurs, l'article 35, paragraphe 2, du Statut mentionne expressément le principe de l'égalité quand il s'agit d'un État non membre devant la Cour.

J'arrive, sous l'angle de cette idée, à une conclusion pratique : le Gouvernement albanais ne peut admettre qu'une définition de l'objet du différend dans l'affaire présente soit faite par le Gouvernement du Royaume-Uni unilatéralement comme il a entrepris de le faire dans sa requête. L'égalité des parties dans l'instance introduite doit se traduire aussi par l'élaboration en commun des questions qui doivent être soumises à la Cour. En même temps, un tel procédé est seul conforme à la recommandation du Conseil de Sécurité et au Statut de la Cour, comme je me suis permis de chercher à le démontrer.

Monsieur le Président, Messieurs de la Cour, je vous remercie respectueusement de l'indulgence que vous avez prêtée à notre exposé déjà trop long. J'ai dit.

## 3.—STATEMENT BY SIR HARTLEY SHAWCROSS

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)

AT THE PUBLIC SITTINGS OF FEBRUARY 28th AND MARCH 1st, 1948

[*Public sitting of February 28th, 1948, morning.*]

May it please the Court. I should like, if I may, at the outset, to make some observations of a rather general character arising directly from the last remarks which were made by my learned colleague, the Counsel for the Government of Albania. I want in the course of what I say to throw out a suggestion which I hope will not be resented, because it is meant to be helpful—helpful to the Government of Albania, helpful to the cause of which the Counsel for the Government of Albania has just been speaking, the cause of maintaining and strengthening the rule of law, and helpful to this Court in enabling it to get down to the actual realities of this important matter.

Now, Mr. President, when I listened to the learned argument which was addressed to the Tribunal this morning and yesterday and on Thursday afternoon, there was all the time still echoing in my ears the noble words of the Agent of the Government of Albania in his original felicitatory speech, and indeed also the statements which my learned friend Professor Vochoč made not once but many times, when he said that the Government of Albania intended and intends to observe in the letter and in the spirit the recommendation of the Security Council.

I must confess, Mr. President, that I was a little puzzled by it all. I really was; I hope that you will not think that I am saying this in any spirit of levity. I was not really quite sure what all this long discussion was about. I do not mean by that that I do not understand fully the legal argument which has been so clearly presented by Professor Vochoč, and I should like, if I may do so without impertinence, to say how much I and my colleagues appreciate the courtesy and the care, the ability and the moderation, with which Professor Vochoč has presented his case. But all the same, having listened to it most carefully and most anxiously, and bearing in mind the original comments which were made about this matter, I still am not quite sure why all this time is being occupied by this discussion. I have listened to these learned arguments, but the more I listened the more my wonder grew whether all this debate is not really completely academic.

Of course, the Government of Albania is fully entitled, if it wishes so to do, to plead that this High Tribunal has no jurisdiction to try this case. That is exactly what one would expect the Government of Albania to do if its real desire were to avoid any judicial investigation of the grave matters which are in issue here. It says, however, that that is not its desire. It says that it is anxious that this dispute about what happened in the Corfu Channel should be fully investigated by this Court. It has used high sounding phrases. It says that it is "profoundly convinced of the justice of its case" and that it is resolved

"to neglect no opportunity of giving evidence of its devotion to the principles of the peaceful settlement of disputes", and so on. Indeed, the Court could well understand that the Government of Albania must wish very earnestly to exonerate itself from any complicity in the odious crime which was committed, by someone, in waters so close to the shores of Albania.

Now, if the Government of Albania does desire to have this matter investigated, what is all this about? The Government of Albania is here, the Government of the United Kingdom is here; the issue has been defined by the Resolution of the Security Council; the Tribunal is ready. Why should we not go on to deal with the real merits of this dispute?

I listened, and listened very carefully, for the reason. It was stated in a phrase at the beginning of the observations of the Agent for the Government of Albania, and it was stated in a phrase just a few minutes ago as Professor Vochoč concluded his address. Apparently the reason for this preliminary objection is some feeling about prestige, the prestige of the Government of Albania—prestige, that strange and false conception which, unfortunately, has done so much in the past to embitter international relations and to cause jealousies and misunderstandings.

Now, I understand prestige, but there is really no occasion for us to worry about matters of prestige in this case. If the Government of Albania thinks that the prestige of its country is involved by its submitting to compulsory jurisdiction—something that the Government of the United Kingdom has done for eighteen years—let the Government of Albania, whilst still maintaining its objection to any question of compulsory jurisdiction, submit voluntarily to the Court's investigation of this dispute.

The United Kingdom Government is quite confident that this Tribunal is now fully seized of this case, and that it has an unquestionable jurisdiction to try it; and in due course I shall go on to argue that proposition and to attempt to convince the Tribunal that it is right.

But I do not want to insist upon that. My Government does not want to attach any prestige importance to establishing the validity of the position which we took up when we made our original application to the Court. Governments and countries which are confident of their position do not need to preoccupy themselves with questions of prestige. If to-day the Government of Albania is willing to do what I rather gathered from the remarks made by Professor Vochoč might be the case, if it is willing to do, what we say it did do in any event by that letter of the 2nd July of last year, if it is willing, to-day, voluntarily to accept the jurisdiction of the Court, whilst of course maintaining its position that the Court is not competent to compel it to appear, then, so far as any question of competence is concerned, so far as concerns the compulsory jurisdiction of this Court, so far as concerns the obligatory effect of Article 25 of the Charter—all these matters go. *Cædit quæstio.* Some other day between some other parties in some other case the Court may have to consider them, but for the purpose of this case we can put them completely aside.

Indeed, Mr. President, I go further. On Thursday we—I say "we" because I mean my Government, myself, and the Agent of the Government of Albania—paid much lip service to the principles of the judicial settlement of disputes and the importance of extending the jurisdiction

of this Court. How better could we demonstrate—an effective and dramatic demonstration—that it was not merely lip service, but that we meant what we said, than by both of us freely and equally, submitting this matter voluntarily to the jurisdiction of this Court?

If the Government of Albania says, as it did say in the last ten minutes, that a special agreement is required, I offer here and now to enter into that special agreement. There is no difficulty. There is no formality about it. It wants only twenty or thirty words: "The Agent of the Government of Albania and the Agent of the Government of the United Kingdom on behalf of their respective Governments agree that the dispute formulated and defined in the Resolution of the Security Council of the 9th April, 1947, shall stand referred to the Court of International Justice." Those are the only words that are necessary; there is no need to introduce any artificial difficulties, and that agreement could be signed at once and this Court could be invested with an undoubted voluntary jurisdiction.

I throw that out, Mr. President, not as a challenge—because this is not the occasion to make challenges—but as an offer which I hope will be considered by the Government of Albania in the spirit in which it is made. We do not, of course, expect an answer to-day, but to-morrow is Sunday and the Court will not be sitting. But the telephones will be working. The Agent of the Government of Albania can obtain instructions, and if his Government accepts the suggestion, then on Monday morning we can sign the agreement and the Court can then make such orders as it thinks right for the further hearing of this case hereafter.

Then all this discussion about Article 25 of the Charter and Article 36 of the Statute and what somebody said in San Francisco and what somebody else wrote at Dumbarton Oaks—all that can be put on one side. If, on the other hand, the Government of Albania says that it is not prepared to take that course, then of course this case will continue in the ordinary way and the Court will eventually pronounce judgment upon this preliminary objection; but we shall at least be able to go on without the pretence, without any further pretence, that the Government of Albania really desires the circumstances of this grave matter to be investigated by the Court.

Now, Mr. President, I leave any reference to the motive behind the preliminary objection of the Government of Albania and I come to the substance of the matter, the validity of the objection which the Government of Albania seeks to make. It may be that the Government of Albania will respond to the suggestion that I have just made, and if it does it would do a great deal to create a better understanding in international affairs. If it does respond to that suggestion, it will not be necessary for the Tribunal to decide any of these questions, but, in the meantime, in order that the time of the Court will not be wasted, we must go on with the argument in order to establish the competence of the Court in the event of the Albanian Government not being prepared to enter into a special agreement.

I hope the Tribunal will not think from the remarks which I have made that I in any way underrate the importance of this objection if the Government of Albania persists or that I in any way dispute the right to make a technical objection of this sort. It is true, of course, that the matter which you are told you have no jurisdiction to consider

concerns the murder of forty-four British sailors, and that is the kind of thing—this is why I mention it—which in the absence of any method of judicial settlement constitutes, or could constitute, a grave threat to international peace.

I suppose that people who are more familiar with the jurisdiction of national than of international tribunals must think it passing strange that the State which is accused of complicity in such a grave crime should be entitled to say to this, the highest Court of all, that you cannot investigate it unless that State consents. I do not take that view. I do not find it strange. That is exactly one of the places where the rule of law in the international field has not yet achieved the full application which we recognize and give to it in the national sphere. I agree at once that if this Court is to extend its influence and is to increase the field of its activities, it is profoundly important that it should do nothing to usurp a jurisdiction which it does not clearly possess. However technical an objection to the jurisdiction may be, and this one is exceedingly technical, and however lacking in merit it may be, and this one is completely lacking in merit, none the less it would be inimical to the establishment and maintenance of the rule of law in international affairs if this Court sought to exercise a jurisdiction which had not in the first place been freely and voluntarily given to it by the nations of the world. I do not dispute that proposition ; indeed I emphasize it and assert it. But I assert also that it would be equally inimical to the development of the work of this Court if it shrank from exercising its jurisdiction in a case where it was clear that the Statute, Charter, or the acts of the Parties had given it a jurisdiction. I shall ask the Court to say that it is abundantly clear in this case that it is one which, both by the terms of the Statute and still more perhaps by the acts of the Parties, the Court is fully competent to try.

Let me say that I attach primary importance to the acts of the Parties. Let me deal with them. On the 9th April, 1947, the Security Council passed a Resolution, about which you have heard so much, recommending that the dispute should be immediately referred to the Court by the Parties. That Resolution having been passed, we have to consider what action to take in regard to it. I do not know whether the Government of Albania considered what action it should take, but in spite of the fact that time after time in the course of his speech Counsel for the Government of Albania said "we accept the jurisdiction of the Court"—"we desire that the dispute should be settled by it"—and "we desire to abide loyally by the decision of the Security Council"—in spite of all this the Government of Albania did not appear at any time to have considered what it was going to do to implement the Resolution of the Security Council. But we did. We considered the matter and we thought—we may have been wrong—that that Resolution gave rise to a compulsory jurisdiction not only in relation to the Government of Albania, but in relation to the Government of the United Kingdom as well. We thought that Article 25 applied. We thought that Article 36 of the Statute of the Court, where it refers to matters specially provided for in the Charter, was also involved. We felt that we were under a legal and certainly under a moral duty to bring this matter before the Court as quickly as we could. We may have been wrong about that. I am not conceding

that we were; on the contrary, I shall argue with as much force as I can command, that we were right—but we may have been wrong. If we were wrong—and you are entitled to consider this in making up your minds whether we were wrong or not, because the conduct of the parties to a treaty is one of the means of interpreting what the treaty really provides—we were certainly wrong in good company, since, as I shall show you beyond any possibility of doubt, the Security Council thought, as we thought, and intended, as we understood they intended, that this Resolution should create an obligation and should give the Court a compulsory jurisdiction. It is possible that the Security Council was wrong; it is possible that we were wrong; it is possible that the Government of Albania alone was right; but that is what the Court has to decide. I am merely saying this. I say it partly because you will have to direct your minds to what the Security Council said about this in order to see what is the proper interpretation to put upon the Resolution, and upon the articles of the Charter under which it was made, and I say it also because it was suggested that we only thought of this question of compulsory jurisdiction after the Albanian Government had made its objection, and that what we were doing was a flagrant violation of the Resolution. One disposes of that at once by saying that at the time the Resolution was passed and on a subsequent occasion when the effect had to be considered, the Security Council was clearly of the opinion that the Resolution created an obligation and gave this Court a jurisdiction. We may have been wrong about that, we may have been mistaken in thinking, as the rest of the Security Council thought, that the effect of the Resolution was really to put both Parties, the United Kingdom Government and the Government of Albania, in much the same position, as if both of them had signed the Optional Clause. We may have been wrong, but that was the view we took, and we filed the application under Article 40 of the Statute.

In passing it may help the Court if I indicate the cases in which, I shall submit, a country is entitled to file an application under Article 40. I think it was suggested by my learned friend that there was only one such case, but in our submission there are four. One is where the parties have signed the Optional Clause. The second is where there is some other treaty involving compulsory arbitration by the Court. The third, we shall submit, is where the Security Council, by a valid resolution, imposes an obligation to refer to the Court on a country which is bound by the resolution of the Security Council as here the Government of Albania became bound under Article 25 by the undertaking they gave when they took part in the proceedings before the Security Council. The fourth case is where the Security Council, by a valid resolution, provides for or recommends submission of a dispute to the Court and thus attracts the provisions of Article 36 (1) of the Statute of the Court.

We thought that we came under one or other, and, perhaps, more than one of these four heads, so we submitted our application under Article 40.

Assume for the purpose of this argument that we were wrong. I am not admitting it. But assume for the purpose of this argument that there was no legal right to submit an application under Article 40, that the Resolution of the Security Council was no more than

persuasive, and that not one of these four cases I have mentioned had in fact arisen. What then were the courses open to the Government of Albania? I think that there is no dispute between Counsel for the Government of Albania and myself in regard to that matter, but at all events there were three quite simple courses open which could easily have been selected and chosen.

First of all, if it had thought it expedient, the Government of Albania would have been entitled to ignore the whole thing. It could have refused to appear. It could have put the application away somewhere or torn it up and thrown it into the waste-paper basket, and on that view this Court would then have had to deal with the application and to satisfy itself whether or not it was competent to try the case. On the hypothesis on which I am arguing now, that our application was in fact wrong, the Court would inevitably have come to the conclusion that it had no jurisdiction, which would have been an end of the matter. That was the first course.

The second course was that the Government of Albania might have appeared and objected to the jurisdiction—appearing only in order to argue its objection on the grounds of competence; not submitting itself to the jurisdiction of the Court at all, but appearing before the Court in order to argue that the Court was not competent. Clearly that course was open to the Government of Albania if it chose to take it.

The third course was that of appearing before the Court and, whilst objecting to any question of compulsory jurisdiction and reserving its position in regard to the grounds upon which the compulsory jurisdiction was alleged to exist, submitting none the less to a voluntary jurisdiction of the Court.

Now that is the course which learned Counsel for the Government of Albania described as throwing a life-line. It was not perhaps a very happy metaphor when one considers the circumstances of this case, but it was a very significant and important metaphor, and I invite the Tribunal to attach great importance to it. What learned Counsel for the Government of Albania said, you will remember, was that the British application was like a drowning man. It was in grave danger, but—and this is the significant thing—it could be saved by throwing a life-line. He said that the Government of Albania had not thrown a life-line and did not intend to do so, but it could be saved by throwing a life-line. That statement by the learned Counsel for the Government of Albania—and I am sure that such an obviously important remark would not have been made without careful consideration to its significance—that the British application was like a drowning man who could be saved by throwing a life-line, is, in our submission, of great importance. We do not admit that the British application was drowning, but we certainly assert that by their letter of the 2nd July last year the Government of Albania threw the necessary life-line. It is clear, in my submission—and I shall develop this a little more later—that that course would, as indeed learned Counsel for the Government of Albania conceded, give the Court jurisdiction.

There is no need whatever—and this seems to be very clearly established by the jurisdiction of the Court—for any special agreement. The old Permanent Court has said more than once that the Court's jurisdiction is not to be subordinated to the use of particular forms,

and that is what one would expect, if I may say so with respect, of this High Tribunal, that it is not going to have its jurisdiction affected by mere technicalities; that it will look at the substance of the matter and that it will disregard mere technical questions. If both parties appear before the Court, that has the equivalent effect of a special agreement. There is no need for a written document if the intention of both parties is to come to the Court and let the Court try the case. That, we say, was the intention of the Government of Albania in the letter of the 2nd July of last year.

I said there were three courses. There is a fourth course, but it is a course which, in my submission, is clearly not open to a party before the Court. It is the course which the Government of Albania is now seeking to pursue, the course of getting the best of both worlds. It is the course of saying in one breath that they are anxious that the case should be tried and that they accept the jurisdiction of the Court (time after time Counsel for the Government of Albania has said in terms "Albania, as has been stated, accepts the Court's jurisdiction. We accept the Court's jurisdiction"), and then saying in the next breath: "We object to the Court trying this case." That is an attempt to blow hot and cold, and an attempt to get the best of both worlds, a course which it is not possible for a party before this Court to adopt.

(The PRESIDENT asked if Sir Hartley Shawcross would speak perhaps for a ten-minute period only, so as to allow for the translation to take place before the Court adjourned.)

Sir Hartley SHAWCROSS: If you please, Mr. President.

Well, I come now to the question: which of the three possible courses which were open to Albania did she, in fact, adopt? And that brings me to the letter of the 2nd July. Now that brings me indeed to what I submit to the Tribunal is really the crux, the core, the central point in this case, and, indeed, the one point—perhaps the only point—that this Court need really concern itself with. Because if the Tribunal accepts the view that I am going to put before it in regard to this part of the case, then the rest of the case—all this long argument about Article 25 and Article 36, and all the rest of it—becomes beside the point, and it would not be necessary for the Tribunal to decide those questions at all. I apprehend—I do not know—but I apprehend—that if the Court is satisfied that it has jurisdiction under one head it will not go on to investigate the hypothetical question whether it might also have jurisdiction under a number of other heads. If the Court is satisfied that by the act of the Parties here, a voluntary jurisdiction has been created, then it remains interesting, but becomes academic, to consider whether there is also compulsory jurisdiction arising for other reasons. Well now, we have heard, if I may say so, all yesterday and to-day, very little about the letter of 2nd July. Perhaps that is not surprising when an experienced and able advocate comes up against a point which is obviously hopeless and unarguable: he glosses it over as quickly as he can and seeks to detract attention from it by elaborate argument about other matters that are not at issue at all, as, for instance, whether the word "parties" means parties, or something else.

Learned Counsel for the Government of Albania is a very experienced advocate and he glossed over this letter as lightly as he possibly

could, but we really must come down to earth now and look at the letter and consider what, on 2nd July, 1947, the Government of Albania said. They may have changed their minds since; there may have been reasons which led them to alter their position; but what we are concerned with at the moment is what they then said.

I must now refer to the letter which is set out in the annex to the Observations which we submitted on 19th January. I had perhaps better read the whole letter, although, of course, I am calling attention to particular parts of it. I do not want to omit anything that my friend might think material, and, for the purposes of the record, I will read the whole of it, so that when the Court comes to consider the matter, it will have the letter conveniently in the record. It is dated 2nd July, 1947:

"Sir,

"I have the honour to confirm the receipt of the Application addressed by the Government of the United Kingdom to the International Court of Justice against the Government of the People's Republic of Albania regarding the incidents in the Strait of Corfu, of which Application you were good enough to inform me by your telegram of 22nd May last.

"Having regard to the contents of the Application, the Government of the People's Republic of Albania desires to present to you the following statement and would request you to be good enough to bring it to the knowledge of the Court:

"The Government of the People's Republic of Albania finds itself obliged to observe:

"1. That the Government of the United Kingdom, in instituting proceedings before the Court, has not complied with the recommendation adopted by the Security Council on 9th April, 1947, whereby that body recommended 'that the United Kingdom and Albanian Governments should immediately refer the dispute to the International Court of Justice in accordance with the provisions of the Statute of the Court'.

"The Albanian Government considers that, according both to the Court's Statute and to general international law, in the absence of an acceptance by Albania of Article 36 of the Court's Statute or of any other instrument of international law whereby the Albanian Government might have accepted the compulsory jurisdiction of the Court, the Government of the United Kingdom was not entitled to refer this dispute to the Court by unilateral application."

I come now to the paragraphs to which I desire to call particular attention, but perhaps before doing so I may make just this one comment. Quite obviously this letter had been very carefully considered. This is not a letter which was written by some office-boy in a minor department of the Albanian Foreign Office; it is obviously a letter which has been drafted by some international lawyer and puts the legal position very carefully, and it may be correctly. This is a very carefully considered document. After all, the Government of Albania had had three months in which to consider how they were going to carry out the request which the Security Council had invited them to carry

out immediately, and when this letter was written they had no doubt given very careful thought to their position. They say:

"It would appear that the Government of the United Kingdom endeavours to justify this proceeding by invoking Article 25 of the Charter of the United Nations.

"There can, however, be no doubt that Article 25 of the Charter relates solely to decisions of the Security Council taken on the basis of the provisions of Chapter VII of the Charter and does not apply to recommendations made by the Council with reference to the pacific settlement of disputes, since such recommendations are not binding and consequently cannot afford an indirect basis for the compulsory jurisdiction of the Court, a jurisdiction which can only ensue from explicit declarations made by States Parties to the Statute of the Court, in accordance with Article 36, 3, of the Statute."

The Court will see from that that they draw a distinction between Chapters VI and VII of the Charter. They are saying that Article 25 applies only to Chapter VII, and has no application at all to Chapter VI.

I think that in view of what you have said to me, Mr. President, I had better break off there for the translation, because if I complete the reading of the letter and my comments, I shall go over the time allotted.

[*Public sitting of February 28th, 1948, afternoon.*]

May it please the Tribunal. I had been referring to the letter from the Albanian Government of the 2nd July of last year, and I had referred to paragraphs 1 and 2 of the letter, because I did not want it to be said that we had omitted anything. That was said this morning. It was said that in our submissions of 20th January we had not dealt with the express reservations which were made by the Albanian Government in its letter. I think that the learned Counsel for the Albanian Government cannot have read as carefully as I would have hoped the submissions which we made. In paragraph 4 and the subsequent paragraphs, we did in fact deal very fully indeed with the reservations which were made by the Government of Albania, and we made comment on them, comment which was set out in a number of separate paragraphs—in paragraph 9, for instance, in great detail. I can only observe, in regard to that, that in his own address the learned Counsel for Albania did not seek at all to attempt to traverse any of the comments which we made or the conclusions which we put forward on this letter in our submission of 20th January. I think that he referred to one of them quite briefly, but for the rest he did not comment on them at all.

I come now to the third and fourth paragraphs of the letter from the Albanian Government, which are the really important paragraphs to which I wish particularly to direct the attention of the Court:

"The Albanian Government considers that, according to the terms of the Security Council's recommendation of 9th April, 1947, the Government of the United Kingdom, before bringing the case before the International Court of Justice, should have reached an understanding

with the Albanian Government regarding the conditions under which the two Parties proceeding in conformity with the Council's recommendation, should submit their dispute to the Court.

"The Albanian Government is therefore justified in its conclusion that the Government of the United Kingdom has not proceeded in conformity with the Council's recommendation, with the Statute of the Court, or with the recognized principles of international law."

Now comes this very important paragraph:

"In these circumstances, the Albanian Government would be within its rights...."

The Tribunal will notice that the words are "would be" and not "is". The letter says "would be within its rights". If the phrase "would be" has any meaning at all, it must be that it would be within its rights in taking this point if it wished to do so. The paragraph says:

"In these circumstances, the Albanian Government would be within its rights in holding that the Government of the United Kingdom was not entitled to bring the case before the Court by unilateral application, without first concluding a special agreement with the Albanian Government."

Paragraph 4 reads:

"The Albanian Government, for its part, fully accepts the recommendation of the Security Council.

"Profoundly convinced of the justice of its case, resolved to neglect no opportunity of giving evidence of its devotion to the principles of friendly collaboration between nations and of the specific settlement of disputes, it is prepared, notwithstanding this irregularity in the action taken by the Government of the United Kingdom, to appear before the Court."

Now, Mr. President, what on earth can those words mean unless they mean that the Albanian Government is prepared to appear before the Court notwithstanding the irregularity on which it would have been entitled to insist had it so chosen, but on which, because of its desire to give evidence of its devotion to the principles of friendly collaboration between nations, and because of its conviction of the justice of its cause, it has decided not to insist?

Mr. President, unless the words "it is prepared, notwithstanding this irregularity in the action by the Government of the United Kingdom, to appear before the Court" is an indication in terms of a willingness to appear before the Court in these proceedings—the present proceedings, arising out of the dispute which was investigated before the Security Council—those words have no meaning whatever. But what do they go on to say? They go on:

"Nevertheless, the Albanian Government makes the most explicit reservations respecting the manner in which the Government of the United Kingdom has brought the case before the Court in application of the Council's recommendation, and more especially respecting the interpretation which that Government has sought to place on Article 25

of the Charter with reference to the binding character of the Security Council's recommendations."

What they are saying there is quite plain, and it is perhaps an impertinence for me to paraphrase it to this Tribunal, because it is so clear. They are saying: "Whilst we are agreeing to appear before the Court in this case, that, of course, must not be taken as admitting that we think that the United Kingdom Government have made their application in the right way. Still less must it be taken as admitting that there is any obligation as a result of resolutions passed under Article 25 of the Charter. None the less, we appear, while making these reservations clear." Then they go on to use a phrase which is of the utmost significance. They say:

"The Albanian Government wishes to emphasize that its acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future."

What on earth can that mean unless it means what it says? It says "cannot constitute a precedent for the future". Of course it could not constitute a precedent for the future if what they were in fact saying was that they were not going to accept the jurisdiction of the Court in this case at all. If they were not going to accept the jurisdiction of the Court in this case, there would be no case to constitute a precedent for the future. They are conceding that there is going to be a case, however, and they say: "We are accepting the jurisdiction; we are reserving these points of law, but we are voluntarily accepting the jurisdiction on the clear understanding, be it understood, that this form of procedure to which we are voluntarily submitting must not constitute any legal precedent for the future. We must protect the future position of other parties, but so far as we are concerned, because we are so anxious to show the justice of our cause, and because we are resolved to neglect no opportunity of giving expression to the principles of the pacific settlement of disputes, we are prepared to appear, but we emphasize that our acceptance of the Court's jurisdiction for this case cannot constitute a precedent for the future." They go on to say:

"Accordingly, the Government of the People's Republic of Albania has the honour to inform you that it appoints as its Agent, in accordance with Article 35, paragraph 3, of the Rules of Court, M. Kahreman Ylli, Minister Plenipotentiary of Albania in Paris."

There it is, Mr. President. If words do not, when they come to be used by the Government of Albania, lose their ordinary significance, these words meant that whilst the Government of Albania objected that the proceedings had been irregular, and that Article 25 was not applicable, and whilst asserting that the case could not afford a precedent for the future, it was waiving its objection and was electing voluntarily to appear.

That was the view of that document which was taken by this Court at that time. I venture to say that that must be so, because of the course which was subsequently taken. On 31st July, after consultation with the Parties, certain pleadings were ordered by the Court.

I say "after consultation with the Parties". I do not know—the Tribunal, of course, will have this information before it, but I do not possess it—what form the consultation with the Parties took. In the case of the United Kingdom, I think that the Agent was seen, and no doubt the Agent of the Albanian Government was also consulted; but at any rate this is expressed in the order to have been done after consultation with the Parties. After that consultation, an order was made by the Court that the United Kingdom Government should deliver a Memorial, I think by a date in October, and that the Albanian Government should deliver another Memorial by the 10th December. If it had been appreciated by the Court at that time, or if the Agent had made it clear at that time when he was consulted about this matter, that what the Government of Albania was doing was to object to the jurisdiction, it is, I venture respectfully to submit, inconceivable that the pleadings would have been ordered in that way. If the point had been present to the mind of the Court at that time that what the Government of Albania was saying was: "You have no jurisdiction to try this case", the Court would not have ordered the Government of the United Kingdom to deliver a Memorial on the merits; it would have ordered the Government of Albania to deliver a Memorial on the question of jurisdiction. It did not do that; instead of that, it ordered the Government of the United Kingdom to deliver the first Memorial on the merits, and we did that in perfect good faith, assuming that the question of jurisdiction was completely waived, and then we waited.

We waited through October and through November until the day before the last day on which the Government of Albania were entitled to deliver a Memorial at all. On the day before the last day on which they were entitled to deliver their Memorial, waiting as we were for a Memorial on the merits, we got this preliminary objection to the jurisdiction.

That is how the matter was dealt with by the Court at that time. It is significant also, in my respectful submission to the Tribunal, that the Security Council at that time took the view that the Government of Albania had submitted to the jurisdiction. The reason I say that is significant is this. In interpreting the meaning of a particular treaty, amongst other methods you are entitled to look at the conduct of the parties to the treaty to see their interpretation of what happened.

I should like to explain to the Tribunal what the situation was at this time, because you may think that the political background of this explains very clearly what has happened in the course of this case. At that time the Government of Albania was seeking election to the United Nations as a Member of the United Nations, and one of the considerations which was affecting the Security Council in deciding whether or not to recommend Albania for membership, was whether or not Albania had accepted the Resolution of the Security Council of the 9th April in regard to the submission of this matter to the International Court. The Security Council had several discussions about the matter, and I am citing them now and am going to read the paragraphs to the Court, first of all as indicating what the Security Council understood the nature of Albania's obligation to be under the Resolution which they had passed, and secondly as showing how the Security Council understood, and were permitted by the Government

of Albania to understand, the action which that Government had taken by her letter of the 2nd July.

I am going to quote from the summary record of the 16th, 17th and 18th Meetings of the Security Council Committee on the admission of new Members. I deal first with the 16th Meeting:

> "Mr. de Souza Gomes stated that his Government had always been in favour of universal membership of the United Nations. With regard to the application of the People's Republic of Albania, he recalled that Albania had been involved in the international controversy regarding the incident in the Corfu Channel and that the Security Council, on 9th April 1947, had recommended that this case be referred to the International Court of Justice. On 22nd May 1947, the Government of the United Kingdom had applied to the International Court of Justice."

I pause there for a moment to remind you that this is the thing we are said to have done in flagrant violation of the Resolution of the Security Council, yet here is Mr. de Souza Gomes calling the attention of the Security Council to what we had done. He goes on:

> "As yet, the Government of the People's Republic of Albania had not undertaken any steps to refer the case to the Court. He therefore proposed that the Committee should formally ask the Albanian Government whether it intended to accept the recommendation of the Security Council. The consideration of the application of Albania should be postponed until a reply had been received. He pointed out that the admission to membership in the United Nations was not a right but a privilege.
>
> Mr. El-Khouri asked whether the Secretariat had any information on this question.
>
> Dr. Protitch referred to the corrigendum to working paper No. 4, to the effect that the People's Republic of Albania had not yet made any application to the International Court of Justice. That did not mean that the Albanian Government had refused to accept the recommendation of the Security Council.
>
> Colonel Hodgson recalled that with respect to the incident in the Corfu Channel on 9th April, the Security Council had recommended that both States immediately refer the case to the International Court of Justice. Three months had passed since then....
>
> Before stating its opinion on the admission of the People's Republic of Albania, his Government wanted a satisfactory answer from the Albanian Government to the end that they would apply to the International Court of Justice in the case of the incident in the Corfu Channel, and likewise that they would comply with the resolutions adopted by the Security Council in the Greek question."

Then there is a remark by Mr. Raynor, but before that Mr. Wendelen said he favoured the proposal submitted by Mr. de Souza Gomes to postpone the examination of the application of the People's Republic of Albania until further information had been received from the Albanian Government. Mr. Raynor, the United States representative, said that his Government favoured the proposal submitted by Mr. de

Souza Gomes, and he suggested the following wording for the letter to be sent to the Albanian Government:

> "Does Albania intend, in accordance with moral and legal obligations undertaken by Albania prior to the Security Council discussion of the United Kingdom complaint, to respect and carry out the Council recommendation that the Corfu dispute be referred to the International Court of Justice?"

Clearly Mr. Raynor was under the impression, rightly or wrongly, that there was not merely a moral but a legal obligation on Albania to do so.

Mr. Ordonneau said that the position of France was the same. He went on:

> "However, the incident in the Corfu Channel must be taken into consideration. He therefore thought that the Committee had to be very careful concerning the Albanian application, and he was in agreement with the proposals submitted by Mr. de Souza Gomes."

That was what happened at the 16th Meeting. Then they adjourned until the 17th Meeting. That was held on 23rd July, so that the 16th Meeting, although I have not got the date of it, must have been before that. We will ascertain the date. The 17th Meeting was held on the 23rd July, and at it Mr. Krasilnikov spoke rather on the merits of the dispute, and I shall not read that at the moment, but Mr. Raynor intervened on behalf of the Government of the United States. The record says:

> "Mr. Raynor did not wish to answer Mr. Krasilnikov in great detail, as he considered most of his statement to be irrelevant. His Government [the U.S. Government] had doubts with regard to the peace-loving nature of Albania and her ability and willingness to carry out the obligations contained in the Charter for the following reasons."

Amongst the reasons I want to refer to these:

> "Thirdly, in the case of the incidents in the Corfu Channel, the Albanian Government had accepted the provisions for pacific settlement under Article 35 of the Charter, but as yet had not made application to the International Court of Justice."

Mr. Nisot said he thought it important to know if Albania intended to comply with the recommendation of the Security Council with regard to incidents in the Corfu Channel. Her attitude thereon, he said, would be an element for the appreciation of the question whether she could be considered as willing to carry out her obligations.

Then the Chairman read out the draft of the proposed letter, as follows:

> "Sir,
>
> I have the honour to inform you that during the re-examination of the application of the People's Republic of Albania for membership in the United Nations, several points were raised by the

various Members of the United Nations. The Committee on the Admission of New Members would be appreciative if you would be kind enough to supply some additional information on the following points, to assist the Committee in preparing its report:

1. Does Albania intend, in accordance with moral and legal obligations undertaken by Albania prior to the Security Council discussion of the United Kingdom complaint, to respect and carry out the Council recommendation that the Corfu dispute be referred to the International Court of Justice?

2. If so, at what time and by what procedure does Albania intend to comply with this recommendation?"

Then Mr. Krasilnikov said that his Government

"did not consider it necessary to send any letter of that kind, as the Government of Albania knew its obligations towards the United Nations and the Security Council and did not need to be reminded of them".

The Soviet delegate considered that Albania stood in no need of being reminded of the need to discharge her obligations under the Charter. He clearly regarded the matter as an obligation under the Charter, and in another passage he made that even more clear, where he says: "The Albanian Government is evidently aware of its obligations, and there is no necessity whatever to send a telegram to the Albanian Government, as the representatives of Brazil and the United States have, with the support of other representatives, proposed."

The 18th Meeting was held on the 28th July, and the 17th Meeting apparently concluded without any final decision as to the form of the letter which was to be sent. By the 18th Meeting on the 28th July, the need for sending a letter had passed, because for some reason—I am not sure why, no doubt in response to some inquiry by the Secretariat—the learned Registrar of this Court sent to the Secretary-General of the United Nations a telegram which set out substantially in full the letter which had been received from the Government of Albania—the letter of the 2nd July. I do not think I need read the telegram, because it sets out the whole of the material parts of the letter very fully, and I must say it very fairly draws attention to the reservations which were made in the letter. It is, with perhaps one minor and unimportant omission, a complete account and copy of the letter which had been received. That telegram, having been received by the Security Council, the Security Council proceeded to consider the matter in the light of the information which the letter contained.

The Chairman pointed out the relevance of the telegram with regard to the draft letter which the Committee proposed to send to the Government of Albania, as the cablegram clearly showed that the Albanian Government had accepted the Security Council's recommendation. He asked the members of the Committee to state their points of view regarding the proposed letter and the application of Albania.

Mr. Gomes, who had said that before it was recommended that Albania should be put forward for membership they had to be satisfied that she was going to carry out her obligations, said "that he was satisfied with the information received from the Registry of the International Court. It was no longer necessary to send the proposed letter.

He pointed out that the telegram did not clarify all points on which doubt existed—doubts existed on other points as well—and could not prejudge the opinion of the Committee regarding Albania's admission to the United Nations." Mr. Raynor and Mr. Lawford agreed with the statement made by Mr. Gomes. Dr. Hsu agreed that there was no longer any reason to send the proposed letter. He said that in view of the new situation he could state that his Government maintained the same attitude towards Albania's application for membership as last year. Mr. Nisot greeted the information given in the telegram. Although Albania's acceptance of the jurisdiction of the Court was an important element, it should not prejudge her admission. The application required further study. Mr. Krasilnikov stated that "Albania's acceptance of the jurisdiction of the International Court fully substantiated his contention at the last meeting that accusations against the Albanian Government were unfounded". The Chairman, speaking as the representative of Poland, agreed that "the telegram proved that the Albanian Government was able and willing to fulfil its obligations under the Charter. It was a good sign that this telegram had been sent before the Committee had made any enquiry." The Court may think that that is a little significant. He reaffirmed his Government's support of the Albanian application.

Later on, in connexion with another part of the case, I shall read to you extracts from the minutes of the Security Council Meeting of the 9th April, where every person who spoke about this matter appears clearly to have contemplated that the Resolution was going to create an obligation on Albania and on the United Kingdom; but at the moment I am concerned with the view of the Security Council as to the effect of this letter. That view was that Albania, by her letter of 2nd July, had accepted jurisdiction. I do not know, but the Court may think that the Albanian Government cannot possibly have been unaware that this question as to whether it had accepted the jurisdiction of the Court or not was going to be one of the relevant factors in leading the Security Council to a conclusion whether or not to recommend Albania for membership of the United Nations. She was content to allow the Security Council to act on the assumption that by her letter she had accepted the jurisdiction of the Court. Eventually Albania was not recommended for membership, and some people may suggest that it was because she was not recommended for membership of the United Nations that she changed the attitude which she had taken up in the letter of 2nd July, because she no longer had the same reason for wishing to show herself to be a good citizen of the world. Of course, she did not disclose her change of attitude until 9th December, the very last day for completing her pleadings.

In regard to this matter, on the facts my submission to the Court is that it is not open to a party which has at first submitted to the jurisdiction of the Court later on to change its mind, to have second thoughts and to attempt to wriggle out of the submission that it has made.

I have ascertained, Mr. President, that the date of the first of those meetings—the 16th Meeting—was the 21st July and not the 4th August, as I said.

I am sure the Tribunal will appreciate that I am not for a moment suggesting that because the Security Council took the view that their

Resolution was obligatory, or that Albania had accepted it and accepted the jurisdiction of this Court, this Court is obliged to have the same view. Of course not. This Court will arrive at a completely independent conclusion about that matter. I have only cited those passages because the common understanding and conduct of the Parties is one of the guides to which you are entitled to look in interpreting the legal nature of their duties and their treaty. It is only one of the guides —and I am not putting it any higher than that—but simply to draw your attention to what the other parties to this treaty and this Resolution thought about that Resolution and about the subsequent action of Albania in connexion with it.

Well now, Mr. President, I come to the law. I shall be very brief on it.

The case to which I particularly want to call the attention of the Court is Judgment No. 12. That was the case concerning the rights of minorities—in regard to the Minority Schools in Upper Silesia, and I am reading from the report in the second volume of Judge Manley O. Hudson's collection of the cases. It is reported in that collection on page 268. The Court may remember that that was a dispute between Germany and Poland about minority rights. Poland sought, in a Rejoinder to one of the pleadings that had been put in, to withdraw her acceptance of the jurisdiction of the Court. Her acceptance of jurisdiction had been implied from her conduct in the proceedings up to that time; it was only when she delivered her Rejoinder that she took the point as to jurisdiction, and it was held that it was no longer open to her so to do.

Now I just wanted to cite one or two quite short passages from this judgment. The first is one on page 283, which refers to Article 38 of the Rules of Court. "The object of this article was to lay down when an objection to the jurisdiction may validly be filed, but only in cases where the objection is submitted as a preliminary question, that is to say, when the respondent asks for a decision upon the objection before any subsequent proceedings on the merits. It is exclusively in this event that the article lays down what the procedure should be and that this procedure should be different from that on the merits.

"But it does not follow from this that an objection to the jurisdiction which is not filed as a preliminary objection in the sense indicated above, can be taken at any stage of the proceedings.

"The Court's jurisdiction depends on the will of the parties. The Court is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it. Article 36 of the Statute, in its first paragraph, establishes this principle in the following terms:" (And then it sets out the terms of the article as it then was.)

The acceptance by a State of the Court's jurisdiction in a particular case—and this is the passage to which I attach importance—is not, under the Statute, subordinated to the observation of certain forms such as, for instance, the conclusion of a special agreement.

Thus, in Judgment No. 5, the Court has accepted as sufficient a mere declaration made by the respondent in the course of proceedings agreeing that the Court should decide a point which, in the Court's opinion, would otherwise have come within its jurisdiction, and there seems to be no doubt that the consent of a State to the submission of a dispute

to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it. There is no rule laying down that consent must take the form of an express declaration rather than of acts conclusively establishing it. If, in a special case, the respondent has in an express declaration indicated his desire to obtain a decision on the merits and his intention to abstain from raising the question of jurisdiction—and that is this case exactly with this Government—this respondent Government accepting in their letter of 2nd July—if, in such a case, respondent has, by an express declaration, indicated his desire to obtain a decision on the merits and his intention to abstain from the question of jurisdiction, it seems he cannot later on in the proceedings go back upon that declaration.

Well, the learned Counsel for the Government of Albania hardly referred to that case at all. Perhaps that is understandable. What he said about that case was that he preferred the opinions of the two minority judges. Well, that also is understandable. It is not unfamiliar for those against whom a decision is given to prefer the views of the judges who did not concur in the decision against them. And that is the position—very understandable—of learned Counsel for the Government of Albania. But unfortunately for that view, this decision did not stand alone. It was followed in Judgment No. 13. I am not going to take up time by reading it, but the Court may wish to refer to the Chorzów Factory case.

So you have these two decisions of the old Permanent Court of International Justice—and you may consider it right to follow them—which appear to indicate in terms quite beyond doubt that the question of the jurisdiction of the Court is not subordinated to the use of particular forms. Special agreements are one way of establishing jurisdiction : tacit conduct is another way.

The learned Counsel for Albania appeared at one stage to submit—and I do not think this was quite consistent with the rest of his argument—that our application was void *ab initio* and could not be cured by any subsequent event. He said it was a non-existent fact. That argument is, of course, quite inconsistent with the argument that he had previously used about the life-line. You remember the argument. I will not repeat it. But really that point seems to be decided by the judgment of the Court in one of the Mavrommatis cases—*Judgment No. 2*. Now again, I will not refer to it. The case was referred to this morning by learned Counsel, and the Court will no doubt read the whole of it. It is perfectly true that the facts in that case were different, and although the application which was filed in order to commence the proceedings was invalid at the time it was filed, there did come a stage when, owing to legislative, treaty changes—legislative changes in that sense, I mean—such an application could have been validly filed, although no new application was in fact filed. That is perfectly true on the facts of that particular case, but what you look for, of course, in the judgment is not for the particular facts, but for the principle which is enunciated in the judgment, and the principle in that judgment, in my submission, is this—that initial error or invalidity can be cured by subsequent events.

That matter was dealt with later in another connexion, in 1936, when the judges of the then Court were considering the possible alteration of the Rules of Court and, amongst others, of Rule No. 32, which

dealt with the matter which must be contained in the written application. And I would like to call the attention of the Court to what was said then by the majority of the judges in regard to the matter. It broadly supports the life-line argument, if I may describe it in that way—it illustrates the view that, although the thing may be bad in the first instance, the other party may choose not to rely upon this badness and may cure it by his own conduct in throwing a life-line, and that is the argument put forward by learned Counsel for Albania. He certainly had solid authority behind his argument, authority which shows that it was a correct argument and one which, if correct, completely destroys his case here. I am quoting here from the documents relating to the Court. The volume for 1936 deals with the preparation of the Rules, and on page 69, first of all, Judge Schücking says this about the *forum prorogatum :*

"Judge Schücking agreed with M. Anzilotti that it was not desirable to insist on the application containing a reference to the treaty clause on which it was based."

Perhaps I ought, before I cite this, just to explain the point at issue. The question at issue here was whether Rule 32 should require an application to state, in terms, the particular provision under the Covenant or under some other treaty under which the application was being submitted to the Court. And the question that was under consideration by the judges was whether it was necessary to tie the applicant down in his original application to state precisely under what article he was proceeding, and the precise point was put that if the Rules compelled the applicant to state under what article and what treaty he was proceeding, it would prevent an applicant from putting in an application in the hope that although there was at that stage no right to apply to the Court, the other party might throw a life-line and give the Court jurisdiction by consent. That was the whole point that was being discussed here, and so it is in this case.

"M. Schücking agreed with M. Anzilotti that it was not desirable to insist on the application containing a reference to the treaty clause upon which it was based. The institution of the *forum prorogatum* has been introduced into the procedure by the Court's practice, in particular in Judgment No. 12, and it was in the interests of the good administration of justice. If they now made it a necessary condition for the admissibility of an application that it must specify the treaty clause, and if, in a given case, the applicant were unable to specify it because no such clause existed, the Court would be compelled to reject the application *a limine*. But that would amount to abolishing the institution of the *forum prorogatum*, and, in his view, that would not be in the interests of international justice.

"Jonkheer van Eysinga said he could agree with all that MM. Schücking and Anzilotti had said; but he wished to emphasize, in addition, the necessity of there being free and easy access to the Court of Justice. The idea that a case could be brought before it in a very short space of time was one of the corner-stones of that institution."

Then "the Vice-President of the Court thought that Article 32 did not provide for the case of a unilateral application not based on the Optional Clause conferring so-called compulsory jurisdiction on the

Court. He asked the Registrar whether the Court would automatically transmit such an application to the cited government.

"The Registrar said that if the application were made under an instrument other than the Optional Clause, known to the Court and in which the cited government had accepted the Court's compulsory jurisdiction, it would no doubt be automatically transmitted; if it invoked some such clause unknown to the Court, the applicant would be likely to be asked for explanations. It should not be forgotten that the cited government might, upon receipt of an application, be willing to accept the Court's jurisdiction *ad hoc*, even though not obliged to do so. This was a reason for notifying applications in all events.

"M. Fromageot thought it should be stipulated in the Rules that an application must specify the provision (Article 36 of the Statute or other clause) upon which it relied. If the cited government accepted the Court's jurisdiction, although not bound to do so, that really amounted to a special agreement."

M. Fromageot, you see, was taking the view that it was not desirable to provide in the Rules for the case of an application which was not made under some specific provision or article or treaty, but he went on to say—and that is the importance of it—that "if a cited government accepted the Court's jurisdiction, although not bound to do so, that really amounted to a special agreement.

"M. Anzilotti said that, in view of this possibility, the Court should not refuse to transmit the application."

In other words, he was in favour of the proposition that if the original application is bad and is irregular, in view of the possibility that the other side may accept it, the Court ought to transmit it and give the other side a chance of accepting it and so, in effect, constitute a special agreement.

Then, on page 71, the Vice-President "considered that to impose obligations more extensive than those placed upon the parties by the Statute would amount to overstepping the limits of the Statute. To require the parties to indicate in the application the provisions relied on by that instrument in submitting the case to the Court would, moreover, be harmful to the development of the Court's jurisdiction and inconsistent with its practice; for this would exclude the possibility of basing the Court's jurisdiction on an express or tacit agreement by the parties in the course of the proceedings."

And then, on page 157:

"Jonkheer van Eysinga held that the question must be considered in close connexion with the first paragraph of Article 38 of the Rules. If a State approached the Court by means of an application, and if that document were transmitted to the respondent, three possible situations might arise:

"The State might consider itself bound to accompany the applicant before the Court, because there was an undertaking obliging it to do so; or it might file an objection to the jurisdiction; or, again, even in the absence of a provision obliging it to accompany the applicant before the Court, it might, in given circumstances, be disposed to do so."

[That is what we say the Albanians did here.] "The latter course might sometimes, having regard to the political conditions prevailing at a given moment, be the only means of securing the legal settlement of a dispute, and it was one which the Court should not exclude. It was therefore important that States should retain the possibility of presenting themselves before the Court in pursuance of a tacit agreement.

"M. Schücking desired that the text should make a clear distinction between those requirements which must be fulfilled in order that an application might be entertained, and those which were merely in the nature of recommendations."

Well, now, that was the view of the judges at the time.

Two judges, M. Negulesco and Baron Rolin-Jacquemyns, took a different view; they dissented from the majority, but in the result the Rules were amended and the present rule, you will remember—Rule 32 (2)—provides, in regard to the application:

> "It must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court...."

Now those words "as far as possible" were deliberately put in for the precise purpose of enabling a State to put an application before the Court although there was no legal jurisdiction enabling it so to do, in order that the other State might be given a chance to throw the life-line and appear voluntarily and so establish tacitly and by conduct a special agreement. And that is, of course, exactly what we say has been done in this case.

That concludes what I want to say upon this aspect of the matter. The matter is dealt with in more detail in the Observations which we put in on 20th January, but since there has really been no attempt to traverse those Observations, I do not want to cover the matter in the detail in which it is covered there. The document is before the Court, and no doubt the Court will consider it. My submission on the whole of that part of the case is that it really is clear beyond argument that if, contrary to our submission, there were imperfections in the manner in which our application was originally submitted, those imperfections were cured by the voluntary acceptance of the jurisdiction of the Court contained in the letter from the Government of Albania of 2nd July. I feel bound to comment that a country which talks about its prestige and its dignity can hardly succeed in trying to wriggle out of the election which it clearly made, whether or not for political reasons, in that letter to accept the jurisdiction of the Court.

I now come to the second leg, so to speak, of my argument. When one has a good and sufficient ground on which one is entitled to succeed, I always dislike traversing other ground, because if you have one good point you do not strengthen it by referring to a lot of other points. I should normally prefer to rest the case here on the letter of 2nd July, because if we are right in regard to that letter the whole of the rest of this matter becomes completely academic.

However, out of courtesy to the Court, and out of courtesy to our opponents, who have dealt with them in detail, I must, I think, deal with the other matters at some little length. Indeed, the other matters are, of course, of fundamental importance not only in connexion with

this case, but in connexion with the general position of the Security Council. There has not been any full exchange of detailed pleadings setting out the arguments on one side and the other in regard to this further part of the case, and for that reason, if the Court permits it, my learned friend Mr. Beckett will follow me later and develop the arguments in more detail on points on which I shall not be touching; but I think that, as these matters have been raised, it would be improper for me to leave the case where it stands, though I want to make it quite clear, as I did at the beginning, that in our submission the core of this case now, in the circumstances in which it has developed, is this letter of 2nd July. If you take that view, you may well decide that you will accept jurisdiction on the basis of that letter and that you will not give judgment in regard to these other and very important points in a case where it is not necessary in order to establish your jurisdiction to give judgment on those points, and in a case where there has been no exchange of detailed pleadings in regard to the matter.

Coming to the second leg of the argument, assuming that the letter of the 2nd July did not constitute a valid submission to the Court, what are the other grounds on which, in the absence of a special agreement, the Court is entitled to exercise jurisdiction? I am going to put the matter before the Court in three alternative ways. First of all, I am going to contend that the Resolution of the Security Council was binding because all decisions of the Security Council are binding, and Article 25 in this respect does not distinguish between what are in form "decisions" and what are in form "recommendations". That is the first submission which I shall make.

Secondly—and this is, of course, as the Court will appreciate, an alternative submission—I shall submit that although all recommendations may not be binding, those under Chapter VI of the Charter, relating to *methods* of settling disputes which endanger peace, are binding.

Thirdly, I shall submit that recommendations of the Security Council under Article 36 (3) of the Charter—that is, a recommendation that the matter should be referred to the Court—attract the words "otherwise specially provided for in the Charter" which are found in Article 36 of the Statute of the Court, and consequently invest the Court with jurisdiction.

Those are all independent and alternative arguments, and, if I deal with one before the others, it does not indicate that I attach primary importance to it. Each argument stands on its own feet, and one may be right and the others wrong, or they may be all wrong, or they may be all right.

I come first to the contention that decisions of the Security Council are binding, and that Article 25 does not distinguish in this respect between recommendations and decisions. Professor Vochoč, in dealing with this matter, before he made any detailed examination of the position, made three general comments, and I should like to follow him in dealing with those general comments. He said first of all that such a proposition had never been raised in any case before. Well, perhaps that does not take the matter very far. This is the first case before this Court. Article 25 did not exist in the Covenant of the League of Nations, and there was no distinction in the Covenant between recommendations and decisions. Neither was binding, and there was no point, therefore, in stating that there is no previous authority

distinguishing them. Article 25, of course, marks a very important step forward in international relations from the days of the League to the days of the United Nations. It was taken deliberately, and it was meant to have certain important consequences.

I shall seek to show the Tribunal that, unless it has the consequence for which we are contending in this case, it has no consequences at all. This is the first case in which the contention could possibly have been raised, and I shall ask the Court to say that we are hardly to be attacked because it has not been raised before. We should like to have brought this case before the Court a long time ago, and it is not our fault that we have not been able to do so. We are raising this point in the first case in which it has been possible to raise it, and at the first opportunity when it could be raised.

Then learned Counsel said that the United Kingdom only thought of this argument after this case had started, and that nobody else had thought of it. I have dealt with that point already. I have pointed out that it is abundantly clear—and I shall refer to the documents presently—that the Security Council thought of this at the time of the Resolution and again later when the question arose about Albania's admission. We have only taken the view which was shared by our colleagues on the Council.

Then learned Counsel said—and I recognize this as a more controversial matter—that the preparatory work, as well as the writings of various commentators on the Charter, shows that Article 25 is of very limited application, and that in any event it does not apply to recommendations. I say that that is controversial because I must confess that I approach this question of preparatory work with all the prejudice of one who has been brought up in the school of the English Common Law, which rather frowns upon the historical method of interpretation; but I know that there are distinguished jurists who take different views about this. I shall have something more to say in detail about the actual preparatory work later, but I just want to deal with it in general terms here.

Much of it, as one would expect in view of the nature of the negotiations, is confused; much of it is obscure, and a good deal of it is conflicting. Learned Counsel, who dealt with the matter very fairly, pointed out yesterday that two Committees sitting at the same time were taking diametrically opposite views about one particular section. That is perhaps not altogether surprising, but if you look on the preparatory work as a whole and examine it carefully, it is by no means clear, in my submission to the Court, that it leads to the conclusion suggested by the Government of Albania.

What I want to say about it now—because I am going to look at it in more detail later—is that preparatory work must in any event be looked at with great caution, if indeed it is permissible to look at it at all. It is permissible to look at preparatory work at all only if the words in the treaty which you are construing are themselves obscure and cannot be clarified by the other methods of interpretation. The best index to the intention of the parties to a treaty is provided by the words which they actually use in it, or perhaps the conduct which actually occurs under it. When the meaning of a treaty can be gathered clearly from its own terms, it is neither safe nor permissible to speculate about what the intention of the parties may have been

by reference to what some of them—not all of them ; sometimes the most important of them, sometimes the most vocal of them—may have said in the course of the preparatory negotiations leading up to the drafting of the treaty.

Sometimes, of course, it happens that the actual discussions are confused. Those who attend these international conferences know that if they read the minutes of what has been said the day before they sometimes find that the minutes record them as saying things which do not altogether accurately represent what in fact they did say. Sometimes we correct these statements ; sometimes we are far too busy to do so. At all events, the minutes record only the views expressed by those who spoke, and do not give much indication of the views of those who remained silent.

The negotiations here were very protracted. Preparatory work of this kind may be very useful in leading to a conclusion as to the intention of the parties where what you are interpreting is some treaty in the nature of a contract between two or three or some quite limited number of States. When what is in question is a multilateral treaty, covering forty or more different States taking part in the negotiations, and when it is a treaty of a constitutional and law-making kind, in which, as in this case, not all the eventual parties were parties to the preparatory work, the preparatory work is, in my submission, a very unsafe and uncertain guide.

In this case, and in the case of the United Nations generally, from time to time other nations acceded to the Charter who were not parties to the preparatory work at all ; and to try and spell out from the reported observations of those who were taking part in the preparatory work, from the debates between the original negotiators, what the meaning is, is in my submission a process which is liable to be dangerous and which must be indulged in with very great care.

That matter was refered to in some detail in an article by Professor Quincy Wright in the *American Journal of International Law*, 1929, Volume 23, at page 94. He draws a distinction between the method of historical interpretation where you have a statute which you are interpreting and a contract. He says that it may be very useful in cases of contract to look at the correspondence which passed between parties before they concluded it, and any other evidence of their express intentions.

With regard to multilateral law-making treaties he says : "It is not common to utilize preliminary materials except in so far as incorporated in reservations formally attached to the instrument on signature or ratification, and accepted by the other parties to the convention. During the World War the French Prize Court even refused to accept the report of the drafting committee as a conclusive interpretation of the Declaration of London. 'The clear and precise provisions of an article which the State had adopted, though the declaration itself had not been ratified, could not be weakened by any extraneous document.'" Then he gives a number of cases in municipal courts where he points out that courts have refused to look at preliminary negotiations in regard to multilateral law-making treaties owing to confusion. He concludes that the method of historical interpretation is one which has to be used at least with the greatest caution in cases where you are dealing with a treaty of the kind that this Court is now dealing with.

I shall refer later on to the incomplete and sometimes rather selective—I do not say this by way of criticism, because obviously great care has been taken in the examination of records, and in the putting of material before you—records which have been submitted by the Government of Albania. In some cases they appear to select passages which favour their view but do not include passage which go the other way. I only observe now that the historical method of interpretation is the last refuge of those who cannot make up their minds as to the meaning of words construed in the light of the ordinary primary canons of construction. I shall ask the Tribunal to say that it has no need in this case to resort to uncertain methods of that kind, because the Charter can be reasonably understood from its own language.

As for the statesmen whose remarks have been quoted, it may be that some statesmen and some lawyers, in the course of speeches made when reporting to their legislatures about the proposed Charter before it was concluded, did put a very restricted interpretation on the powers of the Security Council under the proposed Article 25. Well, one has to consider such statements in the light of the circumstances existing at the time they were made; but neither this Tribunal nor, I venture to suggest, the rest of the fifty-six United Nations, can be bound by a statement which the representative of one of their number may have made not to themselves, not to the drafting committee, not at San Francisco, but to some completely outside body over which the rest of the members have no kind of control.

So far as any official commentaries of the British Government were concerned, reference having been made to them, I have had them made available and there does not seem to be anything in our own commentaries which is inconsistent with the general views which I am submitting now. Indeed, in the commentary on the San Francisco Charter drawing attention to the differences between the Charter as eventually adopted and the original Dumbarton Oaks proposals, the official commentary says this: "The methods for the specific settlement of disputes have been clarified and the powers of the Security Council to take action for that purpose increased and defined in Chapter VI." Therefore, what we are saying is that in Chapter VI the powers of the Security Council are now greater than they were in the original draft. So also is it the case in regard to the other unofficial commentators. No doubt some have taken—I will not dispute it, and I will not canvass the opposing views of others—a more restricted view of the powers of the Security Council than the Security Council has itself taken. I have great respect for the writers of textbooks and commentaries, but if they were always right there would be little need for courts of law. This matter is not to be decided by the *ipse dixit* of commentators or text writers. This Tribunal will have to come to its own conclusion on the wording of the Charter in the light of the way the Charter is being interpreted by the parties to it.

[*Public sitting of March 1st, 1948, morning.*]

May it please the Court. Yesterday I had the melancholy task of reading through the shorthand note of my own speech, and I found one passage which was not accurate, no doubt owing to some lack of

clarity on my own part, and which I think it might be convenient if I corrected now, so that the Court will have before it the submission which I was actually making in regard to this matter.

I said that in my submission there were four cases in which an application could be made under Article 40 of the Statute of the Court, and the passage in the note about that has become a little confused. It is at page 55. The first case is where the parties have signed the Optional Clause; the second case is where there is some other treaty involving compulsory jurisdiction by the Court; the third case, as we submit, is where the Security Council by a valid resolution imposes an obligation to refer to the Court on a country which is bound by the resolutions of the Security Council, as here the Government of Albania became bound by the undertaking which they gave when they took part in the proceedings before the Security Council. The fourth case is where the Security Council by a valid resolution provides for or recommends the submission of a dispute to the Court, and thus attracts the provisions of Article 36 (1) of the Statute of the Court.

I might have mentioned a fifth case, the fifth case being where it is not possible to state in the application any precise provision under which the jurisdiction of the Court is founded, but the application is made in the expectation or the hope that the opposite party will appear voluntarily and by his appearance cure any defect of form in the original application.

I thought that it might be convenient if those five cases were put in that way, in order that as I deal with the different points in argument the Court will appreciate that I am saying that there are these several cases, and not only, as my learned friend suggested, one case where application could be made under Article 40.

I was dealing with the position in regard to Article 25 of the Charter, with the question of how far it is obligatory and what does it embrace. It is said first by the Government of Albania that Article 25 applies only to decisions under Chapter VII of the Charter. That has been said by their Counsel in the course of argument, and it is said in the course of the written memorials which have been submitted. That position, in my submission, is completely untenable. If one were to disregard—and I am going to say something about this later—the preparatory work and the commentaries, one could not find in the Charter itself a shred of support for the view that Article 25 is limited in its application to Chapter VII of the Charter. At least on this point, whatever may be said about other points, the Charter is abundantly and manifestly clear.

I shall refer to the preparatory work. I do not want it to be thought that the preparatory work leads to a different conclusion; on the contrary, it leads to exactly the same conclusion. I could rely on it in order to support my argument, but I am saying that where the Charter is clear you are not entitled to look at the preparatory work, whether it supports me or is against me. I shall, however, refer to it in view of the fact that certain passages have been commented on by my learned friend; but I want first to deal with the matter, without reference to the preparatory work, under the Charter itself.

Article 25 of the Charter is categorical in its terms. The decisions are binding. It says:

"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

It says "the decisions", not "some of the decisions", not "the decisions under Chapter VII", not "the decisions in regard to enforcement action", but "the decisions of the Security Council in accordance with the present Charter" without any kind of qualification whatsoever.

I would ask you to observe where Article 25 is found in the scheme of the Charter. It is found, not in Chapter VII but in that part of the Charter which is dealing with the general constitution and powers of the Council, in Chapter V. I would ask you to look, if you will, at the terms of the article which immediately precedes it, Article 24:

"In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

In discharging these duties the Security Council shall act in accordance with the purposes and principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII."

There is a specific reference to the four chapters under which the Security Council is granted definite powers to carry out duties in connexion with the maintenance of peace on behalf of the Members of the United Nations, and it is immediately following that specific reference to four chapters of the Charter, including Chapter VI, that you get Article 25, under which the Members agree to accept the decisions—all of the decisions—of the Security Council.

How it can be said, in the fact of that juxtaposition of articles and of references to the four separate chapters of the Charter, that Article 25 applies alone to Chapter VII, I confess that I find it very difficult to see.

But if you look at Chapter VII itself, the proposition that Article 25 is intended to apply only to that chapter becomes even more untenable, because the truth is that Chapter VII creates its own obligations so far as the decisions under that chapter of the Security Council are concerned, and there is no need whatever to rely on Article 25. The scheme of the chapter seems to be twofold: partly it covers the things which Members of the United Nations may be called upon or recommended to do in order to maintain or restore the peace, but mainly, of course, it deals with the question of enforcement action, with the measures to be taken by the United Nations as such to maintain or to restore the peace.

I shall come back to the question of recommendations later on; I am dealing now with decisions. If you look at Articles 40, 41, 48 and 49 of Chapter VII, it becomes, in my submission, quite clear that these articles in themselves create obligations in connexion with enforcement action. Article 40 says:

"In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems

necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures."

That appears to be in the nature of a recommendation, and I shall come presently to the question of the obligatory character or otherwise of that kind of provision.

Article 41 says:

"The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations....", and so forth.

In Articles 43 and 44 there are clauses for the provision of military forces and an obligation is imposed in regard to those. Article 48 says:

"The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

Article 49 says:

"The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council."

Now, in my submission, it is clear that so far as decisions—and I mean by that decisions strictly so called; I am distinguishing for the moment between decisions in that sense and recommendations—are concerned, they are binding under the terms of Articles 40, 41, 48 and 49, and Article 25 is wholly otiose in regard to them. The fact is that Chapter VII of the Charter contains its own code of obligations, and those special provisions override the general provisions, as indeed was pointed out in one of the extracts from the preparatory work which was relied upon by Professor Vochoč. If Article 25 is to operate at all, it must operate in relation to the whole of the Charter; that is to say, the whole of those parts of the Charter, the four chapters, under which the Security Council possesses powers.

Now, what about the preparatory work? I am saying, of course, that it is not appropriate for the Court to refer to preparatory work in this case; but if the Court comes to the other conclusion, and holds that it is, then I am entitled to the benefit of the preparatory work just as much as Professor Vochoč. I might, on the paragraphs which I am about to read, have asked you to say that you are entitled to look at them because they are so very much in my favour; but that, of course, would be inconsistent with my argument, because I am saying that this is not a case for preparatory work at all, and that reference to the preparatory work only obscures the real issue. The Court will

have to decide later whether to look at the preparatory work. If it decides to do so, I rely on it as being very much in my favour.

It will be remembered that Professor Vochoč devoted some part of his exposition to references to the meetings which took place at San Francisco on the 23rd and 25th May 1945 in connexion with Article 25, and he referred to a Belgian resolution which had been put in which provided for certain amendments to the Dumbarton Oaks draft of that Article. In the original appendix in which this matter was submitted to the Court by the Government of Albania, there were very important—I am sure not intentional, but very important—omissions from the records of those meetings. Those have since been rectified by a further appendix put in, very properly, by the Government of Albania, which gives a more complete account of the meetings. That being so, and as the complete record (though in two documents) is now before the Court, I am not going to read the whole of them here, but I wish to read one or two passages from the Minutes which were omitted in the first instance.

The proposal in the Belgian amendment was to define, and to some extent to restrict, the powers given to the Security Council under the original draft of Article 25. I said "the powers given to the Security Council", but that was wrong; I mean the obligations attached to the powers of the Security Council under Article 25. Dealing with that proposal, the Minutes say:

> "The representative of the United Kingdom noted that while the Belgian amendment seemed to be a very simple one it was really one of substance and of very great importance. The Council had other duties besides those presented in Chapter VIII, and the implications of the Belgian amendment needed careful study."

His first impression was that it was not a good thing to limit the powers. I should perhaps say at that point that in referring to Chapter VIII, as is done from time to time in the course of this record, the reference is to Chapter VIII of the Dumbarton Oaks draft. Chapter VIII of the Dumbarton Oaks draft embraced both Chapter VI and Chapter VII of the actual Charter of San Francisco. That is a most important point, and I shall emphasize it again in a moment, because what the Belgians were doing there was to say: "Do not extend the obligations under this article to everything that the Security Council does, but make it clear that it applies not to Chapter VII only" —that is, the existing Chapter VII—"but to Chapter VI as well." The Minutes continue:

> "The Canadian representative, however, pointed out that the text was not entirely clear in its implications and asked if one of the sponsoring governments would state whether or not under this paragraph the Security Council could call on a Member to take military action not covered in the special agreement or agreements, to which that Member would be a party under Chapter VIII, Section B."

That would now be Article 43. You will observe that what was being enquired about there was not the general obligation, but the obligation to take military action.

"The delegate of the United States again emphasized that the Charter must be construed in its entirety and that no single paragraph could be separated from the rest of the documents. There were special provisions which would override general provisions, and the answer to the question was a categorical 'No'."

The question was, whether there would be any military obligations under Article 25 other than those which arose under Article 43, and the answer was, of course, "No", because the question of military assistance is specifically covered by Article 43 of Chapter VII.

"The representative of the United Kingdom reiterated the view that it might be dangerous so to limit the Security Council. He suggested that the phrase 'in accordance with the provisions of the Charter' sufficiently met the point raised by the Belgian delegate."

Then again:

"The Belgian delegate concluded that the choice before the Committee lay between his amendment, which would obligate Members merely to obey Council decisions taken under Chapter VIII" —that is to say, Chapters VI and VII of the present Charter— "or the Dumbarton Oaks text, which would obligate Members to carry out all decisions of the Council. The representative of the United Kingdom indicated that he could not accept this interpretation because he asserted that the limiting phrase 'in accordance with the provisions of the Charter' referred to all decisions of the Council."

In the end, the Belgian amendment was rejected.

The point about all that is, of course, that this Belgian amendment, intended as it was to restrict the scope of Article 25 of the Charter, would none the less have made that article embrace Chapter VI as well as Chapter VII, and even so it was rejected on the ground that it was too restrictive. In that part of the preparatory work you have, in my submission, the clearest indication that Article 25 was intended to apply at least to Chapter VI—and I am only concerned with Chapter VI here—and that consequently the submissions of the Government of Albania, contained in the speech here, and contained in the letter of 2nd July, that Article 25 applies only to Chapter VII, are quite without any legal foundation at all.

There remains the question, and I agree at once that it is a more difficult question, whether recommendations are decisions for the purpose of Article 25. At first sight one would say no, obviously. But a recommendation does involve a decision. It is arrived at by a decision of the Security Council, and at first sight that may seem to be intended to have a purely persuasive effect, but this is a case where you have to look at the dictionary, which, so to speak, the Charter as a whole itself provides in order to see whether the literal meaning of the word "recommendation" has to be modified to give effect to the sense it manifestly bears in the context in which it appears.

Although it is true that recommendations are usually persuasive, that is by no means always the case. Recommendations are not

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persuasive when people have agreed in advance to accept them, as they very often do. One can think of many instances in the field of municipal law or municipal politics where that happens. In connexion with trade disputes it often happens that both sides decide to submit some matter to an outside body, a third body, and agree in advance that they will accept the recommendations which that body may make. The body has no power to give a binding decision except for the fact that the parties have agreed in advance to accept any recommendations which may be made. Governments sometimes set up committees of enquiry and sometimes—not always by any means—they announce in advance—especially when they do not desire to get involved in any political difficulty in the matter—that they will accept the recommendation which the committee of enquiry may make. Again, in the case of private disputes, it not infrequently happens that the parties, without going to any formal arbitration, bring in some third party and agree in advance that they will accept the recommendation which that outside party may make.

Is not that exactly what has happened in this case? Article 25, you will see, does not say that the decisions are binding. What Article 25 says in terms is that the Members of the United Nations agree to accept the decisions, and a recommendation undoubtedly involves the decision. In my submission, following Article 24 (1), in which the Members of the United Nations agree that the Security Council in discharging all of these functions is acting on their behalf, in Article 25 they go further and they agree to accept the decisions, and what they agree to accept in doing that means inevitably that they agree to accept the recommendations, for that is what the decisions of the Council in fact amount to. Indeed, throughout the Charter—this is a very significant point and I think I am right, but the Members of the Court will study the Charter and will see whether this is correct or not—where the Security Council reaches a conclusion—and I am using a neutral phrase—reaches a conclusion with regard to which there is any scope for acceptance or rejection by members—and it is only in such a case that Article 25 would be of any utility at all—the decision has invariably to be expressed in the form of a recommendation. It is no good having a provision in this Charter providing that decisions are to be binding, or, rather, providing in the terms it does that the parties agree to accept the decisions, unless that article relates to decisions in which otherwise parties would have a choice whether to accept or not to accept; but in regard to every action, certainly every action under Chapter VI, and I need not go beyond that, where the parties could have any option to accept or reject, the conclusion of the Security Council has to be expressed in the form of a recommendation.

It follows from that that, if Article 25 is to have any utility at all in forcing a Member who has otherwise the choice of deciding whether to accept or not, it must apply to the recommendation, because it is only in connexion with recommendations that, under the scheme of this Charter, that choice between acceptance and rejection exists at all. I say that invariably that is the position, but, of course, under Chapter VII, as I have pointed out, the decisions of the Security Council in regard to enforcement action carry their own obligation. That is another case; but in every other case, I think, under the Charter where something decided by the Council involves action by the parties, action

which they may or may not take, that decision has to be formally expressed as a recommendation. Unless, therefore, Article 25 applies to it, it applies to nothing.

Is there anything in the Charter under Chapter VI or anywhere else to which Article 25 can apply, if it does not apply to recommendations? May I just look at Chapter VI to see whether there are, indeed, any decisions at all which the Security Council can take under Chapter VI; we know that Article 25 is intended to apply to Chapter VI, without prejudice to the question of whether it applies to the question of decisions or recommendations. We know it is intended to operate under Chapter VI. That is perfectly clear from the argument which I have already addressed to the Court. Is there anything in Chapter VI in the nature of decisions to which it could possibly apply? If there is not, it must follow that it applies to recommendations, otherwise it would have no application to anything, which, as Euclid would have said, is absurd.

Chapter VI, Article 33 (2), uses the expression: "The Security Council shall, when it deems necessary, call upon the parties to settle their dispute." That is not in form a decision or a recommendation. In form the words used are "call upon". If the matter stood alone I should submit that the words "call upon" were mandatory, having regard to the scheme of the Charter; but in this particular case they do not stand alone. Under paragraph 1 of Article 33 there is already an obligation on all the Members of the United Nations to use means of this kind, and the action of the Security Council in calling upon parties to use those means perhaps does no more than call their attention to an already existing obligation.

Under Article 34, the Security Council may investigate disputes in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace or security. Under that Article they would, it is true, have to decide whether the continuance of the situation was likely to endanger the maintenance of international peace. That would involve a decision, but it is a decision of a preliminary character leading up to the action that they may take under other articles, and obviously it is not a decision which calls for any acceptance or rejection or any action by anybody else other than themselves. Therefore, there is no question of obligation under Article 34, and the applicability of Article 25 does not arise.

In Article 35 there is no question of any decision or recommendation. That is the Article under which the Members of the United Nations bring disputes to the notice of the Security Council or the Assembly; but there is nothing which enables the Council to make a decision or a recommendation.

Article 36 deals with recommendations only. Article 36 deals with matters in which, following the conclusion of the Security Council—I am trying all the time to find neutral words—the parties may or may not do what the Security Council has suggested they should do—again a neutral word. There is a score for choice. Consequently it is upon Article 36 that the obligatory force of Article 25 ought to have effect if it is to have effect at all. Article 36 deals entirely with recommendations.

Article 37 (2) contains a reference to a decision. There the Security Council is called upon to decide whether to take action under Article 36 or whether to recommend terms of settlement. There again that is

a preliminary decision to be taken by the Security Council in regard to its own functions, and again no question of obligation under Article 25 arises from that. Article 25 does not operate on that paragraph at all.

The last article of Chapter VI is Article 38, and that does not provide for a decision. There are, in my submission—and I do not think this can be controverted—no decisions under Chapter VI on which Article 25 can operate. There are no decisions under Chapter VII in regard to which Article 25 is required to operate. If, therefore, Article 25 is to have any meaning at all, it must operate on recommendations. It must operate on recommendations or it cannot operate on anything.

One gets some assistance for that view when one looks at other provisions of the Charter. If you look at 18 (2) and 18 (3), you will see that 18 (2) provides that decisions of the General Assembly—it is true that it is the General Assembly which is being dealt with here, but it would be odd if one found one meaning given to the word "decision" in one article of the Charter and a completely different meaning given to the same word in another article—on important questions would be made by a two-thirds majority of the Members present and voting.

What are the decisions? The very first thing that the article goes on to say is:

> "These questions shall include: recommendations with respect to the maintenance of international peace",

and then it deals with the election of non-permanent members, and so forth. Quite clearly under that article decisions include recommendations. You could not have it more clearly stated in terms than it is stated there.

Now, if you will look at 18 (3), you will see the same thing:

> "Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the Members present and voting."

"Decisions on other questions" very clearly include the many classes of cases where the General Assembly has power to make recommendations of one kind or another. As I have said, it is beyond argument that in Article 18 decision includes recommendation, but Article 18, it is true, relates to the General Assembly.

Let us look then at Article 27, which is in notable proximity to Article 25 and forms part of the code of Chapter V of the Charter. That says:—

> "1. Each member of the Security Council shall have one vote.
> 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.
> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members, including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

It is perfectly clear, in my submission, that that provision of Article 27 applies to recommendations. It is perfectly clear that it is the

acknowledged practice of the Security Council, and it is also clear from the wording of the article, because if you will look at Chapter VI, as I have pointed out, there is nothing in it of any significance except recommendations, and it is in relation to those recommendations that the so-called unanimity rule is applied. Incidentally, I suppose that one of the reasons for that unanimity rule, and one of the reasons for requiring the concurring votes of all Great Powers, is surely that the resolution is going to be obligatory, and it would not be expedient to bind the Great Powers to a resolution which was going to be obligatory unless they consented to it. That is one of the purposes of the veto provisions, as they are mistakenly called, in the Charter that resolutions including recommendations will be obligatory. I say "including recommendations" because the rule applies to recommendations equally as to decisions, and it would not therefore be appropriate in the existing state of world society to bind the Great Powers unless they consented. If recommendations are merely political and persuasive, then their political and persuasive effect is hardly diminished by the fact that one of the Great Powers votes against recommendations in which the rest of the Great Powers concur. The whole point about that right to refuse to concur or to vote against a resolution supported by other Great Powers is that if the resolution is passed, it will impose an obligation. There is this further point that it really follows that if Article 25 does not cover recommendations it will then have no application even to Chapter VII. I pointed out that, so far as decisions under Chapter VII are concerned with regard to enforcement action, the obligation in regard to them is created by those articles, particularly 48 and 49. As the United States delegate said in that part of the preparatory work I have read, those special provisions in regard to applications override the general provisions of Article 25 ; but what about the recommendations which are made under Chapter VII ? Those are recommendations which are to be followed up by enforcement action if not carried out. Is it to be said that under Chapter VII there is no obligation on the parties to obey the recommendations of the Security Council in regard to the restoration of peace although to those recommendations are attached the sanctions of enforcement action by the Security Council ? It would, in my submission, be strange indeed if those recommendations to which, as I say, in effect, sanctions of enforcement action are attached were not in themselves obligatory.

In my submission they are obligatory because Article 25 applies to them and involves the proposition that the parties to the Charter have agreed in advance to accept them.

[Sir Hartley Shawcross, intervening during the interpretation of his previous remarks, said : I wonder whether I might correct that ? I do not think that it is quite right. What I said was that if the effect of a recommendation was merely political or persuasive, that effect would not be greatly diminished by the fact that one of the Great Powers had not concurred in the recommendation. It was for that reason that I said that the purpose of the rule about the concurrence of all the Great Powers was to cover the fact that a recommendation is not merely political or persuasive but is obligatory.]

Listening to the translation, which was perfectly accurate on that point about which I have just intervened, I still feel that perhaps I

did not make my meaning quite clear about it. What I was seeking to say was this: if the effect of a recommendation is purely political, purely persuasive, then a recommendation directed against a particular Great Power would not lose anything of its political and persuasive effect simply because that Great Power against which the recommendation was directed did not concur in it. Obviously one would not expect a Great Power to concur in a recommendation directed against itself, and if the recommendation is purely persuasive it does not matter whether the Great Power concurs or not; that recommendation has the political effect resulting from four votes against one. If, on the other hand, the recommendation is obligatory, then the fact that the Great Power against which the recommendation is intended to be directed may refuse to concur in it, and thereby make the recommendation completely nugatory, is of course of the very greatest importance. That is why this unanimity rule exists; if it was not for that purpose, it would hardly be necessary to have the provision in the Charter at all.

In support of that general argument I crave in aid two canons of construction which I think have not been subjected to the criticism which has been directed against the historical method of interpretation. The first is that treaties should be construed so as to achieve their purpose, and the second is that you can look at the conduct of the parties to the treaties, under the treaties, to see what their understanding of the meaning of the treaties was. In this connexion, of course, I attach very great importance to the principle that treaties ought to be construed so as to give effect to their manifest purpose. Just for a moment, consider, if you will, the overriding provisions of the first two articles of the Charter, Article 1 and Article 2. Article 1, paragraph 1, says:

> "The purposes of the United Nations are:
> 1. To maintain international peace and security, and to that end: to take effective collective measures"

—the word is "effective"—

> "for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Then let us look at Article 2, paragraph 2:

> "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."

There are the general obligations. Those obligations become very little better than pious, empty platitudes, unless the Security Council has some effective power under Article 25 of recommending how those general principles should be carried out.

But, as I have said, Article 25 could be useful in that regard only if it operates in regard to those resolutions of the Security Council which involve action by the members, and where consequently the efficacy of the resolution taken by the Council depends upon its acceptance by the member. It is there that the element of obligation is required, and Article 25 can have practical value in this Charter only in relation to those resolutions of the Security Council which by their nature would afford scope for acceptance or rejection.

I have said before, and I repeat it simply in connexion with this canon of interpretation, that, if you look at the Charter, that kind of resolution is almost invariably, if not invariably, called a recommendation. There are few, if any, decisions under any part of the Charter —decisions strictly so-called—on which Article 25 could operate.

Article 25, under which the Members of the United Nations agree in advance to accept the decisions of the Security Council (and I use the word now without prejudice to its actual definition), marks, of course, a very great step forward, I suppose the most important step, from the days of the Covenant of the League to the days of the Charter of the United Nations. If that step forward is to be given any effective meaning at all, it must, in my submission, result in the application of Article 25 to those resolutions of the Security Council in regard to which otherwise Members would have a free choice.

In view of that step forward from the Covenant to the Charter, I am not sure, if I may say so with respect, that what may have been said by distinguished statesmen or jurists or commentators at Geneva and elsewhere in years gone by is really very much help. The task of searching out, of digging out, extracts from the former speeches and writings of judges, and still more of one's opponents, is always a very exciting and amusing task, but I am not sure that it is always a very useful task. When one has the honour of being assisted, as I have before this Tribunal, by distinguished colleagues who have made many important contributions to the literature of international law, it must, I am sure, be a particularly stimulating task for Professor Vochoč to engage upon, and I am certain—if I may say so in the most friendly way to him—that he will be quite unable to resist the temptation of some further excursion into the works of my colleagues before he has finished with this case; but on this particular point, if I may say so with great respect to Mr. Beckett, what Mr. Beckett said in 1932 is not of great assistance. I am sure that he will be the first to agree that the effect of Judgment 12 of this Court, which I have already cited, would result in his now reaching a different conclusion from the one which he expressed at that time.

In any event, however, the only comment which needs to be made about what people have said in the past on this particular question of obligation, is that the Covenant of the League did not draw any distinction between a recommendation and a decision. Of course it did not. There was no obligation under the Covenant of the League in regard to a recommendation, decision, or whatever you choose to call it, and so the question was one which simply did not arise at all. In whatever form the Council or the Assembly of the League expressed itself, in effect it was persuasive, and no question of obligation arose.

Here we are concerned with a very different document, one in which quite deliberately the United Nations created certain obligatory powers

which were vested in the Security Council. In my submission, the true view under the Charter is that the Security Council has the power to make its wishes obligatory. The criterion whether it has exercised that power is not to be found simply by ascertaining whether the form in which it has expressed its wishes is a recommendation or a decision. There is no rigid distinction in the Charter for this purpose between recommendation and decision. You must look at each particular case; you must observe under what particular article the matter has been dealt with; and then you must see whether the Security Council was intending to do something which the parties had agreed in advance to accept, whether it was intending to create an obligation or was merely intending to take persuasive action.

If you look at that last point, the point of what the Security Council was intending to do—and you are entitled to look at that, under the second canon of construction which I have just mentioned to you—there can be no shadow of doubt in this case that it intended to create in the Court a compulsory jurisdiction.

If I may now refer to the Minutes of the Security Council Meeting of the 9th April, they bear out to the full the minutes that I read to the Tribunal on Saturday of the meetings in July, when the Council was considering whether this obligation which they had created, as they thought, on the 9th April, had in fact been carried out by this country against whom the obligation was directed. These minutes of the 9th April are contained in one of the appendices to our Memorial. I am not going to read the whole of them, because to do so would take a very long time; but you will have the opportunity of reading the whole, and I shall not, I hope, make any selection or extract which is in any way unfair.

I have referred to the meeting of April 9th, but I think that I ought first to refer to a passage on April 3rd. This matter, as the Court will appreciate, had been under discussion for some time in the Council, and on the 3rd April the United Kingdom put forward a resolution. That is a little significant. It is our own resolution, and we stand by it. The resolution is in the terms in which we originally drafted it. This is what the representative of the United States said on the 3rd April, when the resolution was introduced:

> "I hope the Council will find no difficulty in supporting and passing so equitable a proposition as that made by the representative of the United Kingdom.
>
> It would seem that the least the Council may do now is to give the impartial forum, which the Court of International Justice constitutes, an opportunity to repair, if possible, some of the damage which has been done by the action of the Security Council."

He is referring there to the fact that, owing to the unanimity rule, the Council was not able to reach any decision one way or another. He is saying that the right thing to do is to give the Court some opportunity of deciding this matter. Some Members of the Court will know Mr. Herschel Johnson, and, if I may say so, he is not a gentleman who uses language carelessly; but if the argument of the Government of Albania is right, the Security Council was not giving the Court any opportunity at all; what the Security Council was doing in this resolution, according to the Government of Albania, was to give the

Government of Albania an opportunity of giving the Court an opportunity of dealing with this matter, and one is bound to say, from the attitude of the Government of Albania at that time, that the Security Council might well have taken the view that that was an opportunity of which the Government of Albania seemed exceedingly unlikely to avail themselves.

Mr. Johnson went on to say :

> "It is not our action in sending the case which repairs the damage, but the confidence which we all have in the impartiality of the Court."

It would be a strange use of language to employ the phrase "sending the case" to the Court, if in fact they were doing nothing at all but merely asking the Government of Albania to be good enough to consider whether it would enter in due course, after long negotiation, into a special agreement that the Court might deal with the matter.

Then we come to the meeting of 9th April. At that meeting Mr. Kapo, who holds the high and distinguished office of Deputy-Minister for Foreign Affairs in the Government of Albania, and who is the nominal author of the letter of 2nd July—I say "nominal author" because I do not know whether he is himself a lawyer, and that letter was obviously drafted by a lawyer—, made a speech. Having regard to the high and dignified office which he holds, his outburst (if I may venture to call it so) is so remarkable that it could not possibly have been made by anybody addressing this important body unless the Government of Albania considered that it was being sent to the Court, as indeed Mr. Johnson had said. Mr. Kapo said this :

> "Must we again see other injustices committed against Albania by States such as Great Britain ?"

What injustice would there have been in asking Albania if she would be so good, without obligation, in her own good time, to consider whether she would agree to go before the Court ? He went on :

> "Is it just that a small nation which has shed its blood at the side of other progressive peoples in this war is to be put in jeopardy by Great Britain the greed of which has become a habit ?"

How could the expression be used "be put in jeopardy" if the Government of Albania at that time thought that all it was being asked to do was merely to decide, later on, voluntarily, whether or not it would agree to refer this matter to this impartial Court ? Is it indeed in jeopardy here if the jurisdiction is only voluntary ?

> "Must the treatment which is accorded by the Security Council to a small people which has left 48,000 dead and wounded on the fields of battle for peace, justice, liberty and independence, be such as is proposed ?
>
> No, gentlemen. Albania does not merit such treatment. It is criminal to play with the honour and destinies of a people which wishes only to be independent and to be friendly with all nations. The Security Council must realize the play that Great Britain is making here.

Gentlemen, there is no reason for the name of Albania to figure in this resolution at all. The British resolution does not merit being taken into consideration. The British resolution must be rejected categorically by you."

After that—and that was the first speech on the 9th April—I have no doubt that you will think that the Security Council considered carefully whether it was going to leave this grave matter—and it was a grave matter, a very grave matter—of sending this case to the Court to the discretion of the Government of Albania, which had expressed its views in language of that kind.

The delegate of Australia made the next speech, and he did not seem altogether to agree with the view which had been expressed by Mr. Kapo. He said: "We are sure that to go before a body such as the International Court is not injustice to Albania. I would think Albania would welcome that because I would remind the representative of Albania that the other Party can take the case to the Court, and in the absence of the other Party appearing or failing to defend, a judgment might be given against it." Those words, if they have any meaning—and they are very clear—mean this: "Look here, Albania, whether you go to the Court or not, Great Britain under this resolution will be entitled to take the case to the Court, and if you do not turn up there, judgment may be given against you in your absence." He is saying in terms that this is an obligation which is arising from their resolution. He goes on:

"Now, under Article 36, 'The Security Council may .... recommend appropriate procedures or methods of adjustment' of a dispute. And under the same article, we have the general rule '.... that legal disputes'—and this is now a legal dispute—'should .... be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court'.

Now, that reference implies an acceptance of jurisdiction. And I turn to the letter of invitation sent by the direction of this Council to the Government of Albania. There is one vital condition laid down: '.... to participate without a vote in the proceedings with regard to this dispute on condition that Albania accepts in the present case all the obligations which a Member of the United Nations would have to assume in a similar case'. So any decision, any recommendation, that we may make, binds the United Kingdom and also binds Albania.

Article 36 of the Statute itself provides for the jurisdiction of the Court: '.... comprises all .... matters specially provided for in the Charter of the United Nations....'.

So, we arrive at this conclusion: There is ample provision under both the Charter of the United Nations and the Statute of the Court, and the Security Council is clearly entitled to make such a recommendation as the United Kingdom proposes. Further, as we have said, we have a duty to do this because this is a crime against humanity, and the Security Council cannot, for the sake of its own prestige, authority, and reputation, allow its action to be rendered inoperative."

That is what he is saying. He says: "We cannot allow our actions to be rendered inoperative. There is jurisdiction in the Court and it is a compulsory jurisdiction if we pass this resolution."

The next speaker was Mr. Gromyko, on behalf of the Soviet Union. He spoke to some extent on the merits, and I do not want to create prejudice one way or another by referring to the merits of this unhappy matter; but this is what he said when he came to the question of referring the case to the Court:

> "I feel, on the basis of what I have said, that I must express my negative attitude towards the proposal of Sir Alexander Cadogan, as presented at the last meeting of the Security Council. Albania is innocent of the crime attributed to it by the United Kingdom representative. We have, as a result, no basis for dragging Albania before the International Court of Justice.
>
> In order to do so, we must have a basis, we must have a reason."

Those who know Mr. Gromyko know that he is very careful in his use of language, and it is inconceivable that he would have referred to innocent Albania "being dragged before the Court of Justice" unless his view had been, like that of Mr. Krasilnikov four months later, that the resolution of the Security Council was binding, and that the effect of it would be to oblige Albania to go to the Court.

Then the President asked whether anybody else wanted to speak, and there was no response. The President was the delegate of China. He said:

> "I think several delegations have referred to the fact that this case could have been taken to the International Court of Justice in the first place, but I would remind those delegations that, as Albania is not a member of the United Nations, she could not be compelled to appear before the International Court of Justice. However, since her acceptance of the obligations of the Members of the United Nations, as contained in the Council's invitation for her to participate in a discussion of this case, she is now, like any Member of the United Nations, obliged to comply with both the provisions of the Charter and the Statutes of the International Court of Justice."

As the representative of China, he supported the resolution. He again invited other members to speak, but there was no response.

Every Member who spoke of the resolution at this meeting and at the previous meeting, as at the ones in July, regarded that resolution as obligatory. If there were any member of the Security Council who doubted whether the resolution was obligatory, he remained silent, and when the resolution was adopted, as it eventually was, it must, in my submission, be taken to have been adopted in that sense; that is, in the sense of it being an obligatory resolution.

I come to the end of that part of the case. However unlikely it may seem on first considering the word "recommendation", if you look at it in its context, it is, in my submission, apparent that for the purposes of the Charter, Article 25 is not intended to make any rigid distinction between recommendation and decision. If it does not apply to recommendation, I ask the Tribunal to say in its judgment, and to help us because we shall be guided by this in future, to what, if anything, it does apply. If that view that it applies to recommendation as well as to decision is correct, the effect of the obligation arising under the Resolution of the 9th April is exactly the same, in my submission, as

if both the United Kingdom and the Government of Albania were either parties to the Optional Clause or had entered into a special agreement—the better case perhaps being parties to the Optional Clause—and therefore under obligation to refer to the Court.

The United Kingdom did all that it could do, on that view, loyally to implement the resolution and the decision of the Security Council. The Government of Albania, on the other hand, whilst professing lip-service to the principles of the United Nations, made no move whatever in the matter. We say we did all that we could do, and that was enough, to give this Court the jurisdiction to implement the resolution of the Security Council.

*[Public sitting of March 1st, 1948 afternoon.]*

May it please the Court. I now come to the second leg of the tripod on which we base our position, and in dealing with this and the third leg I shall be dealing with matters to which my learned friend, Mr. Beckett, will also refer covering certain other aspects of them.

The second leg of the argument is, of course, without prejudice to the full argument which I addressed to the Court on the effect of Article 25. I am going to submit now, without prejudice to my argument, that Article 25 applies generally to all decisions or recommendations, the alternative view, which is based to some extent on convenience, that while Article 25 may not apply to all recommendations which the Security Council can make, it does apply to some, and in particular to those which deal with the methods of settling disputes which are likely to endanger the peace. Also, of course, to those which deal with matters under Chapter VII of the Charter, non-compliance with which may result in enforcement action. I want to confine myself for the moment to those recommendations which refer to methods of settling disputes; in other words to certain of the recommendations which can be made under Chapter VI.

This construction, which is, as the Court will appreciate, a more limited construction of Article 25 than the one for which I contended this morning, follows to some extent from the proposition, which I made this morning, that the test of obligation is not whether the action of the Security Council is described as a decision or as a recommendation, but that you must look at the actual resolution and see from the article, under which action has been taken, and from the intentions of the Security Council, whether they intended that particular resolution to attract the provisions of Article 25. If the scheme of Chapter VI of the Charter is to be effective, and of course you will construe the whole Charter as far as you can so as to make it effective, it is necessary, in my submission, to give obligatory force at least to certain of the recommendations which can be made under that chapter.

I drew attention this morning to the first articles of the Charter establishing the obligation on all Members of the United Nations to settle disputes by peaceful means and to fulfil their obligations in regard to that in good faith. Chapter VI is, in my submission, really an expansion of that general obligation which imposes certain imperative duties on the Security Council to see that those general obligations are carried out. If you look at the scheme of Chapter VI as a whole,

it seems clear that the action of the Security Council must always culminate either in a decision to remove a dispute from the agenda, or in a recommendation. Those are the only two ways in which action can culminate. I say "culminate" because under one of the articles one of the preliminary matters is for the Security Council to decide whether there is any endangering of the peace or not. That is not culmination of action, that is the commencement of its action; but having commenced action, thereafter the action of the Council can only culminate either by removing the matter from the agenda altogether, which does not result in any obligation on anybody, or in a recommendation. The scheme of the Chapter is really a kind of progressive scheme in which obligations are imposed first of all on the parties to the dispute under Article 33. Then the Security Council is brought in—assuming that the parties have not succeeded in carrying out their duties under Article 33 successfully—as conciliator, and finally the Security Council is given powers to ensure that the parties pursue peaceful methods in settling their disputes. I shall not go over all the articles again. My learned friend may refer to some of them. I called attention to some of them this morning, and the Court will have the various articles fresh in their minds, but I do want to refer to Article 37, which is the last article dealing with this aspect of the Security Council's functions.

The first paragraph of Article 37 imposes a duty upon the parties of submitting to the Security Council, if they fail in attempting to settle their dispute, *inter alia*, by judicial means, as they are obliged to do under the preceding articles, in particular Article 33 and, of course, in the first instance under Articles 1 and 2. What then is the duty of the Security Council when the matter comes before them in that way? That is dealt with in paragraph 2, and that paragraph, as the Court will see, is imperative.

The Security Council can do two things. Firstly it can recommend terms of settlement. For the purpose of this argument—this alternative and more restricted argument—I am not going to suggest that a recommendation of the terms of settlement is obligatory. If the terms of settlement recommended by the Security Council had to be accepted by both of the parties, that might give the Security Council something in the nature of a law-making function as to the final political solution to be adopted in disputes. It might result in the transference of territory becoming compulsory as a result of action of the Security Council. I am not for the purpose of this argument suggesting that that recommendation is obligatory. That may seem a rather arbitrary distinction, and I confess that I see the force of that myself. I will be perfectly frank with the Court and say the reason I am not insisting that that particular recommendation is obligatory is that in regard to that recommendation, and not to others there is a very strong indication in the preparatory work that it was not intended to be obligatory. That is why I am conceding that it is not.

I suppose that one might say that the very words which are used —"the terms of settlement" involve in themselves, or contemplate, some agreement between the parties, and that all that one can extract from that part of the clause is that the Security Council is entitled to advise the parties as to the basis on which they should seek to agree.

But that is only one of the things which the Security Council may do under Article 37 (2). The other course which the Security Council may pursue is to decide whether to take action under Article 36. The words of the paragraph are:

> ".... it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate".

Article 36 is, of course, the one which we have been discussing in connexion with the previous argument which provides that the Security Council may recommend procedures or methods of settlement. That recommendation I am saying is obligatory, and of course that is a very different kind of recommendation. It is one thing to recommend "terms of settlement", that is to say, to seek to impose the actual political solution and to make that binding on the parties, but it is a very different thing to recommend the methods by which a settlement is to be reached. We say that whilst in the former case there is no obligation, whilst the Security Council is not entitled to say what the terms of a settlement are to be, it is entitled to say how the terms of settlement are to be arrived at. It is entitled to say that "instead of going to war about this dispute which you have so far not succeeded in settling, you must pursue one method or another"—the judicial method or something of that kind. Once it is conceded that Article 25 is intended to apply to Chapter VI, and that there is nothing apart from recommendation to which it can apply in Chapter VI, it is, in my submission, very difficult to resist the conclusion that of all the recommendations in Chapter VI this must be the class to which it must have been intended to apply.

Supposing it were otherwise and that this power of recommendation under Article 36 were merely persuasive. The Security Council considers the dispute and makes its recommendation—purely persuasive recommendation. If it does that, and only that—and if that is all it can do—it effects less than the other provisions of the Charter have already secured, because under Article 33, not to mention Articles 1 and 2, the parties are already under an obligation to seek a solution of their dispute by pursuing such means. *Ex hypothesi* they have not succeeded in carrying out their duty, a duty which as far as submission to the Court is concerned, is one which at that stage could only be carried out by a joint reference by means of a special agreement. That being so, surely the intervention of the Security Council, which, as you will remember, under a preceding article, 24 (1), it has been authorized to take on behalf of the members in order to ensure prompt and effective action, must be intended to advance matters beyond the stage which they have already reached in consequence of the provision of Article 33. Article 33 obliged the parties to seek amongst other peaceful means of settlement a judicial means. If the Resolution of the Security Council is no more than persuasive, it really takes the matter no further than the Charter has already taken it under that Article. The only way in which the Security Council can advance the matter further is to substitute for that general obligation under Article 33 a particular and individual obligation on each of the parties to submit the case to the Court. Just contemplate the practical alternative. Contemplate this very case. In this field the Security Council

is necessarily dealing with disputes the continuance of which is endangering the peace. That is the whole theory and basis of its right to intervene. Take a case like the present one, in which ships of war are mined, with heavy loss of life. That is exactly the kind of incident which in the past would have led at least to a naval demonstration, and quite possibly to a punitive war. Corfu? Was there indeed not such an incident in Corfu in 1923?

Members of the United Nations can hardly be expected to submit to outrages of this kind unless the Security Council is invested, as it was in my submission clearly the intention to invest it, with adequate and effective powers. The only way you can give it effective powers is to say that this power of recommending peaceful methods of settlement is a power which imposes an obligation on those to whom the recommendations are addressed to pursue that peaceful method.

That is all that I propose to say on that second leg of the argument. As the Court will appreciate, it is a more restricted application of the Article 25 theory that I advanced to the Court this morning.

I come now to the third leg of the tripod, and this also I shall deal with very briefly; the matter will be expanded by my learned friend. The third submission is that a resolution under Article 36 of the Charter, even if it does not impose any obligation on the parties, attracts the provisions of Article 36 (1) of the Statute.

Article 36 (1) of the Statute of the Court, as the Court will remember, provides that the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. That was a new provision to the extent that it refers to all matters specially provided for in the Charter of the United Nations. There was nothing of that kind in the Statute of the old Court. To the extent that it is a new provision, it must be assumed that the new words mean something. In the Year Book of the Court, I notice that at page 108 it is said that "cases introduced by application will mainly relate to matters specially provided for in the Charter or in treaties and conventions in force". That seems, if I may say so with respect, a very just appreciation of this provision of Article 36 of the Statute. That is what the Statute says, that the jurisdiction of the Court comprises, among other matters, all matters specially provided for in the Charter of the United Nations.

The manifest object of that article is to give the Court a jurisdiction not dependent upon adherence to the Optional Clause and not dependent upon the signature of a special agreement. Whether a special agreement should be entered into or not following a resolution of the Security Council like this is another point. There would in any event be no need to provide for that case specially in Article 36, because the jurisdiction under any special agreements is already covered; it was covered under the Statutes of the old Court, and it is covered by the initial words of Article 36 (1). These additional words, which were not thought necessary to cover special agreements under the Statute of the old Court, are not necessary to deal with them now; they are clearly dealing with other cases, new cases, cases of a kind which are specially provided for in the Charter of the United Nations.

What special provision is there in the Charter of the United Nations to which Article 36 of the Statute can be referring? There must be

presumably some special provision. It is anticipated in the Year Book that most of your cases are going to come from it, and that may well be true, as the Security Council gradually develops its functions for maintaining peace in the world. The only provision in the Charter to which Article 36 of the Statute could possibly be referring is this very provision, this power of the Security Council under Article 36 to recommend the parties to go to the Court. So far as concerns contentious business—and this is dealing only with contentious business—there is no other provision whatever in the Charter which could on any view give jurisdiction to the Court. Unless, therefore, you are going to say that there is no provision in the Charter which can give jurisdiction to the Court, and that these words are perfectly meaningless dead letters, the conclusion inevitably follows that Article 36 of the Charter is the provision to which Article 36 (1) of the Statute is in fact looking.

Why should this particular provision of the Statute be regarded as a complete dead letter? It seems to link up directly with Article 36 (3) of the Charter, and the joint effect of the two articles, Article 36 of the Statute and Article 36 of the Charter, seems to be this: once there is a resolution by the Security Council recommending reference to the Court, and once that resolution has been acted upon by one of the parties, the Court has jurisdiction.

I am not here putting it so high as to say—and this is the distinction between this leg of the argument and the other two legs—that once the resolution of the Security Council is passed, the Court at once has a compulsory jurisdiction. I am saying, under this part of the argument, that once the resolution of the Security Council has been acted on by one of the parties, the Court is invested with complete jurisdiction. It is really rather as if both of the parties had adhered to the Optional Clause for the purposes of the matters referred by the Security Council.

After all, is that a very surprising conclusion? Under Article 24 of the Charter, the Security Council, in making recommendations in regard to the matter, has acted on behalf of the Members of the United Nations, including the Members who are parties to the dispute. That being so, is there really anything really startling in the idea that in recommending recourse to the Court it has in fact created a kind of *ad hoc* adherence to the Optional Clause by both of the parties on whose behalf, amongst others, it has been acting for the purposes of the particular dispute?

If, as I say, Article 36 of the Statute is not to be linked up with Article 36 of the Charter in that way, then this part of Article 36 is wholly inoperative, so that here again I crave in aid the principle of effectiveness, and I claim it in aid in regard to Article 36 (1) of the Statute as well as in regard to Article 36 of the Charter. You can only make Article 36 (1) of the Statute effective by linking it up with some provision in the Charter of the United Nations, and the only provision with which you can link it up is the provision in Article 36 of the Charter. I crave it in aid also of the Charter. The only way in which you can enable the Security Council to ensure prompt and effective action is by concluding, at least that a resolution of the Security Council under Article 36 of the Charter does produce the result, that one of the parties can then go to the Court. In this case the United Kingdom, by the application which it made, implemented the action

which the Security Council had taken under Article 36 (3), and in my submission brought Article 36 (1) of the Statute into operation and gave the Court a jurisdiction.

With your permission, Mr. President, my learned friend Mr. Beckett will take up the argument from that point. I want to add only this, that this argument under Article 25 and the other articles of the Charter and of the Statute raises matters of much difficulty and of the greatest importance. That that is so there is not, of course, any possibility of doubt. It may well be that you will decide, as I ventured to suggest at the beginning of my remarks, that it is unnecessary to reach any conclusion about these matters. If you are satisfied that the letter of 2nd July involved an acceptance of the jurisdiction, as it was understood both by the Security Council and by the Court to do at the time, and as, no doubt, it was intended to be understood at the time, you may well feel that it is sufficient to base your conclusions in this case upon that initial point, and to leave these other and much more difficult matters to be considered if they ever arise in some future case.

I must say that I regret very much that in the first case which has occurred before this Court any question as to competence and jurisdiction should have arisen. Some day, perhaps—the outlook for it is, I am afraid, very discouraging at the moment—we may reach a stage where individual States in the society of nations will all agree to accept the obligation to submit their disputes to the Court, just as individuals in our national societies agree to submit their disputes to national courts. Unhappily, however, that time is manifestly not yet. On the other hand, we certainly had hoped that no State with any sense of world citizenship would seek by technical objections to evade the jurisdiction of the Court in a case in which the Security Council had recommended that the Court should exercise jurisdiction, whether that recommendation was compulsory or not. Once it is realized that by a voluntary submission to the Court all these issues which we have been arguing about now for four days—all these questions, and very important questions, as to Article 25 and the compulsory jurisdiction and all the rest of it—would disappear completely out of the picture, it follows that the attitude of the Government of Albania is one which is highly, wholly, technical.

The United Kingdom is still prepared to waive its insistence upon which it conceives to be the legal position, in order to enable the Government of Albania to do that which it professes itself anxious to do, namely to submit this matter to the Court by means of a special agreement. There is still time. The agreement is all ready, and I hope that the Government of Albania will agree to sign it. If not, of course, the case will go on and you must decide such parts of it as you think are necessary in order to enable a conclusion to be made.

I concede at once that, however regrettable it may be that the Government of Albania should take up this position, it is entitled to rely upon every technicality of procedure under the Statute and upon every obscurity that there may be in the language of the Charter of which she can possible seize hold. She is entitled to do that, but in my confident submission to the Court there is no technicality of procedure and no obscurity of language which is sufficient to enable the Government of Albania to elude the consequences of the jurisdiction which by its own acts it has conferred upon this Court.

## 4.—STATEMENT BY Mr. BECKETT

### (AGENT FOR THE GOVERNMENT OF THE UNITED KINGDOM) AT THE PUBLIC SITTINGS OF MARCH 1st AND 2nd, 1948

[*Public sitting of March 1st, 1948, afternoon.*]

May it please the Court. As the Court knows, our case rests upon two main grounds. The first is based on the Albanian letter to the Court of the 2nd July, and our arguments on this letter have been made in our written Observations of the 20th January, and my leader, the Attorney-General, has developed further our arguments on this point. The second basis of our case for the jurisdiction of the Court are the grounds which were set forth in our written application of May last. The Attorney-General has already dealt with this matter in his oral argument, but there have been no written pleadings on it, and that is why I am going to attempt to go into it in still further detail. If the Court finds it necessary to pronounce on this aspect of the case, it will be giving a decision of the very greatest importance, because it is an interpretation of the Charter. It will, of course, be strictly necessary for the Court to give a decision on our second argument only if our first argument is held to be ill founded ; nevertheless, in view of the very great importance of any interpretation of the Charter, it does seem to us most desirable that we should give every possible assistance to the Court by way of argument. Moreover, my learned friend Professor Vochoč has described our argument on the Charter, before he heard the Attorney-General, as an *édifice fabuleux ;* and we think it necessary, by supplying as many solid bricks as we can, to show the edifice is a real one. I shall attempt now to add a few more bricks to those which the Attorney-General has already laid.

We were reproached at the beginning for being rather casual over this part of our case. We do not intend to be so. The full statement of our argument on the second point is necessarily somewhat long and complicated. We have to consider the construction of the Charter as a whole. We have to refer fully to the jurisprudence of the Permanent Court with regard to the interpretation of instruments. And, since our opponents have gone into the field of the preparatory work at San Francisco, we also, subject to our contention that the preparatory work should not be taken into consideration, follow them into that field.

As the Court knows, having just heard it from the Attorney-General, we present our submission that the Court has jurisdiction under the Charter in the form of three arguments which are independent and alternative. I will, with your permission, say what the three arguments are. The first is that the Government of Albania, having accepted for the purpose of the present dispute all the obligations of a Member of the United Nations, is obliged to accept the jurisdiction of the Court by reason of the recommendation of the Security Council, since recommendations under Chapter VI of the Charter are

decisions which Members of the United Nations are obliged to accept and carry out under Article 25 of the Charter. That is our first argument.

Our second argument is this. Even if it should be held that Article 25 of the Charter does not apply to all recommendations under Chapter VI, some recommendations may be made under that Chapter to which Article 25 does apply, and in particular those which relate to *methods* as opposed to *terms* of settlement. The recommendation of the Security Council that the Parties should refer the present dispute to the Court is a recommendation of this kind. That is our second argument.

Our third argument is that the Court, as the principal judicial organ of the United Nations, has jurisdiction by virtue of Article 36 (1) of its Statute over the present dispute as being a matter specially provided for in the Charter of the United Nations, as soon as the recommendation of the Security Council had been acted upon by any of the Parties to whom it had been directed, and of course that Resolution has been acted upon by the Government of the United Kingdom.

The Attorney-General has dealt fully with our argument No. 1, and I do not intend to develop that any further ; but in the course of doing so, and as part of that argument, he referred to certain rules of the interpretation of treaties, and I wish to begin by discussing some of these rules and referring to the jurisprudence of the Permanent Court in regard to them. I am glad to know—not that I doubted it for a minute—that we are at one with Counsel for Albania in our acceptance of the jurisprudence of the Permanent Court.

The first rule of interpretation, in support of which I am going to cite some cases, is the rule that treaties must be interpreted in their ordinary and natural sense unless a contrary design or purpose appears in the text. The context of the provisions must be considered, and their meaning must be ascertained in the light of the general purpose of the treaty.

The first case which I wish to mention in this connexion is that of the *Wimbledon*, which is in Series A., No. 1, and the particular passage which I shall want to quote will be found on page 22 of the report. In the *Wimbledon* case, the Permanent Court was called upon to interpret Article 380 of the Treaty of Versailles, which provided that the Kiel Canal and its approaches should be maintained free and open to vessels of commerce and of war of all nations at peace with Germany on terms of perfect equality. A dispute having arisen between Germany on the one hand and the Governments of Great Britain, France, Italy and Japan on the other hand with regard to the proper construction of Article 380, the matter was submitted to the Court for decision. It was argued on behalf of Germany that, in virtue of her sovereignty over the Kiel Canal, she was entitled, and indeed bound, to take such measures to preserve her neutrality as she thought fit, and that the provisions of the Treaty of Versailles must be read subject to this right.

The Court held that there was no ground for interpreting the provisions of Article 380 otherwise than in their natural and ordinary sense. It said :

> "The Court considers that the terms of Article 380 are categorical and give rise to no doubt. It follows that the Canal has

> ceased to be an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State, and it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for .... all nations of the world. Under its new régime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany."

The Court then pointed out that if the conditions of access to the Canal were to be modified in the event of a conflict between two Powers remaining at peace with Germany, the Treaty would not have failed to say so; and later in its judgment the Court refused to adopt the so-called restrictive interpretation such as was maintained on behalf of the German Government because it would be contrary to "the plain terms of the article". That second quotation is from page 24.

Turning just for a moment to our own case, if Article 25 of the Charter was to be limited to decisions of the Security Council under Chapter VII, as our opponents contend, I say, adopting the words of the Permanent Court, that the Charter would have said so.

The next case which I should like to cite is an advisory opinion given in 1925 regarding certain matters arising out of the action of Poland in setting up letter boxes at various places in the streets of Danzig. That case is No. 11 in Series B., and the passage which I shall quote will be found at page 37. One of the points at issue in the case—it seems a small point—was whether Poland could only have letter boxes inside the buildings or whether she could have them outside the buildings in the street as well. At page 37 the Court said this:

> "It will be seen that there is no trace of any provision confining the operation of the Polish postal authorities to the inside of its postal building. The postal service which Poland is entitled to establish in the port of Danzig must be interpreted in its ordinary sense so as to include the normal functions of a postal service as regards the collection and distribution of postal matter outside the post-office."

There is not any trace in the Charter of any provision cutting down Article 25. Elsewhere in this post box case the Court made the following important pronouncement:

> "It has been urged on behalf of Danzig that Poland's postal rights in Danzig constitute a grant in derogation of the postal monopoly of Danzig, and that the grant must be strictly construed in favour of Danzig. In the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd." (P. 39.)

I should like to turn now to Advisory Opinion No. 2, which relates to the competence of the International Labour Organization and which

turned on the point whether agriculture was included within the scope of the activities of the International Labour Organization. That is Series B., Nos. 2 and 3, and the page from which I shall principally want to quote is page 23. In that case the Court said this:

> "In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense."

The Court, having said that, proceeded to consider the meaning of the word "industry" as used in the English and French texts of the Treaty, and it considered in this connexion the dictionary meanings. Having looked at the text from this point of view it said:

> "But the context is the final test, and in the present instance the Court must consider the position in which these words are found and the sense in which they are employed in Part XIII of the Treaty of Versailles."

Reading Part XIII as a whole, the Court held that there was no doubt that agricultural labour was included within the competence of the Organization.

The point there was whether the word "industry" covered agriculture. If you look at the dictionary, you may find that "industry" is very often used in a sense which does not cover agriculture, and indeed just occasionally in contradistinction with it; nevertheless, in this case the Court, taking the matter in its context, and reading Part XIII of the Treaty of Versailles as a whole, reached the conclusion which it did. Similarly, we ask the Court to take the word "decision" in Article 25 in its context and to interpret it in its context and in the light of the whole scope and purpose of the Charter as a whole.

There are two cases which I will merely mention as again confirming the rule of interpretation which I am now submitting, and without going into their facts and without making any quotations from them. The first of these is Advisory Opinion No. 12, relating to the frontier between Iraq and Turkey, Series B., No. 12. The second is the Chorzów Factory case, which is Series A., No. 9. I will also mention, again without bothering to go through the detailed facts of the case, the advisory opinion given in 1932 (Series A./B., No. 50) concerning another I.L.O. question, about the employment of women at night.

I now wish to deal at a little greater length with another case, which is an advisory opinion given in 1923, Series B., No. 7, and my quotation principally comes from page 17. That opinion relates to the interpretation of Article 4, paragraph 1, of the Treaty of 1919 between the Principal Allied and Associated Powers on the one hand and Poland on the other hand, under which it was maintained that certain persons who were formerly German nationals had acquired Polish nationality, contrary to the contention of the Polish Government, which held that those persons continued to possess German nationality and did not acquire Polish nationality, with the result that in Poland they were exposed to the treatment laid down for persons of non-Polish nationality and in particular of German nationality. The question for decision by the Court was whether Article 4 of this Treaty referred solely to

the habitual residence of the parents at the date of birth of the persons concerned, or whether it also required the parents to have been habitually resident at the moment when the treaty came into force. The Court rejected the contention of the Polish Government, and in doing so it made the following remark, which is the one which I wish to quote :

> "To impose an additional condition for the acquisition of Polish nationality, a condition not provided for in the Treaty of 28th June, 1929, would be equivalent, not to interpreting the Treaty, but to reconstructing it."

Is not the argument of our opponents with regard to Article 25 almost tantamount to asking the Court to reconstruct that provision ?

There is one last case which I should like to mention with regard to this rule of interpretation. It comes from an advisory opinion in 1931 relating to access to or anchorage in the Port of Danzig of Polish war vessels. It is Series A./B., No. 43, and the one sentence which I want to read is found at page 144. In that case the Court again emphasizes the rule that the natural interpretation of the treaty must be the first object of the Court's investigation. It held, moreover, that the text of the treaty with which it was concerned could not be enlarged by reading into it "stipulations which are said to result from the proclaimed intentions of the authors of the treaty, but for which no provision is made in the text itself".

That applies just as much to intentions proclaimed after as to those proclaimed before the treaty is signed. I think perhaps it applies with more force to the proclamation of intention afterwards, and therefore I think that it affords some guidance to the Court as regards the quotations which have been made by learned Counsel for the Albanian Government from declarations made in Congress at Washington, or, in another citation, in the Chilean Parliament, and the like.

The Attorney-General has mentioned that the conduct of the parties to a treaty often affords an admirable guide to the meaning of the treaty. That applies with particular force when it is the conduct of an organ whose duty it is in the first place to interpret its own duties under the Charter. He has referred to the view taken by the Security Council with regard to the effect of its recommendation in the present case. I wish to make another citation from the Security Council, a citation of which we have given notice in advance. It arose when the Security Council was dealing with Trieste, and it is in the *Official Records* of the Second Year, No. 3, at page 45, the date of the meeting being 10th January, 1947.

There was an intervention in that case by Mr. Sobolev, Assistant Secretary-General, apparently speaking after having taken all legal advice available to him in the Secretariat, and giving an explanation of the position of the Security Council's decisions which, having been given, was not questioned or queried by any Member of the Council. I should like to read Mr. Sobolev's statement, which is quite short. It is headed "Obligation of the Members to accept and carry out the decisions of the Security Council", and states as follows :

> "The question has been raised as to 'what countries will be bound by the obligation to ensure the integrity and independence of the Free Territory'. The answer to this is clear. Article 24

provides that in carrying out its duties, the Security Council acts on behalf of Members of the United Nations. Moreover, Article 25 expressly provided that 'the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

The record at San Francisco also demonstrates that this paragraph applied to all the decisions of the Security Council. As indicated above, there was a proposal in Committee III/1, to limit this obligation solely to those decisions of the Council undertaken pursuant to the specific powers enumerated in Chapters VI, VII, VIII and XII of the Charter. This amendment was put to a vote in the Committee and rejected. The rejection of this amendment is clear evidence that the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions made under Article 24 and to the decisions made under the grant of specific powers."

That shows that in January 1947 the Assistant Secretary-General was saying in the Security Council that this paragraph applied to all the decisions of the Security Council, and then proceeded to give a commentary on the meetings of the Committee at San Francisco which is the same in essence as that which you have heard from the Attorney-General.

So far from our having invented this theory, and so far from this theory even having been invented by somebody else at the time of the Corfu case, you hear this theory clearly stated by Mr. Sobolev, relating to a different affair on 10th January 1947.

I now wish to pass on to another rule of interpretation on which we have relied, and to refer the Court to a few cases on that point.

This is the rule of interpretation: *ut res magis valeat quam pereat*, and the first case I want to mention here is one which I have mentioned already in connexion with another rule of interpretation. It is Advisory Opinion No. 2, on the question as to whether the activities of the I.L.O. extend to agriculture. I am citing this case and shall show from the quotation which I will read in a minute that the Court based its opinion in a great measure on the ground that it would give an interpretation to the relevant provision of Part XIII of the Treaty of Versailles which would enable the International Labour Organization to perform a function which it appeared it had been set up to perform. And this is what the Court said, on page 24 of the report, in Series B., No. 2. It says:

"As Part XIII expressly declares, the design of the Contracting Parties was to establish a *permanent labour organization*. This in itself strongly militates against the argument that agriculture, which is, beyond all question, the most ancient and the greatest industry in the world, employing more than half of the world's wage-earners, is to be considered as left outside the scope of the International Labour Organization because it is not expressly mentioned by name."

Now in another Advisory Opinion—it is No. 6, given in 1923—the Permanent Court was requested to give an opinion on whether the attitude adopted by the Polish Government towards a number of colonists

who were formerly German nationals, but who, at the material time, were domiciled in Polish territory previously belonging to Germany, and had acquired Polish nationality, was in conformity with its international obligations. In considering this question, the Court was called upon to interpret the Minorities Treaty between Poland and the Allied and Associated Powers which was signed at Versailles on 28th June, 1919. This Treaty had for its object the acceptance by Poland of certain principles which were intended to protect the interests of inhabitants of Poland who differed from the majority of the population in race, language or religion.

It was the contention of the German Government that by a law enacted in Poland on 14th July, 1920, and by various acts in pursuance of this law, the Polish Government had violated the provisions of the Minorities Treaty. The matter was accordingly brought before the Council of the League of Nations, but the Polish Government objected that the Council had no power in the matter because the Polish action had been taken in the exercise of rights conferred upon her by the Treaty of Versailles and that the interpretation of the Treaty of Versailles was not a matter for the Council. The Council therefore requested the Permanent Court to give an advisory opinion on this point as well as on the point whether the Polish Government had acted in conformity with its international obligations.

It is in connexion with the former point, that is to say, whether the Council of the League of Nations was competent in the matter, that the Court said :

> "The Court is unable to share this view. The main object of the Minorities Treaty is to assure respect for the rights of the minorities and to prevent discrimination against them by any act whatsoever of the Polish State. It does not matter whether the rights the infraction of which is alleged are derived from a legislative, judicial or administrative act, or from an international engagement. If the Council ceased to be competent whenever the subject before it involved the interpretation of such an international engagement, the Minorities Treaty would to a great extent be deprived of value." (P. 25.)

The last words are particularly relevant—"If the Council ceased to be competent whenever the subject before it involved the interpretation of such an international engagement, the Minorities Treaty would to a great extent be deprived of value"; that is to accept the Polish Government's contention would be depriving the Minorities Treaty of the greater part of its value. That was one of the grounds why the Court rejected that interpretation.

Turning to an aspect of our particular case about which there has now been much argument, the Counsel for the Albanian Government has admitted that his interpretation deprives of any value at all certain words which were introduced as an amendment into Article 36 (1) of the Statute of the Court. Further, I think the Attorney-General has demonstrated that our opponent's interpretation renders Article 25 of the Charter completely otiose. Therefore, following the principle adopted in the case which I have just cited, the Court should not adopt an interpretation which deprives of value such important provisions first in the Statute of the Court and secondly in the Charter.

I must trouble the Court with two or three shorter citations. The Advisory Opinion No. 12, relating to the frontier between Turkey and Iraq, Series B., No. 12, which I wish principally to cite, is as follows. In that case the Court was primarily concerned with the question whether a decision taken by the Council of the League of Nations in virtue of Article 3, paragraph 2, of the Treaty of Lausanne had a binding character as an arbitral award, or whether it was merely a recommendation or simply a mediation. Also whether in any event the votes of the parties to the dispute should be counted in taking the Council's decision. On these two points the Court applied the principle of interpretation that all treaties must be construed in a manner to render them effective. It pointed out that the intention of the parties in signing Article 3, paragraph 2, of the Treaty of Lausanne "was by means of recourse to the Council to ensure a definitive and final solution of the dispute which might arise between them, namely, the final determination of the frontier".

With regard to the question whether the parties had the right to vote, the Court said:

> "From a practical standpoint, to require that the representatives of the parties should accept the Council's decision would be tantamount to giving them a right of veto enabling them to prevent any decision being reached; this would hardly be in conformity with the intention manifested in Article 3, paragraph 2, of the Treaty of Lausanne." (P. 32.)

One more case I have to quote is Judgment No. 8, the Chorzów Factory, Series A., No. 9, page 25. In that judgment the Court was dealing with the contention of the Polish Government that the Court had no jurisdiction for dealing with the question of compensation in respect of the violation of certain provisions of the Convention regarding Upper Silesia, concluded at Geneva in 1922 between Germany and Poland. The Polish argument was that Article 23 of that Convention, which gave the Court jurisdiction over differences of opinion, resulting from the interpretation of the Convention which might arise between the German Government and the Polish Government, did not contemplate differences of opinion regarding reparations claimed for violation of the provisions of the Convention. The Court said that it was a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form and that there was no necessity to say in the Convention that differences relating to reparations were comprehended in Article 32. It observed in this connexion, that is, the interpretation of Article 23:

> "An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes."

[*Public sitting of March 2nd, 1948, morning.*]

If it please the Court. I want, with your permission, to begin this morning by referring you to some more cases in the jurisprudence of the Permanent Court in regard to another rule of interpretation which we regard to be relevant and important in this case.

The rule to which my remarks are now addressed is the rule that the preparatory work must not be used in the interpretation of the treaty where the text is clear and can be ascertained by applying other rules of interpretation (such as that which I have already mentioned, that the treaty must be interpreted according to the natural and ordinary meaning of the words used, taking them in the context of the instrument as a whole) after applying that rule, and also the rule *ut res magis valeat*. It is only after the Court has failed, after applying those rules of interpretation, to spell out the meaning that it is permissible to have recourse to preparatory work at all. It is sometimes permissible to have recourse to the preparatory work leading up to a treaty. The decisions of the Permanent Court show, however, that no rule was better established in its jurisprudence than the rule that preparatory work cannot be used in the interpretation of a treaty when the meaning of the text can otherwise be ascertained.

The extracts which I am about to give you from one of the cases decided in the Permanent Court show how the rule which I am now contending for was repeatedly applied by that Court.

The first case to which I wish to refer is the case concerning the Iraq-Turkish frontier, a case I have already mentioned in connexion with the rule *ut res magis valeat*. Indeed, that case about the Iraq frontier contains in itself authority for all three of the rules which I am submitting to you.

May I begin by just reminding you that in the Iraq frontier case the Court was asked for an advisory opinion upon the meaning of Article 3, paragraph 2, of the Treaty of Lausanne, and in particular in relation to the rôle of the Council of the League of Nations in a dispute as to the frontier between Turkey and Iraq. The Court, in the first instance, applied itself to the problem of interpreting the article as it stood. The Court said—this is Advisory Opinion No. 12, and the passage which I am reading is to be found on page 19:—

> "The Court must, therefore, in the first place, endeavour to ascertain from the wording of this clause what the intention of the Contracting Parties was; subsequently, it may consider whether —and if so, to what extent—factors other than the wording of the Treaty must be taken into account for this purpose. The Court is of opinion that in signing Article 3, paragraph 2, of the Treaty of Lausanne, the intention of the Parties was, by means of recourse to the Council, to insure a definitive and binding solution of the dispute which might arise between them, namely, the final determination of the frontier."

The Court then proceeded to examine the logical and grammatical meaning of the article, analysing each sub-paragraph and reaching the conclusion that its purpose was to provide successive stages by which the frontier might be determined, culminating, if need be, in the adju-

dication of any dispute on the matter by the Council of the League. It also examined further other articles of the Treaty of Lausanne in order to see whether any light was thrown upon the scope of Article 3 by those other articles. The representative of the United Kingdom in that case had argued before the Court that the true meaning of Article 3 was, as a matter of law, to be gathered from its actual terms alone, and that consideration of the negotiations leading up to the treaty was inadmissible. Now, the Court upheld this contention in the following passage:

> "Since the Court is of opinion that Article 3 is in itself sufficiently clear to enable the nature of the 'decision to be reached' by the Council under the terms of that article to be determined, the question does not arise whether consideration of the work in preparation of the Treaty.... would also lead to the conclusions set out above." (P. 22.)

The Turkish Agent had based the argument on the preparatory work, and the next little passage I am going to read is what the Court said with regard to that Turkish argument. It is contained on page 23, and the Court said:

> "But assuming that a study of the preparatory work.... led to the conclusion that Article 3 should be interpreted as though it had been adopted subject to the condition that the Council could not arrive at any solution without the consent of the Parties, the action of the Council would, in effect, be reduced to simple mediation. Now this conclusion, which would eliminate the possibility of a definite decision capable, if necessary, of replacing agreement between the Parties, would be incompatible with the terms of Article 3, the interpretation of which—as indicated, both from a grammatical and a logical point of view as well as from that of the rôle assigned to that article in the Peace Treaty—has been set out above."

Mr. President, the Court is there saying that the rule *ut res magis valeat* prevails over anything which you can get from the preparatory work. That is the conclusion to be drawn from the Court's opinion in the Iraq frontier case.

The next case to which I wish to refer a little more shortly is the case concerning the European Commission of the Danube. It is a case with which I happen to be rather familiar because I was in it. It was a dispute between the United Kingdom, France and Italy on one side, and Roumania on the other, and it related to the powers of the European Commission of the Danube between Galatz and Braila, and the argument mainly turned on the meaning of Article 6 of the Definitive Statute of the Danube, an instrument which had followed Article 349 of the Treaty of Versailles. Article 6 stated that the authority of the Commission extends "under the same conditions as before and without any modification of its existing limits", and the Court had to decide on the scope to be given to these words.

The Court then pointed out that it was reasonable to suppose that the matter should be settled on the basis of the position as it was before the outbreak of hostilities in 1914, seeing that this was one of the leading principles of the provisions of the Treaty of Versailles concerning

the Danube. They therefore reached the conclusion that the words "under the same conditions as before", etc., in Article 6 referred to the conditions which existed in fact before the war in the contested sector, and that their effect was to maintain and confirm those conditions.

Then there comes a little passage which I wish to cite textually. It is Advisory Opinion No. 14, and the sentence which I am about to cite is found at page 28. The observation of the Court is as follows:

> "Before entering upon the analysis of the contentions of the Governments concerned, the Court observes that the view which it has just developed as to the purport of the Definitive Statute is based solely on the language employed in the Statute and on the historical facts upon which it rests, without any reference to preliminary discussions or drafts. The Court adheres to the rule applied in its previous decisions that there is no occasion to have regard to the protocols of the conference at which a convention was negotiated in order to construe a text which is sufficiently clear in itself."

Then it went on to say that in fact it had looked at the preparatory work and it only led to the same conclusion.

I shall refer rather shortly to one or two more cases. The effect will be to show that this rule about the use of preparatory work, which I am contending for, had become the settled jurisprudence of the Permanent Court. It had, I think, if I may use a French word—I hope not incorrectly—become *doctrine*. It is one of the principles which the Permanent Court applied and repeated over and over again. I will just mention one or two words about the *Lotus* case, Judgment No. 9, Series A., No. 10, where the following sentence occurs on page 16. The Court said:

> "The Court must recall in this connexion what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."

Again, if one takes the Serbian Loans case, Judgment No. 14, Series A., No. 20, one finds the following sentence on page 30, where the Court says this:

> "As the bonds themselves are not ambiguous,"

—the Court had to construe certain bonds under which the loan was issued—

> "there is no occasion for reference to the preliminary documents. But if these are examined, it will appear that they tend to confirm the agreement for gold payments."

Again, in the Memel case, Series A./B., Nos. 47-49, you will find the following sentence at page 249:

> "As regards the arguments based on the history of the text, the Court must first of all point out that, as it has constantly held, preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear."

Then the Court proceeded to consider arguments based upon the history of the text, but held that there was nothing in that history inconsistent with the construction it had adopted.

I think, Mr. President, or at any rate, I hope, that I have given you sufficient situations to support what I have said, that this rule about preparatory work was one of the best established pieces of *doctrine* of the Permanent Court.

When I began yesterday evening, I mentioned that we had three alternative arguments on this part of our case. I also said that the Attorney-General had, I thought, dealt exhaustively with the first argument, and in that connexion it was only necessary for me to develop and give authority for the rules of interpretation which had been mentioned as part of that argument.

I now wish to turn to our second argument, and on that I wish to add something more to what my leader, the Attorney-General, has already said. All these three arguments, of course, are separate and alternative. The first argument, as you will remember, was that Article 25 covers all the decisions of the Security Council, including its recommendations. Our second argument is that Article 25 must be interpreted so as to include at least some of the recommendations made by the Security Council under Chapters VI and VII, and that the recommendation which it has made in this Corfu case is one of those which are covered by Article 25.

In particular, I submit that the recommendations which must be treated as binding decisions are those appertaining to the power, and indeed the duty, of the Security Council to preserve international peace and security, which, because of the circumstances of the case, their urgency, and the peremptory character of the recommendation of the Security Council, indicate this is their object. All this, it is generally agreed, applies to the recommendations under Chapter VII, but the same, I submit, is also true of those recommendations of the Security Council under Chapter VI which name a particular procedure or method of settlement and which are directly and urgently concerned with the preservation of peace. In particular, I suggest that the distinction between decisions which are binding and recommendations which are not—if, contrary to all that we have said on our first argument, such a distinction can be made at all—is not an absolute one, and that there are cases envisaged by the Charter in which a recommendation may be binding on the parties, and the dispute now before the Court involves a case of this description.

In the first place, to put it at the very lowest, it is clear that there is no rigid distinction in the Charter between decisions and recommendations. Inevitably, a great many of the arguments which the Attorney-General has used in support of our argument No. 1 are also applicable to the case which I am making here in support of our argument No. 2, and I wish to spare the Court, as far as possible, any repetition; therefore, in support of what I have just said, I will merely recall to your minds, without repeating what the Attorney-General said, Article 18 (2) of the Charter, with regard to the General Assembly, which, you will remember, begins by using the word "decisions" and immediately afterwards refers to "recommendations" as being included under decisions. I should like also to remind you in this connexion of what the Attorney-General said with regard to Article 27 (3), the

provision about voting in the Security Council. Nobody doubts that that applies to voting for recommendations, but the word "decisions" is the one which is used. I should like to remind you, again, of how the Attorney-General demonstrated that, under Chapter VI, which is mentioned in Article 27 (3), the Council only makes recommendations in the final stage of dealing with cases before it.

I would ask you again to interpret the word "decisions" in Article 25 in the context in which you find it in Chapter V, a general chapter dealing with all the powers of the Security Council, and to interpret it in its context immediately preceding Article 27, where undoubtedly the word "decisions" is used as covering recommendations. In brief, I submit that, contrary to the view which at first sight may be suggested by the words themselves, it is necessary to discard at the outset any conclusions based on the theory that in the Charter a decision is binding and a recommendation is not.

I would remind the Court of the principle *ut res magis valeat*, and I would again recall to you that the Attorney-General demonstrated that on our opponents' contention there are some new words in Article 36 (1) of the Statute which have no operation at all. Further, on their contention, Article 25 applies only to Chapter VII, and that means that Article 25 itself becomes entirely otiose.

This second alternative argument which I am presenting does not, as I have said, involve the proposition that every recommendation under Chapter VI has the binding force of a decision. In particular, I am not contending in this part of our argument that recommendations as to the terms of settlement have this effect. The argument which I am making now is not inconsistent with the view that the Security Council, acting under Chapter VI, functions primarily as a conciliator and possesses no dictatorial powers with regard to the terms of settlement.

As I hope to demonstrate now, there is in the preparatory work of the Conference of San Francisco—if, contrary to my submissions, that work is to be taken into consideration—some authority for the distinction between recommended methods of settlement and recommended terms of settlement. I think, to be frank, that the second argument which I am now making is an argument which we put forward having regard to the preparatory work, and in view of the possibility that the Court, in spite of our submission that it should not be looked at, should nevertheless think it proper to take account of. This is an alternative submission. If you ignore the preparatory work, I think, Mr. President, that you will probably prefer our argument No. 1.

I wish now to turn to the preparatory work, and what I am now referring to is a meeting of the San Francisco Committee III/2. It is the seventh Meeting, held on 17th May, and you will find the passages which I am about to read in Volume XII at page 47. There is a heading "Amendment proposed by the sponsoring governments", and just above that you will find the heading "Paragraph 4 of Chapter VIII, Section A". This is confusing, but that paragraph 4 is what now corresponds to Article 37 (2) of the existing Charter. The passage begins with the following sentence:

> "It was pointed out that the term 'decision' appeared to be used in slightly different senses in different parts of the Dumbarton Oaks Proposals, and it was suggested that this matter might be referred to the proposed sub-committee on drafting."

I then miss out a passage which I do not think is material, but I wish to read this:

> "The delegate of Belgium requested an interpretation from the sponsoring governments of the legal effects of the word 'recommend' as used in paragraph 4."

That is to say, Article 37 (2) of the existing Charter.

> "The delegate of the United States expressed the view that the recommendation of a settlement under paragraph 4 was not obligatory unless the dispute involved a threat to the peace, as envisaged under Chapter VIII, Section B, paragraph 1."

In other words, under Chapter VII of the existing Charter. The delegate of the United States was expressing the view that the recommendation of a settlement under paragraph 4 was not obligatory unless the case was one that came under Chapter VII. He continued:

> "It was only if the failure to settle a dispute, or to carry out a recommendation of the Security Council, constituted a threat to the peace that the Security Council could 'take any measures necessary for the maintenance of international peace and security', and then it must act 'in accordance with the purposes and principles of the Organization'."

However, it appears that the Belgian delegate was not satisfied, because we now have a heading "Belgian amendment to Chapter VIII, Section A, paragraph 4", and this is what it says:

> "The delegate of Belgium stated that if, as appeared to be the case, the power of the Security Council to 'recommend' involved the possibility that a Member of the Organization might be obliged to abandon a right granted to it by positive international law as an essential right of statehood, the delegate of Belgium wished formally to present its amendment to the Committee. The purpose of the amendment was, in case a party to a dispute considered that a recommendation of the Security Council infringed on its essential rights, to allow a State to request an advisory opinion on the question by the International Court of Justice.... It was not in any sense the purpose of this amendment to limit the legitimate powers of the Security Council. It would, however, be desirable to strengthen the juridical basis of the decisions of the Security Council."

Now, what was the delegate of Belgium saying? All his remarks relate entirely to the power of the Council to recommend terms of settlement. He was afraid that unless his amendment was adopted, the Council would have power to recommend with binding force such and such provisions which would deprive the State of rights which under international law it previously possessed. He said that he wished not to limit the powers of the Security Council but to be sure that they were acting upon a proper juridical basis, and therefore if a State thought that a proposed recommendation for terms of settlement infringed its rights, it should be entitled to get the Council to request an advisory opinion of the International Court of Justice. That was

the Belgian delegate's point, and I want to emphasize that, because it is the key to all that follows.

I continue with the record:

> "The delegate of the U.S.S.R. expressed the opinion that the Belgian amendment should not be adopted. He felt that the Security Council should receive the full confidence of the Members of the Organization."

I now miss out a little.

> "The delegate of the United States emphasized the importance of the requirement that the action of the Security Council in dealing with a dispute involving a threat to the peace be taken 'in accordance with the purposes and principles of the Organization'....
> On the whole he did not consider the acceptance of the Belgian amendment advisable."

Then we have the delegate of France:

> "The delegate of France .... supported the views expressed by other delegates as to the advisability of clarifying the meaning of the words 'decisions' and 'recommendations' in paragraph 4. He pointed out that in practice, and particularly for a small State, the difference between the political authority of a recommendation and the legal force of a decision might not be great."

We now pass to a later meeting. Nothing was settled there, and we pass to the ninth Meeting on 21st May, which you will find in Volume XII at page 65. We begin with the delegate of the United Kingdom discussing the Belgian amendment:

> "In opening the discussion, the delegate of the United Kingdom stated he thought the adoption of the Belgian amendment would be prejudicial to the success of the Organization. The amendment would, in his opinion, result in the decision by the International Court of Justice of political questions in addition to legal questions. The performance of this function by the Court, he felt, would seriously impair the success of its rôle as a judicial body. Further, the procedures proposed would cause delay, at a time when prompt action by the Security Council was most desirable.... Finally, he considered it necessary that the Council possess the trust and confidence of all States."

Then we have the delegate of Belgium again:

> "The delegate of Belgium requested a more precise answer to his previously posed question as to whether the term 'recommend' in Chapter VIII, Section A, entailed obligations for States, parties to a dispute, or whether it meant only that the Council was offering advice which might or might not be accepted."

If I may here break off from the reading and comment, the delegate of Belgium had begun by asking a question about paragraph 4 of Chapter VIII, Section A; that is to say, a question about Article 37 (2) of our existing Charter. He had never had an answer, and I submit that in the passage which I have just read he was repeating the same question. You will see, however, that his question, as recorded in the

Minutes, is now a wider one than it was before, because his question, as it appears in this passage of the Minutes, is whether the term "recommend" in Chapter VIII, Section A, entailed obligation, and so on, and the words "paragraph 4", which were in his original question, have been left out. Now, I think—and I shall give some further reasons in support later—that that is a point where the Minutes are probably not quite accurate, and in fact the Belgian delegate asked here the same question which he had asked before and to which he had never had an answer. I suggest that he was posing the question whether the term "recommend" in Chapter VIII, Section A, paragraph 4, entailed obligations—the same question that he had asked before.

It is after that question that we get the statement of the delegate of the United States on which my learned friend on the other side has placed great emphasis. He refers to it as the "assurance". Now, this is what the delegate of the United States said:

> "The delegate of the United States expressed agreement with the views of the delegate of the United Kingdom."

You know what those views were. The delegate of the United Kingdom thought that the Belgian proposal that a State should have the right to ask for an advisory opinion would involve the Court in deciding a number of political questions, and that it would also involve delay. When the delegate of the United States expressed agreement with the views of the delegate of the United Kingdom, he was expressing agreement with those two things. He then went on to say:

> ".... and said he had intended to make it clear that in Section A no compulsion or enforcement was envisaged".

I submit that the delegate of the United States was answering the question which the delegate of Belgium had raised. The question which the delegate of B lgium had raised related to paragraph 4 of Chapter VIII, Section A, or in other words to Article 37 (2) of our existing Charter. The delegate of Belgium had raised a question with regard to the compulsory nature of terms of settlement, and even then he wanted only a judicial opinion on the matter. The delegate of Belgium had never questioned at all and had never suggested that it was undesirable that decisions of the Security Council recommending methods of settlement should not be obligatory.

As I have said, I think that you must read the words of that assurance in their context, and not have regard only to the words of the Minutes which are the work of the Secretary of the Committee, and no doubt passed, with what care I do not know, by the delegates to whom they were sent. If we look at *travaux préparatoires* and try to interpret them, we are entitled to have some rules of interpretation even for them, so that the words in the Minutes must be interpreted in their context.

Then the delegate of the United States said this:

> "He noted that he had earlier expressed opposition to the second sentence of the Belgian amendment to paragraph 3, which concerned this point."

I have not been able to understand quite what that sentence means, but as far as I know it is not relevant. Then there follows the delegate of Belgium:

"The delegate of Belgium stated that since it now was clearly understood that a recommendation made by the Council under Section A of Chapter VIII did not possess obligatory effect, he wished to withdraw the Belgian amendment. The withdrawal was accepted by the Chairman."

Again you notice the very broad words "Section A of Chapter VIII", but again I submit to you that in the context that means paragraph 4 of Section A of Chapter VIII, which was the only thing which had been troubling the Belgian delegate. I think that the passage which I am now going to read will confirm that, because we have a little later a report by the rapporteur of Committee III/2 which was approved by the Committee on 16th June. That is found in Volume XII at page 162, and reads as follows:

"Article 6 corresponds to former paragraph 4 as amended by the proposal of the sponsoring governments adopted by the Committee."

"Article 6" is the number of some drafting committee's text.

"As the result of this amendment, the Security Council may, in the cases envisaged, recommend terms of settlement as well as procedures and methods of adjustment. In the course of discussion on an amendment offered by the delegation of Belgium, the delegates of the United Kingdom and the United States gave assurance that such a recommendation of the Security Council possessed no obligatory effect for the Parties."

It says "gave assurance that such a recommendation of the Security Council possessed no obligatory effect for the parties". I must read the previous sentence, to which that relates. It is: "As the result of this amendment, the Security Council may, in the cases envisaged, recommend terms of settlement as well as procedures and methods of adjustment." I think that on a point of grammar the words "such a recommendation" take us back to the words "recommend terms of settlement". There, I think, that report of the rapporteur brings back the assurance to its proper place again and makes it clear that in the passage above, which I read and criticized, the delegate of the United States was referring to the question which the delegate of Belgium had raised and which was always troubling him, that is, the power of the Council to recommend terms of settlement.

There is just one small further comment which I should like to make on the report of the rapporteur which has just been read. I do not think that it is of very great importance, but I think it as well that it should be made clear. In the report of the rapporteur, at the end, it says: "The delegates of the United Kingdom and the United States gave assurance that such a recommendation of the Security Council possessed no obligatory effect for the parties." As a matter of fact, it follows from the previous passages which I have read that that is wrong in this respect, that the delegate of the United Kingdom gave no such assurance at all. It was stated by the delegate of the United States—he began his statement in that way—that he agreed with the United Kingdom delegate on the two things that the United Kingdom delegate had said, which were that the Belgian proposal to require

an advisory opinion of the Court in those cases would possibly involve the Court in political questions and would involve delay. That is what the United Kingdom had said, and the United States agreed with that. As far as the Minutes show, the delegate of the United Kingdom had no part in that assurance which the delegate of the United States gave, and it looks as though the report of the rapporteur is slightly inaccurate on that point. I do not make much of that point, however, because no doubt the rapporteur's report was submitted to the Committee for correction, and the delegate of the United Kingdom either did not notice it or did not want to correct it; I do not know which.

I have hoped to show that those discussions in Committee III/2 give a basis for the distinction between recommending modes of settlement and recommending terms of settlement. I have hoped to show that that distinction runs right through those discussions, and that the assurance of the United States delegate really relates to recommendations as regards terms of settlement. If I have been successful in that, it can be said that these passages from the preparatory work, if they are admissible at all, are rather against our argument No. 1, but they do not conflict at all with our argument No. 2, which is the one which I am endeavouring to present to you now.

This distinction between the terms of settlement and the methods of settlement finds support also in the wording of Article 37 of the Charter. That article says that if the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate. The language there used emphasizes not only the element of action and decision inherent in the application of Article 36, but also the distinction between the terms and the methods of settlement. The provision might quite as well have been worded in this way: "The Security Council shall either take action by recommending modes of settlement or recommend terms of settlement." That is what it means.

We submit that situations may arise where the Security Council may make a recommendation under Chapter VI as to the method of settlement which, in view of the gravity of the situation and the possibility of the use of non-peaceful methods, it may desire to make binding, and that if such a situation arises and the Security Council judges it necessary, in the interests of international peace, to make such a recommendation, that recommendation is binding.

That it was the intention of the Security Council to make a binding recommendation in the present case appears, we think, both from the terms of the recommendation which it made and from the speeches of the members of the Security Council themselves, both in April and in July. Sir Hartley Shawcross read those passages to you, and I merely wish to recall them to your attention. In circumstances such as those which gave rise to the present dispute, there is every reason why a recommendation of the Security Council referring to the method of settlement should be binding.

The dispute arose out of circumstances in which an outrage was committed in time of peace resulting in the deaths of many innocent men, an outrage which, rightly or wrongly, we have characterized before the Security Council as a crime against humanity. The circum-

stances were every bit as grave as those which, in the past, have led States to instantaneous measures of self-redress, and the Security Council recognized the exceptional gravity of the case brought before it by adopting a valid recommendation without any dissenting vote. The peremptory terms of the recommendation of the Council which instructed the Parties immediately to submit the dispute to the Court testified to the urgency and seriousness of this matter. We do not hold that it is contrary to the general scheme of the Charter to admit the binding force of recommendations made by the Security Council under Chapter VI with regard to methods of settlement. It is not contrary, we say, to admit the power of the Security Council to bring about a judicial pronouncement in a matter of disputed issues even against the will of one of the parties to the dispute. On the contrary, you find in Article 96 of the Charter that there is such a power vested in both the Security Council and in the General Assembly, and this is an advance which the Charter in this respect marks on the Covenant of the League of Nations. Under Article 96 of the Charter, either of these organs may bring about a judicial clarification of the disputed issues even against the will of one or both parties to the dispute, since either of these organs may request the International Court to give an advisory opinion on any legal question. No unanimity is required for the request. It may be made regardless of the opposing vote of a party to the dispute, even if that party is a permanent member of the Security Council.

Therefore, I may conclude my contentions for our argument number two as follows: (1) recommendations of the Security Council under Article 36 of the Charter bearing upon methods and procedures to be adopted by the parties may be binding upon them by virtue of Article 25; (2) this applies in particular to recommendations and disputes constituting a menace to international peace and security; (3) a critical interpretation of the Charter leads to the conclusion that the binding force and decision under Article 25 of the Charter embraces at least some of the recommendations under Chapter VI of the Charter.

Well, Mr. President, that concludes my argument on our second point. With your permission I shall now interpolate something which I should have said before. I should logically have said it when I was talking about the use of preparatory work and its admissibility. I wish to refer the Court to an order which the Permanent Court made in the case concerning the International Commission of the River Oder. This Order will be found in Series A., No. 23, at page 41, and the whole content of the matter is clear from reading four short paragraphs of the Order itself.

The Oder case was between six Governments on the one hand and Poland on the other, and this is what the Order says:

> "Whereas, in their Counter-Memorial, the Six Governments request the Court to rule that the passages of the Polish Memorial containing references to the records of the preparatory work of the Treaty of Versailles and quotations from these records are to be disregarded; as, in their oral observations, they have asked the Court to rule that no attention is to be paid to these passages or to certain passages in the Polish Counter-Memorial;
>
> Whereas, in his oral observations and submissions, the Agent for the Polish Government has stated that he defers to 'the wishes

of the Six Governments to the effect that no account shall be taken of the passages in question' and that he 'does not insist upon' making use of these passages in his defence, adding however that 'the Polish Government reserves the right in the argument on the merits to avail itself of references to or citations from' the aforesaid preparatory work 'in so far as it has already been made public'."

I wish to emphasize that the Polish Agent was still wishing to reserve the right to make use of these passages from the preparatory work of the Paris Conference in so far as they had been made public. I now go on to the next paragraph of the Court Order, which states as follows :

"Whereas three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the Treaty of Versailles ; as, accordingly, the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty ; as this consideration applies with equal force in regard to the passages previously published from this record and to the passages which have been reproduced for the first time in the written documents relating to the present case."

In that recital the Court is saying that it does not make any difference whether the records have been published or not. It continues :

"Whereas, in any particular case, no account can be taken of evidence which is not admissible in respect of certain of the Parties to that case ; whereas, in the present case, the only preparatory work in question is that performed by the Commission on Ports",

and so forth.

In that Order the Court ruled that the preparatory work of a conference, whether published or not published, would never be admissible against any party to the instrument that had not participated in the conference which drew it up. Therefore, on the principle of that Order the Minutes of San Francisco are not available against a great many Members of the United Nations. There are a great number of Members of the United Nations now who did not participate in San Francisco at all. According to that Order, those Minutes of San Francisco cannot be used against them at all. Could it be said that the conclusion which the Court reaches on the interpretation of the Charter —a conclusion which is going to be authoritative for all Members—is to differ by the mere accident as to whether one or both of the parties before the Court at the time happened to have been represented at San Francisco or not ? Is the interpretation which you are going to put upon the Charter to differ according to whether, for instance, Sweden is a party to the case or whether it is the United Kingdom ? I submit that, the Charter being what it is and binding all Members of the United Nations equally, if those records of San Francisco are not evidence against some parties, they can now not be evidence against anybody, and therefore, on that ground, they must be excluded altogether.

That is a further support to the view which was expressed very well in an article in the *American Journal of International Law* by Professor Quincy Wright, to which the Attorney-General made some

reference in his arguments. You will remember that Professor Quincy Wright is saying that it is doubtful, indeed undesirable, to make use of the preparatory work to interpret an instrument which is in the nature of a general statute. I will read another passage from Professor Quincy Wright, which is different from that which the Attorney-General read. It is once more in the *American Journal of International Law*, Volume 23, and the passage which I am quoting comes at the top of page 101. This is what he says:

"The general and permanent objects aimed at by law-making treaties, the complicated procedure by which they are made, and the internal law effect often attributed to them, all suggest an analogy to statutes, and the propriety of resort to interpretative materials which all States can be presumed to have accepted in advance, which will assure uniformity of application and which will permit of adaptation to changing conditions. Reliance on preparatory work or national rules of interpretation would probably result in applications contrary to the intent of some of the parties, would certainly interfere with the generality, uniformity and permanence of the instrument's applicability, and would militate against effective administration of the instrument by courts and officials in the various countries."

This article was written in 1929, but in those sentences is embodied the argument which I have just been putting to you and supported by the great authority of the Oder case, which, incidentally, Professor Quincy Wright could not have had before him when he wrote that article. He says that when you are interpreting a statement, you must only make use of materials which all States can be presumed to have accepted in advance. You must only make use of material which will assure uniformity of application, and that is exactly my argument.

The San Francisco records are not admissible at all against many Members of the United Nations. If you admit them, you are basing yourself on materials which not all States can be presumed to have accepted in advance. You are basing yourself on material which will not assure uniformity of application.

That, Mr. President, is a further argument which I wish to make on the preparatory work.

[*Public sitting of March 2nd, 1948, afternoon.*]

May it please the Court. I now wish to turn to our third argument. Under this argument we submit that the Court, as a judicial organ of the United Nations, is validly invested with jurisdiction in conformity with Article 36 of the Statute, once either party to a dispute before the Security Council has acted upon a recommendation of the Council, made under Article 36 of the Charter, to refer the dispute to the Court. Any such recommendation, even if not directly binding upon the parties, has definite legal effects. It is, I submit, rather like an Optional Clause signature, by both parties to a dispute of which either party can avail itself, or alternatively, and perhaps better, it is as if the Security Council resolution had the same power as a special agreement between the parties. Apart from Article 92 of the Charter, which makes your Court the principal

judicial organ of the United Nations, a provision which in itself has some weight in this connexion, our case in this third argument rests upon the words "all matters specially provided for in the Charter" in Article 36 (1) of the Statute, and on Article 36 of the Charter, and in particular paragraph 3. Our opponents invite you to hold that this addition to Article 36 of the Statute had no effect at all, but this ignores the fundamental principle of interpretation *ut res magis valeat.*

I have already cited to you a number of cases of the Permanent Court where this principle has been laid down as the fundamental principle of interpretation, and where the Permanent Court has given very wide effect to this principle. I mentioned amongst others the Chorzów Factory case and the Iraq frontier case. In the Iraq frontier case the Permanent Court insisted on the Council of the League being able to act effectively to settle the dispute. The Security Council under the Charter would not be a very effective body to settle a dispute if these resolutions directing modes of settlement were not binding, and if even a recommendation that the parties should go to the Court produced no legal effect.

In my second argument I made a distinction between methods of settlement on the one hand and terms of settlement on the other. In the Iraq frontier case the Council of the League of Nations had, as the Court held, power to prescribe the settlement. This, however, I submit is not in any way contrary to the distinction which I have made between modes of settlement and terms of settlement, because if you look at what the Council of the League had to do in the Iraq frontier case, you will find that it is a question of drawing a completely new frontier between territories, both of which before the first World War were part of one empire, namely the Ottoman Empire. Therefore, it was an essentially political act and not a thing, I imagine, which a Court could very well be asked to do.

Well, the Court in the Iraq frontier case adopted a conclusion based on the principle *ut res magis valeat,* and I submit that in this case you cannot adopt a conclusion which gives no effect to these new words in your Statute unless there is no other course open to you. But there is another course open to you, namely, any one of the three alternative courses which we have submitted to you. My present argument, that is our third point, leaves Article 25 of the Charter aside and proceeds as follows. You have in Article 36 (1) of the Statute certain words referring to the Charter, you then look at the Charter and you find one provision and one provision only, that is to say, Article 36, paragraph 3, which is relevant; and having found it you can then give a perfectly reasonable interpretation to your Statute by regarding a resolution of the Security Council under Article 36 (3) of the Charter as giving the Court jurisdiction in the same manner as if the parties had signed a special agreement referring to the Court the dispute which was before the Security Council.

On what ground do our opponents ask you to refrain from adopting this interpretation which I submit is clearly indicated by all the rules with regard to the interpretation of treaties? They ask you to do so on a passage in the Minutes of the San Francisco Conference, and I would, therefore, subject of course to all our reservations about preparatory work, refer you to this passage. It is a statement by a rapporteur of Committee III/2/B at its 12th Meeting on June 14th,

and it appears in Volume 12 of the San Francisco Records, at page 108. Perhaps I had better lead up to it by beginning just a little earlier and calling attention to the Minutes of the 11th Meeting on May 29th, which you find in the same volume on page 97. There you will find the following:

> "The delegate of the United States presented the following motion:
>
> 1. That the Committee approve in principle the insertion in Chapter VIII, Section A, of language specifically authorizing the Security Council to recommend to the parties reference of justiciable disputes to the International Court of Justice."

Then lower down you find:

> "*Decision:* on a motion by the delegate of Bolivia, the Committee, by a vote of 23 to 0, voted to suspend consideration of the motion of the delegate of the United States, and of the first sentence of paragraph 6, Section A, Chapter VIII, until Committee IV/1 had reached a decision on the question of obligatory jurisdiction."

That is followed by the delegate of the United States stating that, in his opinion, it was possible to adopt the motion without in any way prejudicing the settlement of the problem of compulsory jurisdiction.

Then the story is taken up at the 12th Meeting on June 14th, at page 108, and here you find the following passage. It begins "Article 5", which is a little puzzling. It is a drafting committee number and it was equivalent to what was paragraph 6 of Chapter VIII A, and to what is 36 (3) in the present Charter. It states:

> "The rapporteur of Committee III/21 B emphasized that this article definitely did not involve the principle of compulsory jurisdiction, nor did it permit the Council to refer any justiciable dispute to the Court. The Council itself had no such right under this article. The Council merely was reminded that, as a general rule, justiciable disputes should normally be referred to the Court. The Council was not authorized to insist that the parties to such a dispute must refer it to the Court. This provision was entirely compatible with Article 36 of the Statute of the Court as adopted in Committee IV/1."

Now let me frankly admit that the sentence "The Council was not authorized to insist that the parties to such a dispute must refer it to the Court", coupled with the words that it "did not involve the principle of compulsory jurisdiction", states a view which is opposed to that for which I am now contending; but at a meeting of another Committee, that is, Committee IV/1 of the main Conference on June 6th, which we find at page 283 of Volume 13 of the Minutes, you find exactly the opposite conclusion. Here I want to read from Committee IV/1, which commences "Article 36 of the Statute", and continues:

> "The Committee considered the proposals submitted by the delegations of Iran and France. The French delegate proposed that the words 'in the Charter of the United Nations or' be deleted in paragraph (1) of Article 36, since the Charter did not appear to confer jurisdiction in any case. However, another view was

expressed that paragraph 6 of Chapter VIII A of the Charter related to compulsory references of cases to the Court by the Security Council. It was therefore agreed that there should be no deletion.'"

There is Committee IV/1, the Committee which was charged with the drawing up of your Statute: and because of the view expressed that paragraph 6 of Chapter VIII A—and that means the existing Article 36 (3)—related to compulsory reference of cases to the Court by the Security Council, the proposal of the French delegate that those words should be struck out of your Statute, was rejected. Therefore, those words were only left in because of the view that there was in Article 36 (3) a possibility of compulsory reference of cases to the Court by the Security Council. It is true that the rapporteur of Committee III/2—and I now go back to the other passage which I was reading to you—ends up as follows:

"This provision was entirely compatible with Article 36 of the Statute of the Court as adopted in Committee IV/1." (Vol. 12, p. 108.)

I have tried very hard to understand what he meant. First of all, what does he mean by "this provision"? The provision he is talking about is what is now 36 (3), so the sentence is that 36 (3) "is entirely compatible with Article 36 of the Statute of the Court as adopted in Committee IV/1".

If you take that sentence as it stands, he would appear to be agreeing with Committee IV, because, of course, those two things are consistent. But what about the words in your Statute referring to the Charter of the United Nations, if 36 (3) only had the effect which the rapporteur said? In the earlier part of this report he has been expressing a view that they did not cover the compulsory sending of cases by the Security Council to the Court. At any rate the rapporteur of Committee III/2 does not help at all to explain how those words should be left in your Statute if 36/3 does not mean what Committee IV/1 said it meant. He leaves that entirely in the air.

The view of Committee IV/1 is just as much in favour of my argument as the view of Committee II B is in favour of the argument of my opponents, so we have here the conflicting views of two different committees, both expressed at a late stage of the San Francisco Conference, and it is on the basis of such a conflict of preparatory work that you are asked by our opponents to say that some words in your Statute which were deliberately left in after all the discussions, and which were themselves one of the few innovations as compared with the Statute of the previous Court, have no meaning at all. As the Court knows, we in the United Kingdom are not greatly in favour of the use of preparatory work for the purposes of interpreting instruments; but I admit that there is perfectly good authority for using preparatory work in a case where the treaty to be interpreted contains two provisions which appear to conflict, and there is no other source of interpretation by which the conflict can be resolved.

What is the position here? Here our opponents ask you on the basis of preparatory work, which is itself contradictory, to interpret provisions of the Charter and the Statute in which there is no conflict

at all and the meaning of which is otherwise clear, and then to adopt an interpretation which is directly contrary to the rule *ut res magis valeat*, and to make a dead letter of certain words in your Statute. I humbly submit that that is an absolute reversal of all rules of interpretation.

My learned friend Professor Vochoč spent a great deal of his oral argument in demonstrating that the words "the parties", at the beginning of Article 36 (1) in the Statute, mean both parties. He established this by going back to the preparatory work in 1919 of the Statute of the Permanent Court, and he talked about meetings of the First General Assembly of the League of Nations and earlier meetings of the judges of the Permanent Court. May I admit at once that I think he has fully established that point ; but it was one which I, at any rate, would not have required such research to make me accept it. He then pointed out that you find the same words "the parties" in Article 36 (3) of the Charter, and he again says "the parties" must here have the same meaning as in Article 36 (1) of the Charter, and therefore it means "both parties". May I say again that I agree with him there. It is part of our case that the Resolution of the Security Council required both the United Kingdom and Albania to refer this case to the Court.

But, of course, Professor Vochoč is trying to establish something more. He is trying to read the Resolution of April as if it contained the word "jointly". He was trying to establish that the words "by the parties in accordance with the Statute of the Court" meant that they must conclude a special agreement. Here, of course, we do not agree, and we have two answers. First, there is nothing in the Statute of the Court which requires special agreement in such a case, and our argument is that the Resolution of the Security Council takes the place of a special agreement. Further, I think we have demonstrated that under your Statute and the Rules of the Court it is possible in such a case to start proceedings before this Court by written application. I shall not argue that further ; amongst other things the Attorney-General referred to a sentence in the Court's *Yearbook*.

In this connexion Professor Vochoč referred to another little bit of preparatory work which I shall also quote. It is the 14th Meeting of Committee III/2 on June 15th, and it comes at page 137 of Volume XII. This is the passage :

> "The Secretary, after reading the article"—"the article" means for present purposes Article 36 (3) of the Charter—"noted that the sub-committee, on the motion of the delegate of Norway, had added the words 'by the parties' after the word 'referred'."

Then, after a short omission, we have the following :

> "The sub-committee had accepted the addition of the words 'by the parties' in order to make it perfectly clear that the Security Council had no right or duty to refer justiciable disputes to the International Court of Justice."

Then comes the decision :

> "The Committee, by a vote of 22 to 2, adopted Article 5"—as it was then called—"with no change other than the addition of the words 'by the parties' after the word 'referred'."

Now, what I understand the view of the sub-committee to be in this passage is this, that the Security Council cannot itself seize the Court in a contentious case. It cannot proceed as it can when it is a question of an advisory opinion, seizing the Court simply by its own resolution; in order that the Court should be seized in a contentious case, it is necessary that the Security Council's resolution should be acted upon by one of the parties, and that is not merely consistent with, but in fact is, the argument which I am putting before you now.

To sum up our position on this part of our case, I say that my present submission in the first place is fully consistent with the views of the Permanent Court about *ut res magis valeat*. In fact, in a substantial sense the submission which I am making to you about Article 36 (3) of the Charter and Article 36 (1) of your Statute does not go so far as some of the decisions of the Permanent Court in which it held itself entitled to give an extensive interpretation of the clauses of the treaty in order to render effective the purposes of the treaty as a whole, as distinguished from the words actually used.

Therefore, just to sum up my argument finally on this part of the case, it is as follows:

(*a*) The recommendation of the Security Council of the 9th April 1947 was a valid recommendation under Article 36 of the Charter.

(*b*) That recommendation established a basis for the jurisdiction of the Court under Article 36 (1) of the Statute, on the ground that this is a matter specially provided for in the Charter of the United Nations by Article 36 (3), and that under Article 92 of the Charter the Court is the judicial organ of the United Nations.

(*c*) This resolution takes the place of a special agreement between the parties, and it is sufficient if the case is brought before the Court in one of the ways in which cases can be brought before the Court under Article 40 of the Statute.

(*d*) The Government of the United Kingdom, by acting on the recommendation of the Security Council, did validly establish the jurisdiction of the Court over the present dispute.

I have nearly finished. When the translator has translated this portion of my address to you, my address will be concluded. I wish before I finish to refer you to yet one more passage of the Minutes of San Francisco. I do so because it is here that the meaning of the word "recommendation" is principally discussed. If the Court finds that nevertheless it does not get very much guidance from that passage, I would only say that it is not part of our case that the *travaux préparatoires* of San Francisco are very helpful for the purposes of the interpretation of the Charter; but I do not wish to neglect this passage, and we do not wish it to be thought that there is anything in the *travaux préparatoires* of which we are afraid. The passage which I wish to refer you to now comes from the meeting of Committee III/3, the 8th Meeting, held on May 16th, Volume XII, at page 334. At that meeting, you will find the following:

> "The delegate from Norway asked for an explanation of the meaning of the words .... 'make recommendations or decide upon the measures necessary' in paragraph 1 of Section B, Chapter VIII."

Section B, Chapter VIII, is what is now Chapter VII. The actual paragraph 1 is no longer in the Charter.

"His first impression was that the measures to which reference was made were measures to be taken only by the parties to the dispute. He asked if the Security Council's recommendations automatically implied sanctions. He suggested that, whenever the Council take action whereby the use of force was not intended, the Council should specifically refer to its recommendation as friendly advice.

The delegate from Belgium thought that the word 'recommendations' should be either deleted from paragraph 2"—paragraph 2 is the present Article 39—"or that a more suitable word be substituted. The Chairman proposed a small sub-committee."

We shall find throughout these meetings the delegate of Belgium worrying out what is the meaning of the word "recommendations". Then it was referred to a little sub-committee consisting of the delegates of Belgium, Greece and the United Kingdom, and then we get the next meeting, which is the 13th, held on 25th May. It is at page 372, and it begins:

"The Norwegian delegate reiterated his previous objections to the wording of paragraph 2 of Section B, Chapter VIII."

That is the present Article 39. You will remember that what he wanted was that whenever the Security Council recommended something which did not require the use of force, it should describe it as "friendly advice".

"The Belgian delegate .... asked the rapporteur to consider the difficulties in interpretation raised by the use of the word 'recommendations' in both Section A and paragraph 2 of Section B."

The rest of what the delegate of Belgium says is not relevant to this point.

"The Czechoslovakian delegate pointed out the confusion in terminology throughout the Dumbarton Oaks Proposals in which there are so many different wordings of the varying degrees of aggression. He asked, too, that the wording of 'recommendations' in paragraph 2 of Section B, Chapter VIII, be clarified so that it would be clearly understood whether or not it referred only to 'amicable' recommendations."

Then the matter comes up again at the next meeting, the 14th, and that is at page 380 of the volume. We have an item headed "Discussion of enforcement powers of Security Council, Chapter VIII, Section B", and it reads:

"In response to questions, the following clarifications were made of the change....

2. The word 'recommendations', as it appeared in paragraphs 1 and 2 of the motion, carried a different meaning from the word as used in Chapter VIII, Section A."

That is saying that "recommendation" means one thing in Chapter VI and another thing in Chapter VII. A little later on we find this:

"The delegate from Belgium withdrew the text for his sub-committee in favour of the Chinese motion, with these two provisions:

(1) that any recommendation made under Section B should conform with the definition of 'recommendations' as used in Section A...."

That is just the opposite; the meaning of "recommendations" in Chapters VI and VII is to be exactly the same. The rest of the Chinese motion is not relevant to this.

The Chinese motion was adopted, and then we have the report of the rapporteur of Committee III/3 on what is now Chapter VII, and that comes at page 507 of Volume XII. Some of that is, I think, relevant. I will begin reading at the beginning:

"The new paragraph 1 which reproduces in effect the provisions of the former paragraph 2 of the Dumbarton Oaks Proposals leaves to the Security Council the task of determining the existence of any threat to the peace, breach of the peace, or act of aggression. According to the circumstances, the Security Council should make recommendations and decide upon the enforcement measures to be taken as set forth in this Chapter."

Then we come to this:

"It would nevertheless be contrary to the opinion generally expressed within the Committee to imagine that the very great latitude thus left to the Council should retard its action or diminish its effectiveness. This is what Senator Rolin, the Belgian representative, desired to emphasize by withdrawing in the name of the drafting sub-committee the draft proposed by that sub-committee."

I have read to you the draft which he withdrew; I did so just now.

"Therefore, according to his request, it was decided that the new text should be interpreted in accordance with the scope of the following observations, the inclusion of which in the report was unanimously approved by the Committee.

(1) In using the word 'recommendations' in Section B, as already found in paragraph 5, Section A, the Committee has intended to show that the action of the Council so far as it relates to the peaceful settlement of a dispute or to situations giving rise to a threat of war, a breach of the peace, or aggression, should be considered as governed by the provisions contained in Section A."

As I understand that, the Committee came down in favour of the view that a recommendation in Chapter VII and a recommendation in Chapter VI have the same force. We have got established from that passage which I have read that the recommendations in the two chapters have the same force, but we are not very much further on the Minutes in answering the delegates of Belgium and Norway, because I cannot find anything in the Minutes which expressly says what force they have.

To resume our views on all this question of preparatory work, first of all you have my point based on the Oder case. The preparatory work is excluded altogether, because there are many Members of the United Nations who were not at San Francisco, and it does not matter from that point of view whether the minutes are published or not.

Secondly, you have my point that preparatory work must not be used in the interpretation of the treaty where the meaning of the text can be clearly ascertained by applying other rules, that is to say on the natural meaning of the words used in their context, and from the rule *ut res magis valeat*.

Now, Mr. President, we say that the text of the Charter, if you read it by itself, is clear and harmonious. We take leave to doubt that if the text stood alone there would really be any hesitation about its interpretation, except perhaps an initial hesitation which arises from the mere use of the word "recommendations" in Chapter VI and "decisions" in Article 25, but that hesitation is quickly resolved when you read Article 25 in its context and see, and you soon do see, that the Charter uses the words "recommendation" and "decision" almost interchangeably. I do not want to repeat the argument, but you remember Article 18 (3) and Article 27 (3).

In spite of that, you are asked on the basis of the preparatory work to put a construction on the Charter which is different from what the words naturally mean, and is completely contrary to the rule *ut res magis valeat*, because it reduces to ineffectiveness one provision of your Statute and Article 25 of the Charter.

I come to my third point. Leaving all these purely legal arguments aside, are the records of the San Francisco Conference very good records to assist you in the interpretation of the Charter? Do they appear, from what you have heard of them now, to be records that are going to solve your difficulties, or will it not be the case that they will raise far more points and doubts than they will be able to solve? However, supposing you wish to refer to them, what is the effect of those records on the present case? I will take them in four parts.

We have first those Minutes which are set out by our opponents in their Annex 8. Those Minutes were dealt with by the Attorney-General, and I submit that he showed you that those Minutes were altogether in our favour. You remember the point. The Belgians proposed to add at the end of Article 25 further words which meant that decisions of the Security Council were binding if they were taken in accordance with Chapter VI or Chapter VII. My learned friend, Professor Vochoč, in his argument, made a slight slip, because in part of his argument he had not seen that Chapter VIII of Dumbarton Oaks covered both Chapter VI and Chapter VII of the Charter. The Belgian amendment to add in Article 25 "taken under Chapters VI and VII" was rejected, but it was rejected because it was too narrow, not because it was too wide. That is one passage of the Minutes which we think is totally in our favour.

Then there is the second group of Minutes, and that is the first group with which I dealt this morning, in connexion with the second argument of the United Kingdom on this part of the case. So far as those Minutes are concerned, while admitting that their general tendency is against our argument No. 1, I say that it is in no way in conflict with our arguments Nos. 2 or 3.

The third part consists of those two passages relating to what is now Article 36 (3) of the Charter, and Article 36 (1) of your Statute. There, as you know, there are two different Minutes, completely contradictory, and as far as I can see they completely cancel out.

Lastly, there are the Minutes which I have just read to you in order to see what light they threw on the meaning of the word "recommendation". All that I think that we got out of that was that "recommendation" has the same meaning in Chapter VI and in Chapter VII. As far as that goes that is in our favour too, because if you do not hold that Article 25 covers any recommendations, you are weakening Chapter VII as well as Chapter VI.

I have endeavoured to show that the Minutes of San Francisco are at least as much in our favour, if not more, as they are in favour of the arguments of our opponents. Why, therefore, do we make so much fuss about them? Well, if the Court will look at the jurisprudence of the old Court and the cases before the old Court, it will find, I think, that the United Kingdom has taken with regard to preparatory work an absolutely consistent attitude in, I think I am right in saying, every case which we have been in. We have always been against the use of preparatory work by the Court for the interpretation of treaties. We have taken that line in cases where, by the opinion or judgment of the Court, the preparatory work was entirely in our favour. Why did we do that? I think that there are two main reasons.

First of all, possibly we are influenced by our own national practice as regards our own legislation, where, as I expect the Court knows, you may never refer to debates in Parliament and to statements by Ministers to interpret an Act of Parliament. The Acts of Parliament have to be interpreted in accordance with their own language, and all the rest is excluded. Perhaps we are partially influenced by that because we have found that to be a satisfactory practice with regard to the interpretation of Acts of Parliament.

I think, however, that we have another reason, and that is our experience as delegates and as participators in international conferences, and the manner in which at such conferences the minutes are drawn up and dealt with. I am now referring to a matter which is within the experience of members of the Court as much or more than it is within my own. The first thing about international conferences as a rule—and it certainly applied to San Francisco, so I am told—is the extraordinary pressure of work and the pressure on the time of the people attending the conference. In those circumstances, a secretary of a committee draws up a sort of résumé minutes, trying to get the main points of the discussion. Of course, these San Francisco Minutes are not full minutes of everything that was said; they are the efforts of the secretary to resume the main points of the discussion. That, of course, is a frightfully difficult thing to do.

However, he does it, and they are presented for some form of approval. You do get a chance as a rule of objecting to the minutes and getting them corrected if you do not think that they are accurate, but in practice it is by no means always the case that delegates and delegations find the time to give this summary record of discussions in a committee the attention which they would give to it if they thought that these summary records afterwards were going to be of vital importance for the interpretation of the ultimate text. I think that it will be the experience of nearly all of us that the minutes seldom get that amount of attention. And what a difficult thing it is to make a summary record!

One may illustrate that rather graphically by showing what happens sometimes to minutes which are simply a stenographic record of what the speaker said. How often does it occur then that the word "not", or some other word, is left out, making the sense of what the speaker said completely different from what he in fact did say, and how easy it is if you do not read the record which is sent to you with extreme care to miss the fact that "not" is left out. How easy it is, therefore, to leave for eternity a record of your having said something completely opposite to that which you did say.

That concludes my address to the Court, and I respectfully thank the Court for its attention.

## 5. — RÉPLIQUE DE M. KAHREMAN YLLI

(AGENT DU GOUVERNEMENT ALBANAIS)

A LA SÉANCE PUBLIQUE DU 5 MARS 1948, MATIN

Monsieur le Président, Messieurs de la Cour,

Après avoir entendu l'exposé qui a été fait par l'autre Partie, je tiens à vous remercier de me donner l'occasion de prendre de nouveau la parole pour tirer les conclusions de notre thèse, notamment en ce qui concerne l'exception préliminaire, et pour développer un peu plus longuement certaines idées que nous croyons utiles. M. le professeur Vochoč, conseil du Gouvernement albanais, désire faire l'analyse nécessaire, mais pour ma part, je ferai quelques remarques générales pour préciser en même temps l'attitude de mon Gouvernement. Je n'ai pas l'intention de parler longuement, étant donné le caractère de la réplique tel qu'il a été défini par M. le Président lors de la dernière séance, et je ne mentionnerai ces quelques points que brièvement.

Dans mon premier discours, ainsi que dans toute notre plaidoirie, nous avons présenté à la Cour la thèse de la nécessité d'un compromis parce que, comme nous l'avons dit, le compromis est le seul instrument valable pour saisir la Cour dans le cas présent.

M. le représentant britannique, au début de son exposé, a exprimé l'idée qu'il était prêt, pour sa part, à accepter le compromis. C'était un symptôme favorable que l'autre Partie considère comme utile l'établissement de ce compromis, c'est-à-dire d'un accord qui tiendrait compte de nos droits et de nos intérêts.

Réaliser techniquement le compromis, c'était s'assurer le temps nécessaire à cette réalisation pour que les Parties puissent négocier. Nous nous inspirons des meilleures intentions possibles, et il serait peut-être superflu de ma part de répéter encore une fois devant la Cour combien désireux est le Gouvernement albanais de se conformer aux recommandations du Conseil de Sécurité.

Dans ces conditions, il nous aurait même paru logique de proposer d'un commun accord à la Cour de bien vouloir clore le débat, puisque la discussion sur la requête et l'exception n'aurait plus été nécessaire.

Toutefois, pour ne pas laisser subsister le moindre malentendu sur un point quelconque, en prenant contact avec l'autre Partie, nous avons proposé de nous mettre d'accord pour demander à la Cour de bien vouloir renvoyer les débats à un mois, délai nécessaire pour que les négociations arrivent à un compromis sur la définition du différend et en notifier ensuite à la Cour le résultat.

C'était là une proposition raisonnable. En effet, il s'agit ici d'une affaire entre États, et, en dépit des meilleures intentions, il est impossible d'établir un compromis uniquement par des conversations téléphoniques. De notre côté, nous ferions tout ce qui est en notre pouvoir pour arriver à un accord, et de cette façon les questions qui se débattent ici auraient pris fin. Malheureusement, je dois regretter que l'autre Partie n'ait pas été disposée à donner suite à notre proposition. C'est pourquoi en attendant nous sommes bien obligés de continuer les débats.

En effet, de nombreux points ont été touchés par l'autre Partie, qui n'a pas manqué, tout en développant le point de vue juridique, d'examiner aussi l'attitude du Gouvernement albanais à l'égard de la recommandation du Conseil de Sécurité et les motifs qui ont poussé l'Albanie à répondre à la Cour le 2 juillet ainsi qu'à déposer une exception préliminaire plus tard. Peut-être ces remarques politiques étaient-elles nécessaires pour combler un vide dans la thèse britannique en général et pour soutenir la requête en particulier.

En ce qui concerne la requête, comme nous l'avons déclaré dans notre premier plaidoyer, nous maintenons et nous affirmons avec force que cette requête est inadmissible et non valable. C'est un procédé qui confirme l'attitude constante du Gouvernement britannique en vue de forcer l'Albanie à se soumettre à sa façon de voir, et quand nous répondons, on prétend même nous refuser les arguments que nous désirons faire valoir devant la Cour.

Le Gouvernement britannique s'est lancé dans une voie qui aboutit et qui doit aboutir dans une impasse, à notre avis ; il a lancé une requête en prétendant la fonder sur trois articles de la Charte en nous citant ainsi directement devant la Cour et quand, de plein droit, nous soulevons maintenant une exception contre cette requête irrégulière, on nous déclare tout simplement qu'une pareille analyse n'a guère d'importance, que c'est une discussion académique inutile et qu'il n'est donc nul besoin d'en parler.

M. le conseil du Gouvernement britannique a même déclaré que plus il écoutait notre plaidoyer, plus il était étonné de la longueur du débat. Le Gouvernement britannique n'a certainement pas pensé ainsi le 13 mai dernier, quand il présentait sa requête en prétendant précisément la fonder sur les dispositions de la Charte que nous avons dû analyser devant la Cour.

D'un côté donc, on prétend soutenir une thèse basée sur la Charte, et de l'autre on s'étonne et on qualifie d'inutile de revenir à une analyse de ces dispositions. Un tel raisonnement nous paraît bien étrange, d'autant plus que l'exposé britannique, dans sa plus grande partie, a été consacré à cette même analyse. Il est évident que la responsabilité d'un tel débat — qui, nous ne le nions pas, a une très grande importance — incombe au Gouvernement britannique, qui, désirant étayer une requête, s'est référé à des dispositions qui ne correspondent nullement, à notre avis, à la réalité des choses. Pour notre part, nous étions obligés de relever cette interprétation erronée de la Charte des Nations Unies. Le désir du Gouvernement britannique de s'opposer dans tous les cas aux droits et aux points de vue de l'Albanie l'a engagé dans une voie qui va à l'encontre des principes auxquels il a souscrit. Il s'agit là d'une question de prestige : il fallait sauver le prestige de la requête, bien qu'on nous ait affirmé ne pas tenir compte du prestige dans cette affaire.

En parlant de la recommandation du Conseil de Sécurité qui, d'après le Gouvernement britannique, entraînerait force obligatoire, l'autre Partie a prêté au Conseil ses propres intentions, ses propres vues pour pouvoir se trouver ainsi en bonne compagnie, ainsi que l'a dit M. le conseil britannique ; mais le Conseil de Sécurité n'a pas donné une interprétation quelconque sur la résolution : si des opinions ont été exprimées dans un sens général, elles ne peuvent pas constituer un argument juridique dans le plan sur lequel nous discutons aujourd'hui le problème.

Les États sont libres de changer d'idées, d'attitude, mais l'interprétation authentique de la Charte est celle qui lui a été donnée au moment de son élaboration. Nous croyons exprimer le point de vue de la grande majorité des États qui ont participé à l'élaboration de la Charte en déclarant devant la Cour que les recommandations du Conseil de Sécurité n'ont nullement un caractère obligatoire, elles n'ont nullement force exécutoire. Maintenir la thèse contraire, c'est déformer délibérément le sens des buts et des principes de cette Charte. On sait que des recommandations ont été émises par le Conseil de Sécurité ou par l'Assemblée des Nations Unies ; c'est dans le sens de notre thèse que ces recommandations ont été faites. Mais quand il s'agit d'une recommandation, comme toutes les autres recommandations en général, qui se rapporte à l'Albanie, le Gouvernement britannique n'a attendu que quelques jours pour se mettre en action. En dépassant les limites et le caractère de cette recommandation, il a agi si vite qu'il a violé son sens et son contenu dans le but de créer dans le monde l'opinion que l'Albanie se trouve toujours impliquée dans des différends d'ordre international.

Dans le débat actuel, si habile et si intelligente que soit l'interprétation de la requête britannique, elle ne peut nous convaincre. M. le conseil du Gouvernement britannique se trompe si, pour trouver un appui, il se retranche derrière le Conseil de Sécurité : celui-ci n'a pas entendu dire quoi que ce soit en faveur de l'interprétation britannique. Nous croyons que la responsabilité d'une telle interprétation incombe uniquement au Gouvernement britannique, qui a entrepris là une tâche ingrate qu'il ne peut pas et ne doit pas réussir.

Quant à l'interprétation de l'article 25 et au caractère des recommandations du Conseil de Sécurité, nous maintenons le point de vue que nous avons exposé devant la Cour clairement et nettement, sans équivoque et sans ambiguïté. Agissant ainsi, nous sommes conscients de rester fidèles à la Charte des Nations Unies.

En écoutant l'exposé de l'autre Partie, on a vu que plusieurs hypothèses étaient exprimées pour valider la requête du 13 mai, donnant ainsi l'impression de chercher des appuis partout : d'abord au Conseil de Sécurité, qui aurait donné à la recommandation un caractère obligatoire, puis à l'interprétation de la Charte en général, et enfin par la lettre du 2 juillet qui, en cas de besoin, aurait validé la requête. Nous maintenons la thèse que ni l'un ni l'autre ne peut être invoqué à l'appui d'un acte irrégulier, sans effet juridique et nul. Nous avons d'ailleurs largement exposé notre point de vue à ce sujet.

Parlant des discussions du Conseil de Sécurité dans sa séance du 9 avril, M. le conseil britannique a cité également une déclaration du représentant de l'Albanie, M. Hysni Kapo, la considérant comme une « exclamation », provoquée par ce que les membres du Conseil avaient dit au sujet de la résolution que le Conseil de Sécurité devait prendre. Il n'y a rien ici d'une « exclamation ».

L'attitude de M. Hysni Kapo était conséquente de bout en bout : il défendait énergiquement son pays et demandait le rejet catégorique de toute requête où le nom de l'Albanie aurait été mentionné. Il avait d'ailleurs nettement déclaré, dès le début de son premier discours, que, dans cette affaire, le but du Gouvernement britannique était de « nier tous les droits incontestables de l'Albanie au sein des Nations

Unies, de l'isoler du monde extérieur en l'accusant de menacer la paix et la sécurité ».

Quand M. Kapo s'opposait à un vote affirmatif en faveur de la recommandation, il ne le faisait pas parce que l'Albanie serait de ce fait automatiquement forcée de paraître devant la Cour, mais bien parce que, en tant que représentant de son pays, il pensait que l'Albanie, conformément à sa politique, devrait adopter, bien que librement, une attitude positive à l'égard de la recommandation du Conseil, malgré son innocence.

Pour contredire notre thèse sur l'exception, on a eu recours en outre à certains documents qui n'ont rien à faire avec le cas présent. M. le conseil du Gouvernement britannique a fait des commentaires et a même lu certains documents *in extenso*. Je veux parler des procès-verbaux du Comité des Nouveaux Membres.

Toute la discussion qui a eu lieu au sein de ce Comité se rapportait à l'admission de l'Albanie dans l'Organisation des Nations Unies, et, naturellement, notre position était discutée. On a parlé de ce que l'Albanie avait fait de la recommandation du Conseil de Sécurité et on a même préparé un projet de lettre destinée à notre Gouvernement. Il n'y a aucun doute que le Gouvernement britannique n'était pas étranger à tout ce qu'on discutait. Le point soulevé n'était d'ailleurs qu'un prétexte inspiré par le Gouvernement britannique, qui s'est opposé systématiquement et constamment à notre admission à l'Organisation des Nations Unies. Cette attitude n'a d'ailleurs pas été prise à la suite du différend actuel, mais date de bien longtemps auparavant : il s'est opposé à notre admission depuis 1946. Il n'y avait pas, à ce moment, de différend, il y avait purement et simplement le ferme désir du Gouvernement britannique de ne pas voir l'Albanie entrer dans l'Organisation des Nations Unies.

Au sein du Comité, d'ailleurs, le point de savoir ce que l'Albanie avait fait de la recommandation du Conseil était un obstacle purement fictif : la suite des débats du Comité l'a démontré. La Cour a, d'ailleurs, devant les yeux les procès-verbaux de cette discussion : le 24 juillet, le Comité recevait le télégramme du Greffier de la Cour qui lui notifiait le dépôt de notre lettre. Dès qu'ils en prirent connaissance, certains membres du Comité, si désireux par ailleurs de voir l'Albanie appliquer la recommandation du Conseil, soulevèrent d'autres objections, parce qu'on trouve toujours quelque chose à dire, et le Gouvernement britannique n'est nullement étranger à cette attitude.

Une autre opinion a été émise au sein de ce Comité : puisque l'Albanie était impliquée dans un différend d'ordre international, elle n'était pas encore qualifiée pour être admise. Mais si tous les États impliqués dans un différend d'ordre international non encore tranché ne pouvaient pas faire partie de l'Organisation des Nations Unies, l'Angleterre ne devrait-elle pas, elle aussi, quitter l'Organisation des Nations Unies ? Dans une telle hypothèse, nombre d'États ne seraient pas Membres des Nations Unies, et on ne voit pas comment l'Organisation des Nations Unies pourrait survivre.

J'ai tenu à m'étendre un peu plus longuement sur ce sujet parce que le représentant britannique, en commentant les procès-verbaux, a lui-même donné une certaine importance à cette discussion. Il désirait, en effet, atteindre deux buts : d'une part il désirait trouver un argument dans le caractère obligatoire de la recommandation du Conseil de

Sécurité, et d'autre part faire une publicité à ce qu'on a dit et écrit sur l'Albanie au sein du Comité d'admission des Nouveaux Membres.

L'Albanie n'est pas Membre de l'Organisation des Nations Unies, mais, sans en faire partie, elle est fermement attachée à cette organisation. A la suite des discussions du Conseil de Sécurité, elle s'est trouvée, le 9 avril 1947, devant une recommandation qu'elle a acceptée et qu'elle désire suivre, conformément au sens et au contenu de cette recommandation.

Il a été dit aussi que, par notre réponse du 2 juillet, nous avons voulu donner l'impression de nous comporter régulièrement. Une telle insinuation aurait pu être omise dans l'exposé du représentant britannique, parce qu'elle ne correspond nullement à la réalité. Il a expliqué cela par ce qu'il a appelé l'arrière-plan politique de l'exception, mais il n'y a rien de semblable dans notre attitude et dans nos activités. S'il existe une arrière-pensée politique quelconque, c'est bien celle du Gouvernement britannique, pour lequel les petits pays doivent avoir moins de droits, plus de devoirs, et surtout une prédisposition à se soumettre à sa volonté. Si l'on n'agit pas selon ses désirs, on n'est plus un État convenable, on n'agit plus correctement. Mais nous avons la conscience tranquille, notre attitude et notre politique ne sont pas fonction de ce qui est agréable ou désagréable au Gouvernement britannique, nous agissons en fonction de nos droits et de nos devoirs, en conformité avec le but des Nations Unies, en vue de la paix et de l'entente entre les peuples.

Conformément à l'interprétation de la Charte et surtout au caractère juridique de la recommandation du Conseil de Sécurité, nous avions transmis la lettre du 2 juillet, et par la suite, afin de réaliser les réserves les plus expresses, nous avons déposé, dans le délai légal, notre exception.

Dans son exposé, le représentant britannique a repris ce qui avait été dit dans les Observations du 20 janvier au sujet du dépôt de notre exception en employant le terme d'abus de procédure. Or, nous avons agi ici conformément à la pratique de la Cour, conformément à nos droits réservés par la lettre du 2 juillet, et surtout au sens de l'article 62 du Règlement, qui prévoit la procédure à suivre dans ce cas, et c'est dans le délai légal que nous avons déposé l'exception. Il n'y a donc eu ni changement d'attitude ni abus de procédure : notre position a été claire dès le début, comme elle l'est encore aujourd'hui. Si le fait de déposer une exception dans le délai légal prévu dans l'article 62 du Règlement est considéré comme un abus de procédure, cet article n'aurait plus de sens, au moins pour le Gouvernement britannique. Mais ce qui inquiète ce Gouvernement, ce n'est pas le fait que nous ayons déposé une exception dans le délai légal, c'est le fait que nous l'ayons déposée. Le véritable abus de procédure dans tout ce procès, si abus il y a, c'est la requête britannique.

Dans la première déclaration devant la Cour, j'ai dit que notre position était la seule à adopter à la suite de la requête britannique. Le représentant britannique, parlant de notre lettre du 2 juillet, l'a considérée comme l'objet principal de son exposé, bien qu'il n'en ait pas parlé plus que nous. Nous avons déjà analysé cette lettre, nous avons déjà dit ce que nous entendions faire savoir par cette lettre, et nous l'avons interprétée comme il est de notre droit.

Je dis comme cela nous revient de droit, parce que cette lettre est un acte unilatéral d'un État souverain. Dans le cas où le sens de cette

lettre ne serait pas clair, les explications sur les points obscurs ne peuvent être exclusivement fournies que par le Gouvernement albanais, qui est le seul habilité à interpréter ses actes. Ce n'est donc pas le Gouvernement britannique qui peut fournir cette interprétation. La situation serait naturellement tout autre s'il s'agissait d'actes bilatéraux ou multilatéraux pour lesquels l'interprétation incombe aux parties.

Donc, pour ne pas laisser l'ombre d'un doute sur les intentions du Gouvernement albanais exprimées dans cette lettre, nous en ferons de nouveau l'analyse aujourd'hui.

Après le 13 mai, nous étions en présence d'une requête qui prétendait considérer comme établie la juridiction obligatoire de la Cour. Un État désireux de donner suite à la recommandation du Conseil de Sécurité devait bien réfléchir à l'attitude qu'il devait adopter. Le Gouvernement albanais était entièrement libre d'agir, mais il était profondément désireux d'agir dans le sens de la recommandation du Conseil. La requête était pour lui inattendue et constituait un fait accompli adressé à la Cour unilatéralement et arbitrairement. Nous avions la possibilité d'ignorer purement et simplement la requête, de ne pas répondre à la Cour, de ne pas nommer d'agent. Mais une telle attitude n'était pas compatible avec le but que nous poursuivions. C'eût été ignorer le Conseil de Sécurité, ignorer l'autorité de la Cour internationale de Justice: le Gouvernement n'a pas voulu le faire parce qu'il est fermement attaché à ces institutions.

Il y avait encore une autre voie: d'accepter la juridiction de la Cour purement et simplement et se soumettre à la procédure irrégulière introduite par la requête britannique. C'était accepter l'irrégularité qui nous était imposée sans faire valoir devant cette Haute Cour les moyens légaux et les droits qui étaient à notre disposition en vertu du Statut et du Règlement.

Mais s'engager dans cette voie, ce serait aussi considérer comme justifiée toute cette construction des articles de la Charte qui a été exposée dans les débats actuels.

Dans ces conditions — et je crois que la Cour sera complètement de notre avis —, il ne nous restait qu'une voie par laquelle nous pouvions nous présenter ici en acceptant la juridiction de la Cour, mais après avoir réservé le droit de contester la méthode employée par le Gouvernement britannique.

Accepter donc de se présenter devant la Cour sans que ce geste nous liât les mains pour demander que la procédure soit régulière, conformément au contenu et au caractère des recommandations du Conseil de Sécurité, conformément au Statut et conformément au droit en général, telle était l'intention de la lettre du 2 juillet par laquelle nous avons expressément déclaré que, malgré l'irrégularité de la requête britannique, nous étions prêts à nous présenter devant la Cour. Telle est l'interprétation unique que le Gouvernement albanais donne à la lettre du 2 juillet. A la fin de cette lettre, nous avons ajouté, dans le sens le plus naturel, que l'acceptation de la juridiction de la Cour ne devait pas constituer un précédent pour l'avenir.

Il est exact que cette lettre a été bien étudiée; on a même fait remarquer ici, à deux reprises, non sans étonnement et regret semble-t-il, que cette lettre a été soigneusement rédigée. On semblait même curieux de savoir qui l'avait rédigée. On a regretté qu'une telle lettre ait été établie par nous comme si nous n'avions pas le droit d'étudier le droit

international, de nous intéresser à son développement, et enfin d'avoir nos juristes. Rien d'étrange dans tout cela, rien d'étonnant, rien de curieux. Si cette lettre fait beaucoup de peine et si elle est désagréable au Gouvernement britannique, c'est à lui qu'en revient la responsabilité. Nous ne voulons pas savoir qui a rédigé la requête britannique, nous nous bornons à constater seulement que cette requête est absolument irrecevable et nulle pour que la Cour puisse être saisie de l'affaire. C'est pourquoi, dans notre thèse, nous demandons le rejet de cette requête pour que la Cour, conformément à la résolution du Conseil de Sécurité, puisse être saisie par l'instrument valable qu'est le compromis. Maintenir le contraire, ce serait justifier notre attitude si nous avions ignoré la requête britannique ou si nous nous étions soumis à des irrégularités judiciaires.

Monsieur le Président, nous croyons avoir exposé clairement notre position, et nous pensons que la voie que nous avons adoptée est la seule juste, raisonnable, et conforme à la mission que cette Haute Cour est appelée à remplir : Contribuer au maintien des relations internationales conformément au droit et à la justice.

Monsieur le Président, Messieurs les Juges, j'ai ainsi terminé mon dernier discours, et je vous prie de bien vouloir donner la parole au conseil du Gouvernement albanais, M. le professeur Vochoč.

## 6. — RÉPLIQUE DE M. VOCHOČ

(CONSEIL DU GOUVERNEMENT ALBANAIS)

A LA SÉANCE PUBLIQUE DU 5 MARS 1948

[*Séance publique du 5 mars 1948, matin.*]

Monsieur le Président, Messieurs de la Cour,

Grâce à la bienveillante décision prise par la Cour lors de la dernière séance, nous présentons aujourd'hui une réplique pour définir notre position à l'égard des arguments produits au cours des débats oraux contre l'exception préliminaire soulevée par le Gouvernement albanais.

Ces arguments ont deux bases principales :

En premier lieu, nos éminents adversaires se réclament de la lettre du Gouvernement albanais du 2 juillet et proposent formellement à la Cour de baser sur elle sa décision à l'égard de notre exception préliminaire.

En second lieu, et subsidiairement, nos adversaires maintiennent leurs arguments déjà présentés dans la requête du 13 mai, et se réclament notamment, eu égard à l'article 36 (1) du Statut de la Cour, de certaines dispositions de la Charte des Nations Unies.

Ayant pour la dernière fois le haut privilège de parler au nom du Gouvernement albanais devant la Cour, et procédant à l'analyse des deux arguments britanniques que je viens d'indiquer, nous croyons utile de fixer une fois encore le pivot autour duquel les deux arguments doivent tourner. Ce pivot est constitué par la question de savoir si la requête britannique du 13 mai dernier répond ou non aux conditions fixées par le Statut et le Règlement de la Cour pour introduire une requête devant cette juridiction.

C'est l'enjeu — le seul enjeu — de ces débats préliminaires.

Pour examiner comment ce problème a été élucidé à la suite des débats oraux qui se déroulèrent d'une façon si abondante devant la Cour, je porterai tout d'abord mon attention vers l'argument britannique présenté comme subsidiaire.

Il nous semble que ce point a été bien éclairci par nos débats. Nos thèses se sont évidemment développées en sens contraire ; mais le problème, l'« issue », nous semble bien défini.

Sous l'angle des arguments britanniques, la requête pourrait être considérée comme valide pour l'une ou l'autre des deux raisons suivantes, peut-être même pour les deux ensemble :

1) La requête serait recevable vu sa nature juridique.

Les Observations britanniques du 20 janvier ont dit que la requête peut être employée comme moyen formel de porter l'affaire devant la Cour promiscue, et dans le cas de la juridiction volontaire et dans celui de la juridiction obligatoire.

2) La deuxième base de la requête serait s'il y avait vraiment, dans l'affaire présente, le cas de la juridiction obligatoire spécialement prévu dans la Charte des Nations Unies (article 36 (1) du Statut de la Cour). Dans ce cas, la requête serait aussi valable.

Or, qu'est-ce que les débats oraux devant la Cour ont apporté en ce qui concerne ces deux arguments tendant à valider la requête ?

En ce qui concerne, tout d'abord, la nature de la requête, je me permets d'indiquer que nos adversaires n'ont pas abordé ce point dans leur plaidoirie. Ils n'en ont pas dit un mot. Ni le très honorable procureur du Royaume-Uni, ni M. l'agent du Gouvernement britannique n'ont réagi contre notre démonstration tendant à prouver que les Observations du Gouvernement britannique, du 20 janvier dernier, ont manifesté évidemment une opinion erronée, en affirmant que la requête peut être employée promiscue, et dans le cas de la juridiction volontaire, facultative, et dans celui de la juridiction obligatoire. Nos adversaires n'ont pas répondu à cette partie de notre thèse. Et je me permets donc de tirer de nos débats la conclusion que la requête est bien le moyen unilatéral qui, au sens de l'article 40, paragraphe 1, du Statut, peut être employé pour porter l'affaire devant la Cour, seulement dans le cas de la juridiction obligatoire.

S'il en est ainsi, et étant donné que les observations orales présentées devant la Cour n'ont pas contesté ce point de vue, il est tout naturel que nos éminents adversaires aient fourni un effort d'autant plus grand pour soutenir que la Cour a bien devant elle, dans l'affaire présente, un cas de *juridiction* obligatoire, c'est-à-dire un cas spécialement prévu dans la Charte des Nations Unies. Ainsi, nos adversaires sont revenus à la thèse soutenue dans leur requête du 13 mai dernier. Il convient de reconnaître que, en le faisant, ils ont tenu leur promesse figurant au paragraphe 12 de leurs Observations du 20 janvier. Pendant deux jours et demi, le très honorable procureur général du Royaume-Uni et M. l'agent du Gouvernement britannique se sont dépensés pour nous faire comprendre les motifs allégués par la requête du 13 mai à l'appui de la prétendue disposition sur laquelle se baserait cette requête.

Qu'il nous soit permis de dire que nous avons suivi leurs plaidoiries avec tout l'intérêt que leur thèse suscite et dont la valeur a été rehaussée par la manière maintes fois brillante dont les deux orateurs l'ont soutenue.

D'autre part, il faut remarquer que la tâche que s'imposèrent nos éminents adversaires était sans doute difficile. Nous avons déjà fait observer, au commencement de notre exposé jeudi dernier après-midi, qu'on chercherait en vain parmi les articles de la Charte pour y trouver un « cas spécialement prévu », selon les termes de l'article 36 (1) du Statut de la Cour. Dans toute la Charte il n'y a aucune allusion spéciale, j'entends expresse, à cet égard. Il incombait donc à nos éminents adversaires de construire eux-mêmes « un cas spécialement prévu dans la Charte des Nations Unies ».

Comment y parvenir ? C'était un dessein hardi.

Nous pouvons bien dire aujourd'hui, après avoir suivi avec le plus vif intérêt leur argumentation, que nos éminents adversaires n'ont pas eu, eux-mêmes, le courage d'aller jusqu'au bout de leur construction. Ils se sont efforcés de convaincre la Cour que le jeu combiné de certains articles de la Charte, notamment de ceux compris dans le chapitre VI, avec l'article 25, produisait l'effet voulu, c'est-à-dire obligeait les Parties à aller devant la Cour. Mais ici, nos adversaires se sont arrêtés. M. l'agent du Gouvernement du Royaume-Uni a attaché une importance particulière à la question de savoir ce qui se passe quand le Conseil de Sécurité « recommande » — c'est-à-dire d'après lui « ordonne » — aux parties

d'aller devant la Cour. Est-ce que la Cour se trouve ainsi saisie, sommes-nous en présence d'un « cas spécialement prévu dans la Charte » ?

Point du tout. D'après M. l'agent du Gouvernement britannique lui-même, il faut encore que les parties prennent l'initiative et agissent. Bien entendu, selon lui, il suffit que l'une ou l'autre des parties prenne l'initiative. Mais ce qui importe pour nous, c'est que, d'après la thèse britannique, le résultat peut être défini de la façon suivante : la Cour n'est pas encore saisie par la recommandation du Conseil, même si une telle recommandation est tout à fait obligatoire pour les parties.

Il nous semble bien que s'il en est ainsi, la question posée par nous reste entière, à savoir : est-ce que ce sont les deux parties qui — s'étant préalablement mises d'accord — doivent saisir la Cour, ou bien est-ce que l'une ou l'autre partie peut porter seule l'affaire devant la Cour ?

Nous n'avons pas hésité à consacrer la séance de vendredi après-midi à cette question, pour essayer de prouver que ce terme « les parties » signifie nécessairement, au sens de l'article 36, paragraphe 3, de la Charte, l'action commune des deux parties.

Or, il nous semble bien que cette proposition, que nous nous sommes permis de placer sous les yeux de la Cour, a été, elle aussi, laissée intacte et non contestée dans les plaidoiries de nos éminents adversaires.

Nous pouvons donc dire : même si par le jeu miraculeux de quelques articles de la Charte on parvenait à envisager quelque chose ressemblant à l'obligation pour les parties d'aller devant la Cour, rien ne réglerait encore la question de savoir si ce sont les deux parties ensemble qui doivent soumettre leur affaire à la Cour.

Ainsi, la thèse britannique, même poussée jusqu'à l'extrême limite des conséquences hypothétiques qu'elle comporte, n'a pas ébranlé cet élément capital de notre thèse, affirmant que, conformément à la Résolution du Conseil de Sécurité du 9 avril dernier, les parties doivent ensemble porter l'affaire devant la Cour.

Si nous pouvons considérer que notre thèse n'a pas été atteinte par l'argumentation de nos adversaires, cette situation nous permet de nous dispenser de suivre en détail les arguments tirés par eux de la Charte à l'appui de la thèse de la prétendue juridiction obligatoire. Il s'agit des articles 25, 36 (3), du chapitre VI de la Charte. Nous trouverions très intéressant d'analyser toute cette argumentation en détail. En toute modestie, mais d'une façon très ferme, nous pensons qu'il nous serait possible d'indiquer comment des erreurs se sont glissées dans cette argumentation et pourquoi, malgré les grands et sincères efforts déployés, la thèse britannique ne résiste pas à l'examen.

Nous résisterons bien entendu à cette tentation. Nous ne voulons pas encourir la responsabilité d'abuser de la bienveillance de la Cour, qui nous a déjà accordé, à nous et à nos adversaires, tant de jours. Nous nous limiterons seulement à quelques réflexions critiques concernant certains aspects généraux de la thèse britannique.

Notre première observation se rapporte à l'article 25 de la Charte.

Le très honorable procureur général du Royaume-Uni et M. l'agent de son Gouvernement se sont posé la question de savoir ce qu'il resterait de l'article 25 si cet article ne renfermait pas pour les Membres des Nations Unies l'obligation de suivre les recommandations du Conseil de Sécurité, notamment celles faites dans le cadre du chapitre VI de la Charte. M. l'agent du Gouvernement britannique a essayé d'appliquer ici la règle qui recommande d'interpréter chaque disposition juridique

de telle façon qu'il en résulte les conséquences voulues et qu'elle ne devienne pas stérile. Pour que l'article 25 produise ses effets, il serait, selon lui, nécessaire que la décision du Conseil de Sécurité, au sens de cet article, embrasse aussi les recommandations du chapitre VI de la Charte.

Or, nous désirons faire remarquer qu'une telle conception de l'article 25 de la Charte méconnaît singulièrement le caractère dominant de la Charte.

Quelle est la disposition la plus importante que la Charte ait apportée au monde ? Il ne saurait faire de doute que c'est le grand pouvoir donné au Conseil de Sécurité pour empêcher toute atteinte, toute menace à la paix, toute agression. Le chapitre VII donne au Conseil de Sécurité les pouvoirs et moyens de supprimer toutes voies de fait dans les rapports internationaux. Les nations peuvent continuer d'avoir des différends ; ces différends peuvent être graves, et même menacer la paix et la sécurité internationales, mais un point est certain : d'après la Charte, personne ne doit plus recourir à la force. Si un tel fait ou une telle menace survient, le Conseil de Sécurité a le devoir de veiller sur le maintien du *King's peace*. Le chapitre VII arme le Conseil de Sécurité d'une façon appropriée. Ces pouvoirs du Conseil sont ceux que, suivant l'article 24 de la Charte, les Membres des Nations Unies lui ont délégués comme gardien compétent du maintien de la paix. Et les décisions du Conseil de Sécurité, prises sous ce chapitre VII, sont celles que les Membres des Nations Unies se sont indiscutablement obligés, en vertu de l'article 25, à reconnaître comme obligatoires et de plein droit pour chacun d'eux. Nous ne sommes pas les seuls à voir, dans cette combinaison du chapitre VII avec l'article 25 de la Charte, le résultat le plus important de la Charte.

Nous ne nous expliquerons pas davantage sur cette observation.

Notre deuxième observation, à l'égard de la thèse britannique, telle qu'elle a été présentée, concerne encore l'article 25 de la Charte, mais à un autre point de vue.

Nous avons tout à l'heure fait valoir contre nos éminents adversaires la portée considérable de cet article par rapport au chapitre VII. Maintenant, nous croyons nécessaire de nous opposer à la tentative du Gouvernement du Royaume-Uni, par son interprétation des termes « décision » et « recommandation », de vouloir élargir les pouvoirs du Conseil de Sécurité au delà de toute mesure.

Nous pensons que les Nations Unies ont déjà donné au Conseil de Sécurité des pouvoirs considérables en lui confiant, à lui exclusivement, la tâche d'empêcher toutes voies de fait dans les rapports internationaux. Il serait exorbitant et inimaginable que les Nations Unies aient donné au Conseil de Sécurité le pouvoir d'agir impérieusement dans des affaires internationales autres que celles concernant le maintien de l'ordre contre les voies de fait. Non, rien de semblable n'a été décidé à San-Francisco, et personne n'y a songé. Pour autant qu'on ait envisagé une telle contingence, on s'est arrêté à l'hypothèse opposée, et on a cherché à obtenir des apaisements et des garanties contre l'abus de pouvoir du Conseil de Sécurité s'il voulait se saisir d'autres matières que celles prévues au chapitre VII et dans quelques dispositions précises éparses dans divers chapitres. Tel était le sens de tous les amendements belge, canadien, norvégien, australien et autres.

C'est dans cet ordre d'idées que nous avons essayé d'attirer l'attention de la Cour, au commencement de notre exposé, sur le fait invraisemblable que les Nations Unies auraient doté le Conseil de Sécurité du pouvoir de leur ordonner d'aller devant la Cour en matière de différends juridiques.

Avant de quitter définitivement cette partie de nos débats, je vais me permettre de toucher encore très brièvement à la question des travaux préparatoires de la Charte.

Le très honorable procureur général du Royaume-Uni ainsi que M. l'agent du Gouvernement britannique demandent à la Cour de ne pas tenir compte des travaux préparatoires de la Charte ayant eu lieu à la Conférence de San-Francisco et qui éclaircissent les articles de la Charte cités. La raison invoquée par MM. les représentants britanniques surtout est qu'il s'agit, dans la Charte, d'un traité multilatéral.

Il est vrai que l'opinion donnée sur les articles de la Charte aujourd'hui par la Cour dans l'affaire présente pourrait toucher aux intérêts des États qui ne sont pas présents, et peut-être gêner la Cour elle-même dans l'avenir.

Toutefois, nous avons l'honneur de dire que nous nous opposons à cette demande du Gouvernement britannique tendant à faire éliminer les travaux préparatoires de la Charte de la considération par la Cour.

En ce qui concerne la raison principale de cette demande de nos adversaires tirée du fait qu'il s'agit, en l'occurrence, d'un acte multilatéral, nous nous référons aux articles 59 et 63 du Statut. L'arrêt ne résout que l'affaire présente et ses considérants ne sont pas obligatoires même pour les parties en litige. D'autre part, tous les Membres des Nations Unies ont été avisés de l'affaire présente par M. le Greffier de la Cour, au sens de l'article 63 du Statut. Nos intérêts pourraient être lésés si les travaux préparatoires n'entraient pas en ligne de compte.

D'ailleurs, d'une façon générale, nous prions la Cour de bien vouloir prendre en considération, à l'égard de toute cette question des travaux préparatoires, l'enseignement donné sur ce point, déjà depuis plusieurs années, par l'éminent titulaire de la chaire de droit international à Cambridge, le professeur Lauterpacht, que nous avons l'honneur et le plaisir de saluer ici. Le professeur Lauterpacht, selon son habitude, d'une façon très sûre et comme toujours stimulante, a expliqué l'usage que la Cour permanente a fait des travaux préparatoires. L'impression que laisse l'exposé de ces questions par le professeur Lauterpacht est bien qu'après une certaine période d'hésitation, la Cour permanente a fait un usage systématique et constant des travaux préparatoires. Le texte aurait pu être trouvé par la Cour permanente clair ; il n'en valait que mieux de le confirmer en recourant aux travaux préparatoires. Et, comme l'a fait remarquer le professeur Lauterpacht, aussi les membres de nationalité britannique de la Cour avaient recours à cette méthode dans leurs opinions dissidentes.

## II

Nous avons indiqué au commencement de notre exposé d'aujourd'hui que le principal argument contre notre exception préliminaire est tiré par nos adversaires de la lettre du Gouvernement albanais du 2 juillet.

Dans la dernière partie de notre exposé, nous nous occuperons de cette thèse dirigée en premier lieu contre notre exception.

La question pour nous est de voir comment, sous l'angle de cet argument, se pose la question de l'irrecevabilité de la requête britannique.

Or, on dit, à cet égard, que la lettre du Gouvernement albanais du 2 juillet aurait validé la requête d'une certaine manière.

D'une façon générale, je me permets de dire qu'après nos impressions, et à la différence de ce qui se passait avec les arguments britanniques s'appuyant sur les articles de la Charte, les questions que pose la lettre du 2 juillet 1947 n'ont pas été trop élucidées ni éclaircies par les débats. C'est l'argument principal de nos adversaires contre notre exception. Cependant, il nous semble qu'ils ne l'ont pas jusqu'à présent approfondi et qu'ils ont laissé pas mal de questions dans l'ombre.

Sous cette réserve, nous croyons pouvoir discerner dans l'argumentation de nos adversaires, en ce qui concerne la lettre du 2 juillet, deux sortes de raisons possibles :

1) la lettre du 2 juillet aurait déjà, par son texte, par certaines de ses phrases, éliminé la question de validité, de la recevabilité de la requête. Il n'est plus possible aujourd'hui au Gouvernement albanais de revenir sur ce texte ;

2) l'autre raison dirigée contre notre exception serait à peu près celle-ci : le Gouvernement albanais a accepté, dans sa lettre du 2 juillet dernier, la juridiction de la Cour pour l'affaire présente ; il est donc oiseux de revenir sur la question de la requête comme moyen de porter l'affaire devant la Cour. L'affaire a été portée devant la Cour, peu importe comment elle l'a été. Et si l'on revenait sur cette question, ce serait pour contester la compétence de la Cour.

En ce qui concerne la première raison prétendue, tirée de la lettre du 2 juillet — ainsi que nous croyons le discerner dans les paroles qu'ont prononcées nos éminents adversaires —, nous allons examiner à notre tour le texte de cette lettre pour voir plus exactement si elle aurait validé la requête du 13 mai ou si elle se serait prononcée dans un tel sens.

Le très honorable procureur général du Royaume-Uni a déjà lu lui-même devant la Cour cette lettre presque tout entière. En nous y référant, nous ferons observer tout d'abord qu'elle contient en tout quatre paragraphes. Les trois premiers constituent ce que l'on pourrait appeler l'exposé des motifs, les considérants. Le dernier paragraphe contient la décision prise. Telle est l'économie générale de la lettre.

Les trois premiers paragraphes qui contiennent ce que j'appelle les considérants analysent et discutent un seul point, qui est celui-ci : rien n'autorise le Gouvernement du Royaume-Uni à traîner le Gouvernement albanais dans l'affaire présente devant la Cour, par une procédure unilatérale, la requête. Les considérants se réclament à cet égard vigoureusement du droit en vigueur entre les nations, du Statut de la Cour, de la Charte. Le Gouvernement albanais se croit en droit de considérer que la Cour n'est pas valablement saisie de l'affaire du tout.

On croit trouver en un conditionnel employé dans la dernière phrase du paragraphe 3 de la lettre qui résume ces considérants, une portée particulière, une reconnaissance de la requête de la part du Gouvernement albanais. Il n'en est rien. Les mots « serait en droit », etc., de la phrase en question indiquent seulement que le Gouvernement albanais serait en droit même de ne pas répondre à la requête britannique.

Mais, pour le Gouvernement albanais, il ne suffisait pas, au mois de juin dernier, d'exercer une critique : il devait prendre une attitude.

Laquelle ? Elle est indiquée dans les mesures prises par le Gouvernement albanais au quatrième paragraphe de la lettre.

Ces mesures sont au nombre de quatre : 1°) le Gouvernement albanais déclare accepter la Résolution du Conseil du 9 avril ; 2°) il se déclare prêt à se présenter devant la Cour, en se réservant, en même temps, d'attaquer devant la Cour la façon dont le Gouvernement britannique l'a saisie en application de la recommandation du 9 avril et l'interprétation britannique de l'article 25 de la Charte ; 3°) il prononce une sorte de *clausula salvatoria* pour l'avenir ; 4°) enfin, il nomme son agent près la Cour, comme le Règlement de la Cour le prescrit.

Voilà ce que contient la lettre du 2 juillet.

Et alors, on vient affirmer ici que quelque part dans ce texte le Gouvernement albanais se serait prononcé en faveur de la requête britannique.

Avant de voir d'un peu plus près s'il en est vraiment ainsi, nous nous permettons de faire remarquer que, s'il en était ainsi, le rôle joué par cette lettre du 2 juillet serait vraiment curieux. Quiconque lit cette lettre se rend aisément compte que le Gouvernement albanais n'est pas content du procédé appliqué contre lui, qu'il proteste. S'il se décide à aller devant la Cour malgré ce qui se passe, il fait les réserves les plus expresses pour dire d'avance qu'il va attaquer justement ce procédé ! Et cette lettre qui contient toutes ces protestations serait précisément le seul instrument qui, en fin de compte, sauve ce procédé contre lequel le Gouvernement albanais se prononce et qu'il veut attaquer, à la première occasion, devant la Cour ! S'il en était vraiment ainsi, cette lettre aurait encouru une malchance singulière. Son intention, tout à fait claire, est de se défendre contre la requête, contre le procédé unilatéral dont on use contre lui. Deux pages entières sur trois de la lettre sont remplies de protestations de cet ordre, et ce serait justement cette lettre — et cette lettre seule — qui sauverait la requête !

Nous allons voir, par nous-mêmes, s'il est vraiment possible de tirer de telles conséquences de cette lettre.

En premier lieu, le Gouvernement albanais accepte pleinement, en ce qui le concerne, la recommandation du Conseil de Sécurité du 9 avril dernier. Nous croyons pouvoir passer rapidement sur cette partie de la lettre, car il ne nous semble pas possible de déduire quoi que ce soit de cette déclaration en faveur de la requête du 13 mai. La déclaration oblige *ex nunc* le Gouvernement albanais à exécuter la recommandation du Conseil de Sécurité du 9 avril. C'est une promesse, un *pactum de contrahendo* qui peut se réaliser seulement dans l'avenir et dont l'accomplissement exige l'accord et le concours du Gouvernement britannique. Cette promesse pour le futur ne peut pas valider *ipso facto* la requête du 13 mai 1947.

2) Cette promesse mise à part, la requête du 13 mai, transmise au Gouvernement albanais par le Greffier de la Cour, a posé devant ce Gouvernement des questions qu'il a fallu résoudre immédiatement.

A cet égard, je l'ai déjà dit, deux voies en principe étaient ouvertes, au mois de juin dernier, devant le Gouvernement albanais : ignorer complètement la requête et sa transmission qui lui en avait été faite par la Cour, ou aller devant la Cour en se réservant d'attaquer et de faire juger par elle le procédé irrégulier que représente la requête. De ces deux voies, le Gouvernement albanais a choisi la dernière.

Assurément — toujours en suivant le texte clair de la lettre —, le Gouvernement, en faisant ce choix, était bien décidé à ne pas passer l'éponge sur la requête. La lettre du 2 juillet le dit en termes on ne peut plus nets ; elle formule à cet égard « les réserves les plus expresses ». Elle définit l'objet de ces réserves.

Y a-t-il une contradiction entre la déclaration exprimée d'aller devant la Cour et la condition qu'on y ajoute qu'un certain point précis de l'affaire sera attaqué ?

Nous sommes persuadés que les deux choses vont certainement ensemble. On veut aller devant la Cour — on a pour cela certaines raisons particulières —, mais en même temps on déclare à la Cour ce qui paraît inadmissible et ce qui est d'avance réservé.

Nous concluons donc, en ce qui concerne ce passage important de la lettre du 2 juillet, qu'il serait vraiment contradictoire *in adjecto* de considérer la requête comme validée par une déclaration de volonté qui se réserve justement de l'attaquer comme nulle et non avenue.

3) Dans la phrase suivante, le Gouvernement albanais désire souligner que son acceptation de la juridiction de la Cour ne peut pas constituer un précédent pour l'avenir. Cette phrase suit immédiatement celle contenant les réserves ; mais il ne s'agit ici d'un point immédiat que la lettre du 2 juillet a été dans l'obligation de régler. Le Gouvernement albanais entend se prémunir contre le précédent que, le cas échéant, pourrait constituer son attitude et dont on pourrait se réclamer dans l'avenir.

Avant de nous prononcer sur la portée juridique de cette phrase de la lettre, je veux faire observer qu'il arrive souvent que les États, surtout les États puissants, invoquent une attitude prise par l'autre État, dans le passé, comme un précédent dont ils se réclament si cela leur paraît opportun. Dans la vie internationale on montre quelquefois une certaine bonne volonté pour l'affaire déterminée, et, le lendemain, les autres arrivent et disent : « Pourquoi voulez-vous nous traiter différemment, nous, aujourd'hui ? » Dans un tel ordre d'idées, le Gouvernement albanais se rend compte qu'en se décidant à aller devant la Cour au lieu d'ignorer la requête et de dire que c'est une pièce nulle et non avenue, il pourra peut-être fournir à d'autres États, dans l'avenir, l'occasion de lui demander de procéder pareillement vis-à-vis d'eux s'il y a lieu. La lettre du 2 juillet tend à se prémunir contre une pareille position dans l'avenir.

Si nous voulions considérer ces préoccupations de la lettre du 2 juillet au point de vue du droit, nous pourrions dire : « Si je me décide à agir, de ma propre volonté, d'une façon, dans une affaire déterminée, je ne suis pas obligé de procéder de la même manière dans le futur. » Mais, considérant la vie internationale comme elle se déroule, nous savons bien ce que parler veut dire. C'est beau, souvent, d'invoquer un droit. En vue de telles préoccupations, la lettre du 2 juillet dit, dans la phrase que j'ai citée : « Que qui de droit prenne note que, si j'agis aujourd'hui comme je le fais, je ne veux nullement que quiconque, dans l'avenir, se réclame de mon attitude d'aujourd'hui comme d'un précédent. » C'est tout. Rien d'autre, à notre avis, ne ressort de cette phrase de la lettre du 2 juillet. Cette phrase ne concerne pas du tout l'affaire présente, elle détermine l'attitude future du Gouvernement albanais pour des cas qui peuvent se présenter dans l'avenir.

Rien non plus, dans cette phrase, n'a trait à la requête du 13 mai. Rien qui enlève quoi que ce soit aux réserves formulées dans la phrase précédente.

4) La phrase du dernier paragraphe contient nomination de l'agent albanais.

J'en ai terminé avec la lecture de la lettre du 2 juillet.

Je résume toute cette analyse en disant que vraiment, à notre avis, rien ne peut justifier l'opinion que cette lettre aurait accepté la requête du 13 mai. Nous avons disséqué toutes les phrases l'une après l'autre. Leur texte ne contient pas même l'ombre d'une allusion à une volonté quelconque du Gouvernement albanais d'accepter la requête.

Par contre, des réserves expresses y sont faites qui prouvent que la requête n'est pas acceptée. L'économie générale de la lettre, son contexte, ses phrases et les mots montrent bien l'intention de ses auteurs de demander le rejet de la requête comme une pièce nulle et non avenue.

[*Séance publique du 5 mars 1948, après-midi.*]

Monsieur le Président, Messieurs de la Cour,

Au commencement de notre exposé d'aujourd'hui consacré à l'argument principal que le Gouvernement du Royaume-Uni croit pouvoir tirer de la lettre du 2 juillet, nous avons dit qu'à part certains passages tirés du texte, nos éminents adversaires emploient encore un argument d'une autre sorte, et le sens de ce deuxième argument semble être le suivant : si le Gouvernement albanais a accepté par sa lettre du 2 juillet la juridiction de la Cour pour l'affaire présente, il ne lui appartient plus de mettre en question la requête. En le faisant, le Gouvernement albanais reviendrait sur son acceptation de la juridiction de la Cour, ce qui ne lui est pas permis.

Nous nous permettons de faire remarquer que ce sont surtout les Observations britanniques du 20 janvier qui font entrevoir cette argumentation en divers endroits. C'est ainsi que les Observations disent : « la question que soulève l'exception préliminaire du Gouvernement albanais est celle de savoir si la Cour est compétente » (paragraphe 8 des Observations). « Il n'appartient plus au Gouvernement albanais de rouvrir la question de la compétence » (paragraphe 9, lit. *i*, des Observations). Etc.

D'autre part, nous nous permettons de faire remarquer qu'au cours des débats oraux cet aspect des arguments du Gouvernement du Royaume-Uni n'a pas été examiné de plus près par nos éminents adversaires. En général, il nous semble que toute cette argumentation présente un aspect assez fuyant, incertain, et que les débats oraux, à notre avis, n'en ont pas suffisamment éclairé le sens.

En abordant encore à la fin de notre exposé cette sorte d'argumentation britannique, nous croyons devoir attirer l'attention de la Cour sur le raisonnement suivant : il est bien évident que tout plaideur cité devant un tribunal de son pays est dans son droit s'il use aux fins de sa défense de tous les moyens que lui offre la procédure, tant en ce qui concerne le fond de l'affaire qu'en ce qui concerne d'autres objections. En ce qui concerne certains de ces moyens, il doit, bien entendu, examiner quand et comment il peut les employer. Il pourra, par exemple, soulever

certaines exceptions à son profit seulement *in limine litis*. Mais c'est tout. Personne ne pourrait jamais dire à un plaideur cité devant un tribunal : « et maintenant, puisque vous comparaissez ici, vous ne pouvez plus employer d'autres moyens que ceux tirés du fond de l'affaire ».

S'il en est ainsi, nous nous permettons de demander si cet état de choses est changé quand il s'agit d'un État devant la Cour ? Il nous semble bien encore une fois que poser la question c'est la résoudre.

Pour le Gouvernement albanais, puisque c'est le gouvernement d'un État, il n'existe pas de *Prozesszwang*. Ce Gouvernement ne peut aller devant la Cour que par un acte de sa volonté fait exprès à cette fin. Mais comment une telle acceptation de juridiction devrait-elle entraîner *ipso facto*, pour l'État qui entreprend cet acte volontaire, la limitation de ses moyens de défense, de son statut procédural ainsi que celui qui est déterminé par le Statut et le Règlement de la Cour ? S'il en devait être ainsi, un tel état de choses, plutôt surprenant, devrait résulter au moins d'un texte assez précis. Mais, bien entendu, un tel texte n'existe pas.

D'ailleurs, comment cela serait-il possible ? Si je me décide à aller devant la Cour pour pouvoir discuter mon point de vue, combattre les prétentions de mon adversaire, soulever toutes les exceptions préliminaires, il faut bien qu'auparavant je paraisse, pour ainsi dire physiquement, devant la Cour. La lettre du 2 juillet n'a rien fait d'autre que d'exprimer cet état de choses. Elle dit : je veux aller devant la Cour pour me défendre. Pour un plaideur devant un tribunal national, une telle déclaration serait parfaitement inutile et serait même sans doute arrogante, car il va de soi que le plaideur est obligé de se présenter devant le tribunal, et personne ne lui demande s'il veut ou non en accepter la juridiction. Mais en ce qui concerne un État, c'est autre chose. Surtout s'il s'agit d'un État qui auparavant doit accomplir quelques actes pour ester en justice.

Nous nous permettons de présenter encore cette question d'une autre façon. Nous nous demandons comment un État devrait s'y prendre alors qu'il n'est pas obligé d'aller devant la Cour dans une affaire déterminée et qui pourtant veut y aller pour faire la Cour juge de cette affaire ? Si nous comprenons bien nos éminents adversaires — mais nous n'en sommes pas, je me permets de le dire, tout à fait sûrs —, un tel État ne pourrait aller devant la Cour que pour le fond de l'affaire.

Nous disons donc qu'il aurait fallu que le Gouvernement albanais renonce expressément à son droit de produire devant la Cour tous les moyens de défense pour qu'il ne puisse dorénavant faire usage de la procédure de la Cour dans toute son ampleur, dans toutes ses dispositions.

Or, il n'y a pas eu de renonciation pareille de la part du Gouvernement albanais. Bien au contraire, le Gouvernement albanais a, par sa lettre du 2 juillet, fait les réserves les plus expresses.

Nos dernières paroles seront pour essayer de serrer encore d'un peu plus près la portée juridique des réserves faites par la lettre du 2 juillet.

Nous croyons pouvoir qualifier nos réserves de conditions apposées à l'acte principal que constitue la déclaration d'être prêt à paraître devant la Cour.

Les conditions dépendent, par définition, d'événements futurs et incertains. De tels événements peuvent dépendre d'un pur hasard ; ou d'un événement qu'il est au pouvoir des parties de faire arriver ou d'empêcher ; et enfin, il y a les conditions mixtes. « La condition mixte

est celle qui dépend à la fois de la volonté d'une des parties contractantes et de la volonté d'un tiers. »

Nous croyons pouvoir ranger dans les conditions mixtes les réserves du 2 juillet. En effet, pour que ces réserves, pour que ces conditions s'accomplissent, il faut qu'interviennent notre volonté, celle du Gouvernement albanais et la volonté d'un tiers, savoir la volonté de la Cour.

Il faut qu'intervienne notre volonté. Nous nous sommes réservé cette possibilité. Mais nous n'étions pas obligés de la faire valoir. Ainsi, la réalisation de cette réserve, de cette condition dépend pour une part de notre volonté. D'autre part, nous ne sommes pas maîtres tout seuls de la condition ; nous avons déféré la décision, sur cette condition, à la Cour. Pour que la condition soit remplie, il faut que la Cour, partie tierce à la condition, la fasse jouer. Si la Cour ne le faisait pas, la condition ne serait pas remplie.

Ainsi, le concours de deux volontés se manifestant dans le même sens est nécessaire pour que nos réserves produisent l'effet voulu.

Encore une question, la dernière. Quel serait l'effet de la réalisation de nos réserves, de nos conditions ? Cet effet serait celui de toute condition résolutoire, l'acte juridique entrepris sous certaines conditions est cassé, tombe *ex tunc*.

Cet état de choses produirait certains effets par rapport à la Cour et par rapport au demandeur.

En ce qui concerne la Cour, s'il nous est permis de dire notre pensée à cet égard, il nous semble que la réalisation de notre condition va priver la procédure, engagée dans l'affaire présente devant la Cour, d'un élément important et nécessaire pour son mouvement. La pièce qui, suivant le Statut de la Cour, est seule susceptible de porter l'affaire devant la Cour va disparaître. Ainsi la procédure manquera pour ainsi dire du rouage important grâce auquel elle peut se dérouler. En attendant un rouage meilleur non entaché de nullité, la procédure s'arrêtera. L'affaire est pour le moment terminée.

Ce n'est pas ce résultat que nous avions en vue en présentant l'exception préliminaire. Si l'exercice de la juridiction de la Cour se trouve pour le moment paralysé et arrêté parce que la requête a été trouvée nulle et non avenue, ce n'est pas notre faute, je me permets de le dire. Nous n'y pouvons rien si le Gouvernement britannique a tenté de saisir la Cour sur la base d'une disposition prétendue inexistante ; sur des motifs non valables ; sans aucun accord préalable avec nous, par un procédé unilatéral contraire à la recommandation du Conseil de Sécurité du 9 avril dernier qui a invité les deux Parties à procéder ensemble devant la Cour, le seul procédé qui, en l'espèce, est « conforme au Statut de la Cour ».

Nous ne sommes pas responsables de ces procédés.

D'autre part, si nous ne voulons pas valider ces procédés, si nous ne voulons pas les ratifier en jetant à nos adversaires cette planche de salut dont nous avons parlé, c'est bien que nous sommes dans notre droit : *qui suo jure utitur, neminem lædit.* Nous ne voulons dans cette affaire que procéder *in due process of law.*

Telle est la situation dans laquelle se trouvera la Cour à la suite de l'accomplissement de notre condition.

Dans quelle position se trouvera la partie demanderesse ?

A cet égard, il est sûr que le Gouvernement britannique pourra toujours revenir sur l'affaire et toujours devant la Cour. Il n'aura pas

consommé son droit d'action contre nous si notre exception est acceptée par la Cour, mais il faudra que prochainement et dorénavant il évite de négliger *the due process of law* dans l'espèce.

Pratiquement, nous revenons à notre volonté de porter cette affaire devant la Cour d'accord avec le Gouvernement britannique par le compromis.

Notre exception est du vieux type classique. Attaquant la requête irrecevable, elle se range bien dans la catégorie des exceptions dilatoires bien connues et appliquées déjà dans le droit romain. Voici ce que dit le grand maître du droit romain qu'était le professeur Buckland concernant une telle exception : « They were *dilatoriæ* in the sense that threat of them would cause the plaintiff to withdraw proceedings before *litis contestatio*, with a view to renewed action later without the defect. »

Monsieur le Président, Messieurs de la Cour, j'en ai terminé. Je prie la Cour d'accepter encore une fois mes très respectueux remerciements pour la bienveillance avec laquelle elle a bien voulu m'écouter.

## 7.—REJOINDER BY SIR HARTLEY SHAWCROSS

(COUNSEL FOR THE GOVERNMENT OF THE UNITED KINGDOM)

AT THE PUBLIC SITTING OF MARCH 5th, 1948, AFTERNOON

May it please the Court.

I shall endeavour, like my friend, Professor Vochoč, to be brief. I recognize that mere repetition of arguments does not as a rule add very greatly to their weight. I do not propose to follow the Agent for the Government of Albania into the details of, if he will allow me to say so without offence, his somewhat political speech, much of which no doubt was intended for an audience many hundreds of miles away, and hardly expected to influence the decision of this Court. I am profoundly conscious of the fact that whatever may be the position elsewhere, in this Tribunal abuse does not pass for argument, and misrepresentation does not take the place of facts. I hope that always, however strong political feeling may be about disputes which come before this Court for investigation—and sometimes the political feeling about them will of course be strong as it may be here—we shall preserve in this Court the detached, calm, objective atmosphere of a Court of Justice, as this Court is.

But while I shall not attempt to follow in detail the address of the Agent for the Government of Albania—in detail or in invective—there are three matters in his speech with which I must deal.

On Saturday last in addressing this Court, at the beginning of the case of the United Kingdom, I said that if the Government of Albania meant to be taken seriously when it suggested that it was anxious to comply with the recommendations of the Security Council and that it wanted to come before this Tribunal, that it was willing to enter into a special agreement, the Government of the United Kingdom were ready for their part, here and now, to enter into a simple special agreement on the lines of the twenty or thirty words which I ventured to suggest to the Court at that time. I did not make that suggestion because of any lack of confidence in the grounds upon which we say that the jurisdiction of the Court is based in this case, but simply in order to enable the Government of Albania to do that which it professes to be anxious to do. That was on the morning of last Saturday. Five days went by in complete silence, and during three of them the Court was not sitting. There was, therefore, an ample opportunity to make use of telegraphic communication, which no doubt exists between here and Belgrade and Tirana. Last night, for the first time, the Agent for the Government of Albania approached us with the suggestion that the Court should be asked to adjourn for one month, without any further argument, in order to see whether the Government of Albania would agree that a special agreement could be arrived at. There was no undertaking whatever that the Government of Albania would enter into a special agreement; no guarantee that after a further delay this Court would not be required again to resume discussion of this matter at the point where it would

have left off. We thought it was quite intolerable that this High Tribunal should be made to wait upon such vague and uncertain contingencies, and we thought also that it was really quite intolerable that this grave matter should be submitted any further to the dilatory tactics which have hitherto been pursued.

I must remind the Court of the dates. It was on 22nd October 1946 that, somehow, by someone, murder was done to forty-four British sailors, and that crime against humanity, as every one will agree it was, has still not been brought home to its perpetrators, whoever they may be. It was in December 1946 that we addressed a note to the Government of Albania, and it was in January 1947 that we put the matter before the Security Council. It was in April 1947 that the Security Council resolved and recommended that this matter should be referred immediately to the Court. That was in 1947, and now we are well into 1948. We cannot be parties to any procedure which may delay further the investigation of this matter. Nor do we regard this matter as one at all suitable for protracted negotiations. I ventured to indicate on Saturday the simple form of words that, in my submission, would suffice for a special agreement to refer the case to the Court. All that is needed is a bare agreement to refer the dispute, as formulated and defined in the Resolution of the Security Council of 9th April, to the Court. Anything further and beyond that must either restrict the powers of the Court in dealing with the dispute or be more surplusage. Five days should have been quite ample to enable Albania to decide upon its answer to the simple suggestion, if, indeed, it ever had the slightest desire to come before this Court at all. Our position in regard to the matter remains exactly as it was when I announced it on Saturday. We are ready to enter into a special agreement, but we cannot delay or impede the proceedings of the Court. That offer—and it is a test of the sincerity of the constant declarations which have been made by the Government of Albania that it wished to conform to the Resolution of the Security Council and that it desired this matter to come before the Court—although it has so far been unacceptable, still remains open. If at any time before the decision of this Court is announced, the Government of Albania approaches us and desires to enter into a special agreement so that, notwithstanding the decision, whatever it may be, this matter can voluntarily come before the Court, we shall be prepared to deal with the matter on the basis of the offer I made ; but we are not prepared to be parties to any further delay.

Then the Agent for the Government of Albania said that I had complained of the length of time which we had devoted to our discussion here. I made no such complaint. If, as may well be the case, the real desire of the Government of Albania is to elude the jurisdiction of the Court, then I agree that the question of the competence of the Court and as to the compulsory powers of the Security Council in connexion with the competence of the Court, are matters of the utmost importance and of the greatest difficulty—ones which certainly merit the most careful consideration and discussion. The matter is academic if, and only if, the real desire of the Government of Albania is what they ask the Court to believe is their desire, namely, to invest this Court with jurisdiction to try this dispute. If that were the real desire of the Government of Albania, then, of course, it would be very easy

to accomplish it either by voluntary submission to the Court or by special agreement, leaving this difficult and important question altogether on one side. It was on that view of the matter, and only on that view, that I said that we were taking up a great deal of time with the discussion of something which might be academic. If, however, that is not, as it appears, the desire, then the problems, far from being academic, are real and concrete ones, and ones of far-reaching importance.

Finally, the Agent for the Government of Albania said that the question as to whether or not Albania had submitted to the jurisdiction of the Court was raised by the United Kingdom at those meetings of the Security Council in July of 1947 only as a pretext to oppose the Albanian application for membership. The Agent for the Government of Albania said that in spite of the telegram which was received from the Registrar of the Court, indicating the attitude which the Government of Albania had taken up, the United Kingdom voted against its application for membership as, indeed, it had voted against it in 1946 when, according to them, there was no dispute. That is wholly incorrect. The United Kingdom Government did not raise this point before the Security Council at this time at all. It was raised by other States, which, in raising it, pointed out in terms that it was only one of a number of matters which might help the Security Council to decide whether or not the Government of Albania was a peace-loving government, able and prepared to fulfil its obligations to the United Nations. Nor, of course, was the question, as the Agent for the Government of Albania seemed to suggest, whether or not Albania was a party to a dispute. That was not the ground on which it was suggested that Albania might not qualify for membership. The ground was that Albania, being a party to a dispute, was not prepared to comply with the recommendation of the Security Council to settle that dispute by peaceful means. That was the matter into which the Security Council was enquiring at that time. Nor was it, I am bound to say, altogether correct for the Agent for the Government of Albania to say that when we opposed the admission of their country in 1946 there was no dispute. I shall not go into the grounds for our position in that or other connections, but you will see from the pleadings in this case that in May 1946, before the question of admission to the United Nations had been decided, British ships had already been fired upon in the Corfu Channel. That is one of the matters which no doubt carried some weight.

My only reason for referring to the proceedings of the Security Council in July 1947 at all was to link the proceedings at those meetings with the proceedings in April 1947, and to show, for what it was worth, if it was worth anything at all, what was the common understanding of the Members of the Security Council as to the Resolution which they passed on the 9th April. Their understanding of the effect of that Resolution or its intention is, of course, not binding upon this Court. It is always possible that the opinions which were expressed at the Security Council by all those who took part in the discussion may have been wrong, and that it was given only to the Government of Albania to see the true light in regard to this matter. However, that is perhaps a question not to be settled by the *ipsi dixit* of the Agent of the Government of Albania, but one to be decided by the Tribunal in the light of all the relevant material at which it is entitled to look.

Mr. President, in saying that one of the reasons why the United Kingdom opposed the application of the Government of Albania for membership of the United Nations in 1946 was that British ships had been fired upon, I did not, I think, say that was the principal reason. I said it was one of the reasons, but I did not advance the other reasons because they were irrelevant before this Tribunal. I mentioned that one only because it is recorded in the pleadings before the Court. I do not attempt to assess for a moment the weight that would attach to that reason as against the other reasons which may have influenced the decision of my Government and other governments at that time.

Now, Mr. President, I come to the arguments of Professor Vochoč. He dealt, if I may say so, in a somewhat cursory way with the submission that if Article 25 does not apply to recommendations under Chapter VI of the Charter, it does not apply to anything, by suggesting that we have overlooked the main purpose of the San Francisco Charter in giving powers to the Security Council to prevent wars and threats to the peace under Chapter VII of the Charter. Chapter VII, says Professor Vochoč, is where you find the fundamental powers of the Security Council. Well, now, that may well be true, and I do not doubt that the enforcement powers under Chapter VII are of the utmost importance, although I would not wish myself to underrate the significance of the preventive action which the Council may take under Chapter VI. But those who seek to restrict the operation of compulsory powers to Chapter VII are faced by a double difficulty, which Professor Vochoč made no attempt whatever to resolve. Chapter VII, as I have submitted to the Court—and I am not going to repeat the argument—Chapter VII of the Charter, particularly in Articles 48 and 49, contains its own code of obligation, and does not need to attract the provisions of Article 25 in order to give the decisions of the Security Council under that Chapter the obligatory force which we all hope that they certainly possess. So far as those decisions under that Chapter are concerned, Article 25 appears to be wholly otiose. If, on the other hand—and that is the second difficulty—the provisions of Article 25 are attracted in order to give recommendations as distinct from decisions—recommendations under Chapter VII—obligatory force, what is there in the Charter—in the preparatory work, or in anything else—to give a different effect to Article 25 in its operation on Chapter VI to that which on this argument it admittedly bears in its operation on recommendations under Chapter VII? That is the real dilemma which faces my learned friend, and that is the dilemma which he has made no attempt whatever to resolve.

If you apply Article 25 to recommendations in Chapter VII, as, apparently, Professor Vochoč would wish to do, how can you possibly give a different application to the article when you find exactly the same words in a preceding chapter? The preparatory work, whatever else it shows, certainly shows—in my submission—beyond all possibility of speculation or doubt—that Article 25 was intended to apply to Chapter VI as well as to Chapter VII. That is apparent beyond question from the Belgian resolution that has been so much discussed, and which was referred to again by Professor Vochoč this morning. And so I ask again, upon what provision Article 25 can operate if, contrary to my submission to the Tribunal, it does not operate on recommendations; and once its operation on recommendations is

conceded, on recommendations under both chapters. If it does not operate on these, on what does it operate?

Now it may well be true—it would be unfortunate, I think, but it may well be true—and this Court will have to arrive at a decision in regard to it—that the powers of the Security Council are not as strong as has hitherto been believed to be the case, both by the Members of the Council and by the other Members of the United Nations. We had thought that in Article 25 we had made a real, an effective step forward from the old days of the League of Nations, for the League could do no more than pass persuasive resolutions; we had thought that by the provisions of Article 25 the Members of the United Nations had agreed in advance to accept the decisions of the Security Council —decisions or recommendations, whatever form they took. It may turn out—and this in my respectful submission is the only conclusion to which the Court can arrive if it finds in favour of the Government of Albania in this case—it may turn out that Article 25 has done nothing of the kind and that there is nothing in the Charter to which that article can really apply. It may turn out that the only obligatory powers that arise out of the Charter—and, it is true, these would in themselves mark a step forward from the days of the League—are those which are to be found under the specific articles of Chapter VII. It may be that that is where the real obligation lies, and that that is where the step forward was taken, and that that was the only step forward that was taken. That is a specific obligation in regard to enforcement measures when you get to a situation where the peace has actually been broken. But it was the generally accepted view—and it still has been until this case arose—a generally accepted view—that Article 25 had some general effect, and that all the Members of the United Nations had undertaken specific obligations under it—general obligations—applying not only Chapter VII, to which the Article does not specifically or particularly relate, but to all the decisions of the Council in whatever part of the Charter they might be given.

Now, speaking of preparatory work leads me to a comment, not about Professor Lauterpacht, the quotation of whose views I knew my learned friend would be quite unable to resist—but about a misunderstanding which appears to have arisen in the mind of my learned friend, and I hope not in the mind of any one else—about something said by Mr. Beckett in the course of his argument. Mr. Beckett laid great stress on the importance of uniformity in the interpretation of the Charter, and he used that argument as a ground for rejecting a method of interpretation which, whilst it is available in those cases where the parties to the litigation were also parties to the preparatory work, is not available—or may not be available—where that was not the case. Professor Vochoč then referred, in his reply to that argument, to Article 59 of the Statute of the Court. But of course that is a totally different point. It is quite true that under Article 59 of the Statute, the decisions of the Court are binding only upon the actual parties to the case in which the decision was given; but this is not a question of the legal binding force of a particular decision. This is a question of the desirability of having some kind of uniformity in the construction which you place on the same articles of the same treaty. Is it really to be suggested that it is convenient, that it is judicial, that it is even possible, to give one construction to a particular article of the

Charter in the case where the parties to the litigation were also parties to the preparatory work, and to give another construction to the same articles of the same Charter in a case where the parties to the litigation were not parties to the preparatory work, and so, consequently, where preparatory work cannot be looked at?

You will, of course, have to consider, in my respectful submission, very carefully what is the real nature of this rule about looking at preparatory work in cases where the parties or one of the parties before the Court was not also a party to the preparatory work. I am not going to go into detail on that argument again. There is authority in the jurisprudence of the old Court about the matter. But if the true view is—as it appears to be from the jurisprudence of the Court—that preparatory work can only be looked at in the case of litigation between States which were parties to the preparatory work—that, in my submission, is a very strong argument for rejecting a reference to preparatory work altogether, in cases where you are dealing with multilateral treaties which may be acceded to in later years by many States which took no part whatever and had nothing whatever to do with the preparatory work on which it is sought to rely. That was the point of the argument that my learned friend, Mr. Beckett, put before the Tribunal, and really, if I may say so with respect, Article 59 of the Statute of the Court has no more to do with that argument than "the flowers that bloom in the spring".

Mr. President, preparatory work or no, it is in my submission impossible in this case to escape the conclusion: firstly, that it was intended by those who took part in the preparatory work and who framed and signed this Charter—that it was intended that Article 25 should apply to both Chapter VI and VII; secondly, that according to the letter of the Charter it clearly does so apply; thirdly, that it cannot operate on anything unless it operates on recommendations in Chapter VI.

Mr. President: I said that it might be true—that it might be true—that Article 25 was without compulsory effect. That would of course be a most astonishing and most regrettable conclusion. My submission is that it has effect. The Court will consider the Charter so as to give effect to it if it can, and to further the manifest intention of the Charter as a whole.

Now, I come to a point on which Professor Vochoč perhaps did less than justice to us in spite of the care and courtesy which has distinguished, if I may say so, the part that he has played in these proceedings throughout. He said that we had not dealt with the submission that applications were only proper—[applications to the Court, I mean, of course] one case, namely where there was a compulsory jurisdiction—a compulsory jurisdiction because of adherence to the Optional Clause. Well, I dealt with that expressly, and the Court may remember that owing to an error in the translation I dealt with it twice. The Tribunal will find it—I am not going to repeat it to you—I just note the place where it occurs—the Tribunal will find that matter discussed in the shorthand note of the third day, page 55, and in the shorthand note of the fourth day, page 76 and following pages. And the Court may recall that I said there were in fact not one case only, as Professor Vochoč had suggested, where it was proper to proceed by way of application, but no less than five. Of those five cases, I submitted that there was one, for which I suggested that Article 32

of the Rules of Court had made specific provision after the matter had been deliberately debated and discussed by the judges in 1936, by the inclusion of those words in the Rule to the effect that the exact jurisdictional basis relied upon by the application need not be stated in the application itself if it were not possible to state it. I suggested that in consequence of that, and by virtue of that, one of the five cases in which it was proper to proceed by application, was the case where an application originally bad in form was cured by a subsequent voluntary acceptance of the jurisdiction—what I ventured to call the "life-line" article.

And so I come to what my learned friend said about that argument —the letter of 2nd July last year. The Agent of the Government of Albania, if I understood him rightly in the French of his original address, said that the Government of Albania was alone—alone—entitled to interpret the meaning and intention of its own letter. Well, that may be good political doctrine in some places, but I hardly expect it would be followed in this Court. It is for this Court to interpret from the words that were used what was the effect and intention of that letter. Now, what was it? In the detailed analysis which Professor Vochoč made of the letter there were two significant omissions. There was no reference at all by Professor Vochoč to the third paragraph of paragraph 3. Well now, why was that? Was it again a good advocate glossing over a point to which he knows there is no answer? What does the third paragraph of paragraph 3 say?

"In these circumstances" (they recited the grounds of their objection—grounds on which there may or may not have been any substantial weight) —and they go on:

"In these circumstances, the Albanian Government would be within its rights in holding that the Government of the United Kingdom was not entitled to bring the case before the Court by unilateral application, without first concluding a special agreement with the Albanian Government."

Well now, what do these words mean if they are not introductory to and explanatory of the words which follow in paragraph 4?

This is the first omission; you cannot, in my respectful submission, disregard those words. If you do not disregard them, if you attach to them the meaning which they ordinarily bear, they clearly indicate that although the Government of Albania would have been entitled to rely on its objection if it had thought it politically expedient so to do, none the less the Government of Albania, anxious to give evidence of its devotion to the principles of friendly collaboration and pacific settlement of disputes, is not going to take that point.

Then one comes to Article 4, paragraph 4, of the letter. And in that paragraph—unless I am greatly mistaken—Professor Vochoč, in citing the last sentence of the penultimate paragraph about the question of a precedent for the future, glossed over, if he did not entirely omit, the words "its acceptance of the Court's jurisdiction". Now, those seem significant words—some meaning must be given to them—and I suggest to the Court that the only possible meaning to be given to those words is that the Government of Albania is there and then accepting the jurisdiction of the Court without creating any precedent for the future. What the Government of Albania could

very easily have done—and I am far from suggesting that this course was not open to them, as Professor Vochoč just now rather suggested I had—far from saying that this course was not open to them, I specified it as one of the three courses which they were clearly entitled to take —what the Government of Albania might have and could have done very easily would have been to write to the Court setting out its objections—as indeed they did in the first part of their actual letter—its objections to the jurisdiction of the Court, and adding that if the Court wished to hear the Government of Albania about the matter, then, without submitting itself to the jurisdiction of the Tribunal at all, it would be willing to appear before it to argue the question of competence.

Well, that would have been a course open to the Government of Albania, and if that course had been taken and the Court, after itself considering whether there was any jurisdiction to deal with the Government of Albania, had asked the Government to appear and argue the matter at issue, then there would be no question whether or not the Government of Albania had accepted the jurisdiction of the Court. But that is not what the Government of Albania did do. They did something which was quite different. They wrote a letter which, in terms, stated that they accepted the jurisdiction of the Court, without giving rise to any precedent for the future.

Then my learned friend Professor Vochoč suggests, as I understand his argument, that these reservations they make—most explicit reservations, as indeed they say—amount to conditions to their acceptance of the jurisdiction, and that if you do not accept the conditions—this is how I understand the argument—if you do not accept the conditions, you cannot accept the rest of the letter. You cannot rely on that part of the letter which appears to be a submission to the jurisdiction unless you have regard also to the conditions and accept those.

Well, that seems to be a sound doctrine, and I certainly would not disagree with it, but what were the conditions, what were the reservations? The conditions surely were simply these: that the Government of Albania was saying that there was no compulsory jurisdiction; that the Government of Albania reserved its position; that if it accepted the jurisdiction voluntarily it was subject to the condition that it was not bound compulsorily to accept the competence of the Court.

Well, I fully accept all those conditions. Whether the Government of Albania is bound or is not bound is a matter which it reserves, and which consequently this Court does not decide at all. The Government of Albania, having accepted voluntarily the competence of the Court, these questions are all reserved and they may or may not arise in some future case. But the fact that it has voluntarily accepted the jurisdiction of the Court in this case gives rise to no kind of precedent in regard to these conditions for the future. Those reservations are maintained and the decision in regard to that matter is kept entirely open.

I rather gathered from the Agent of the Government of Albania that he made some complaint of the interpretation that we put upon this letter. But really the Government of Albania cannot be heard now to complain if that letter is now understood to mean what, in my submission, it was intended to mean, and certainly understood to mean at the time of its receipt, both by this Court and the Security Council.

May I just consider very shortly the effect of the Order made by this Court—I have referred to the matter already—on the 31st July. It is set out in paragraph 7 of our submissions of the 19th January of this year. The Court will remember that under Article 35 (2) of the Statute of the Court, it is provided that the conditions under which the Court shall be open to a State which is not a party to the Statute shall be such as may be laid down by the Security Council, and on the 15th October, 1946 (you will find it in the Yearbook, page 106), on the 15th October, 1946, the Security Council did, by a valid resolution, lay down the conditions that the Court was to be open to those States which previously deposited with the Court a declaration under which they accepted the Court's jurisdiction and agreed to be bound, etc. There were other conditions, but I am only concerned with this one—the one which provides that only those States which previously deposited a declaration that they accepted the jurisdiction of the Court could find the doors of the Court open to them.

Then to come to Article 36 of the Rules of this Court. Article 36 of the Rules of Court specifies that a document containing amongst other matters the evidence as to that declaration having been deposited —having been deposited or containing the declaration—must be deposited with the Registrar of this Court. That is one of the conditions precedent to the doors of the Court being open at all to a State which is not a party to the Statute.

Now, on the 31st July the Court, after consultation with the Agents, made an Order which stated in terms that the letter of the 2nd July constituted the document specified by Article 36 of the Rules of Court; namely, the declaration accepting the jurisdiction of the Court.

The Government of Albania knew full well that its letter of the 2nd July had been regarded by the Court as an acceptance of its jurisdiction. They knew full well that it had been regarded by the Security Council at that time as an acceptance of the Court's jurisdiction. The Government of Albania now seek to say that all that was a false impression of the meaning of the letter, but the Government of Albania knew quite well at that time that that was the impression which had been derived by the Court from the letter, which was held by the Security Council and which was held by her opponents in these proceedings.

Why was it, does the Court suppose, that she allowed six months to go by before she permitted herself to say that that impression was wholly mistaken and wholly false? I ask this Court to say that this attempt to go back now upon the position which was taken up at that time—a position which, if they did not intend it by the terms of their letter of 2nd July, was at least one which for reasons, good or bad, they were very content to acquiesce in at that time—is something which constitutes a grave abuse of the procedure of this Tribunal.

Mr. President, I have come to the end of what I desire to say to the Tribunal, and my responsibility in the matter is over. The responsibility of the Tribunal is very great. I wonder if I may just add this: you may think it impertinent—I hope it is not—perhaps it is, but if it is will you put it down to my inexperience and acquit me of any intention to offend.

I spoke last Thursday when in those impressive proceedings this Court opened its first session—I spoke of the detachment and protection

which this Court enjoys from political considerations. Now it is said—and one cannot shut one's eyes to it—that this is a case which has political implications, which makes its decision difficult. And certainly it does concern a dispute between a country of Eastern Europe and a country of the West. And—certainly no one regrets it more than we do—we cannot shut our eyes to the fact that there is a dangerously increasing tendency to divide Europe into two camps, of the East and of the West. But I like to think—I like to think—that there is something which is common to both of these camps, if camps there must be, something which is shared at least amongst the ordinary common people of all the European countries. And that is a belief that we all have in the fundamental ideas of law and justice. There can be no barriers and no divisions in regard to that. And whatever the result of this case—whether it goes against the Government of the United Kingdom, or whether it goes against the Government of Albania —this Court must remain a landmark and a lighthouse amidst the treacherous tides and the shifting political sands of Europe. My country hopes to succeed in this case. Of course we do. We are submitting that we are right.

But—you may think this insincere, but believe me it is not—I would far sooner that my country failed in this case than that any political consideration whatever should enter into the matter, because this happens to be a dispute between an Eastern European country and a country of the West. Whatever way your ultimate decision may go —whether it is for the Government of the United Kingdom, or for the Government of Albania—the manner in which you give may keep alive one of those lamps of hope and faith in Europe so many of which have gone out.

# LISTE DES DOCUMENTS DÉPOSÉS PAR LES PARTIES EN FÉVRIER 1948

# LIST OF DOCUMENTS FILED BY THE PARTIES IN FEBRUARY 1948.

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## DOCUMENTS FILED BY THE AGENT OF THE UNITED KINGDOM

Letter to the Registrar of the Court (20th February, 1948).

*Annexes :*

Extract from statement by Mr. Sobolev, Assistant Secretary-General, at the Ninety-First Meeting of the Security Council. (*Security Council, Official Records*, Second Year, No. 3, pp. 44-45.)

Extract from Summary Record of the Sixteenth Meeting of the Security Council Committee on the Admission of New Members, 21st July, 1947 (S/C. 2/SR. 16).

*Idem*, Seventeenth Meeting, 23rd July, 1947 (S/C. 2/SR. 17).

*Idem*, Eighteenth Meeting, 28th July, 1947 (S/C. 2/SR. 18).

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## DOCUMENTS SOUMIS PAR L'AGENT DU GOUVERNEMENT ALBANAIS

Lettre au Greffier de la Cour (24 février 1948).

*Annexes :*

Extraits de la publication : *Documents de la Conférence des Nations Unies sur l'Organisation internationale, San-Francisco 1945* (photolithographie des documents originaux) ; ces documents ont été édités en collaboration avec la *Library of Congress* par la *United Nations Information Organization*, 1945, Londres/New-York. (Vol. XI, pp. 388, 399.)

Extrait de la publication : *Republica de Chile, Ministerio de la Externe : Chile y la Conferencia de San Francisco*. Santiago, MCDXLV. (P. 45.)

Extrait de la publication : *Actes de la Première Assemblée, Séances des Commissions, Genève, 1920. Procès-verbaux des séances de la Troisième Commission (Cour permanente de Justice internationale). Cinquième séance, 8 décembre 1920.* (P. 300.)

Extrait de la publication : *Société des Nations, Actes de la Première Assemblée, Séance des Commissions*, I, Genève, 1920. (P. 511.)

Extrait de la publication : *Cour permanente de Justice internationale. Série D, Actes et Documents relatifs à l'Organisation de la Cour. Addendum au n° 2. Revision du Règlement.* (P. 176.)

Extrait de la publication : *Académie de Droit international, Recueil des Cours*, 1932, I, tome 39 de la Collection. (Pp. 131, 216.)

Extrait de la publication : *Cour permanente de Justice internationale, Actes et Documents relatifs à l'Organisation de la Cour. Troisième addendum au n° 2. Préparation du Règlement du 11 mars 1936*, Leyde, 1936. (Pp. 69, 157, 845.)

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# PROCÉDURE ORALE (*suite*)

B. — SÉANCE PUBLIQUE

*tenue au Palais de la Paix, La Haye,*
*le 25 mars 1948.*

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# ORAL PROCEEDINGS (cont.)

B.—PUBLIC SITTING

*held at the Peace Palace, The Hague,*
*on March 25th, 1948.*

# PROCÈS-VERBAL DE LA SÉANCE TENUE LE 25 MARS 1948

## (EXCEPTION PRÉLIMINAIRE)

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### ANNÉE 1948

### SEPTIÈME SÉANCE PUBLIQUE [1] (25 III 48, 16 *h.*)

*Présents :* M. GUERRERO, *Président ;* M. BASDEVANT, *Vice-Président ;* MM. ALVAREZ, FABELA, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, sir ARNOLD MCNAIR, M. KLAESTAD, BADAWI PACHA, MM. KRYLOV, READ, HSU MO, AZEVEDO, *juges ;* M. DAXNER, *juge* ad hoc ; M. HAMBRO, *Greffier ;* M. BECKETT, *agent du Gouvernement du Royaume-Uni ;* M. KAHREMAN YLLI, *agent du Gouvernement de la République populaire d'Albanie ;* MM. le professeur VOCHOČ, le professeur LAPENNA, *conseils du Gouvernement albanais.*

Le PRÉSIDENT, ouvrant l'audience, annonce que la Cour se réunit pour le prononcé de l'arrêt qu'elle va rendre sur l'exception préliminaire, soulevée par le Gouvernement albanais, dans l'affaire du Détroit de Corfou, qu'a introduite le Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord contre le Gouvernement de la République populaire d'Albanie.

Les agents des deux Parties ont été dûment prévenus, conformément à l'article 58 du Statut, qu'il serait donné lecture de l'arrêt au cours de la présente séance publique. Ces agents sont présents à l'audience et l'expédition officielle de l'arrêt vient de leur être remise.

La Cour ayant décidé, conformément à l'article 39 du Statut, que ce sera le texte français qui fera foi, le Président donne lecture de ce texte [2] et prie le GREFFIER de donner lecture du dispositif de l'arrêt dans le texte anglais.

Cette lecture achevée, le PRÉSIDENT signale que M. le juge Daxner, déclarant ne pouvoir se rallier à l'arrêt rendu par la Cour et se prévalant du droit que lui confère l'article 57 du Statut, a joint à l'arrêt l'exposé de son opinion individuelle [3]. MM. les juges Basdevant, Alvarez, Winiarski, Zoričić, De Visscher, Badawi Pacha et Krylov, tout en se déclarant d'accord sur le dispositif, ont joint l'exposé de leur opinion individuelle sur certains motifs de l'arrêt [4].

Le Président demande à M. Basdevant, Vice-Président, s'il désire donner lecture de l'opinion individuelle signée par lui et par les membres de la Cour dont les noms viennent d'être indiqués.

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[1] Vingt-cinquième séance de la Cour.

[2] Voir *Recueil des Arrêts, Avis consultatifs et Ordonnances* 1948, pp. 15-30 (n° de vente 6).

[3] Voir *idem*, pp. 33-45.

[4] » » » 31-32.

# MINUTE OF THE SITTING HELD ON MARCH 25th, 1948

## (PRELIMINARY OBJECTION)

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YEAR 1948

SEVENTH PUBLIC SITTING[1] (25 III 48, 4 *p.m.*)

*Present : President* GUERRERO ; *Vice-President* BASDEVANT ; *Judges* ALVAREZ, FABELA, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO ; Mr. DAXNER, *Judge* ad hoc ; *Registrar* HAMBRO ; Mr. BECKETT, *Agent for the Government of the United Kingdom ;* M. KAHREMAN YLLI, *Agent for the Government of the People's Republic of Albania ;* Professor VOCHOČ, Professor LAPENNA, *Counsel for the Albanian Government.*

The PRESIDENT, in opening the hearing, stated that the Court had met for the delivery of its judgment on the preliminary objection raised by the Albanian Government in the Corfu Channel case brought by the Government of the United Kingdom of Great Britain and Northern Ireland against the Government of the People's Republic of Albania.

The Agents of the two Parties had been duly notified in accordance with Article 58 of the Statute that the judgment would be read at that public sitting. These Agents were present in Court and official copies of the judgment had been handed to them.

The Court having decided under Article 39 of the Statute that the French text of the judgment should be the authoritative text, the President read that text[2] and requested the REGISTRAR to read the operative part of the judgment in English.

The Judgment having been read, the PRESIDENT stated that Judge Daxner had been unable to concur in it and, availing himself of the right conferred upon him by Article 57 of the Statute, had appended to it his separate opinion[3]. Judges Basdevant, Alvarez, Winiarski, Zoričić, De Visscher, Badawi Pasha and Krylov, while in agreement with the operative part, had appended a separate opinion concerning some of the grounds of the judgment[4].

The President then asked Vice-President Basdevant whether he wished to read the separate opinion signed by himself and the Members of the Court whose names he had just given.

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[1] Twenty-fifth meeting of the Court.

[2] See *Reports of Judgments, Advisory Opinions and Orders* 1948, pp. 15-30 (Sales No. 6).

[3] See *idem*, pp. 33-45.

[4] „ „ „ 31-32.

Le VICE-PRÉSIDENT, ayant répondu affirmativement, donne lecture de cette opinion individuelle.

Le PRÉSIDENT demande à M. le juge Daxner s'il désire qu'il soit donné lecture de son opinion individuelle.

M. DAXNER répond affirmativement et lecture est donnée de l'opinion de M. Daxner.

Le PRÉSIDENT donne la parole à l'agent du Gouvernement albanais, qui l'a demandée.

M. KAHREMAN YLLI prononce les paroles reproduites en annexe[1].

Le PRÉSIDENT donne la parole à l'agent du Gouvernement du Royaume-Uni.

M. BECKETT prononce les paroles reproduites en annexe[2].

Le PRÉSIDENT signale que la Cour prend acte avec satisfaction de la conclusion du compromis que les agents des Parties viennent de lui notifier.

Il prie les agents des Parties de bien vouloir, après l'audience, se réunir à la salle n° 3.

Le Président prononce la clôture de l'audience.

L'audience est levée à 17 h. 45.

Le Président de la Cour,
(*Signé*) J. G. GUERRERO.

Le Greffier de la Cour,
(*Signé*) E. HAMBRO.

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[1] Voir p. 162.
[2] » » 163.

The VICE-PRESIDENT replied in the affirmative and proceeded to read this separate opinion.

The PRESIDENT then asked Judge Daxner if he wished to read his separate opinion.

Judge DAXNER having replied in the affirmative, his opinion was read.

The PRESIDENT called on the Agent for the Albanian Government, who had asked permission to speak.

M. KAHREMAN YLLI made the statement reproduced in the annex[1].

The PRESIDENT called on the Agent for the Government of the United Kingdom.

Mr. BECKETT made the statement reproduced in the annex[2].

The PRESIDENT said that the Court noted with satisfaction the conclusion of the special agreement which the Parties' Agents had just notified.

He requested the Agents to be good enough to meet in Room 3 after the hearing.

The President declared the hearings closed.

The Court rose at 5.45 p.m.

(*Signed*) J. G. GUERRERO,
President.

(*Signed*) E. HAMBRO,
Registrar.

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[1] See p. 162.
[2] „ „ 163.

## ANNEXES AU PROCÈS-VERBAL

EXPOSÉS ORAUX DU 25 MARS 1948

**(EXCEPTION PRÉLIMINAIRE)**

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## ANNEXES TO THE MINUTE

ORAL STATEMENTS OF MARCH 25th, 1948

**(PRELIMINARY OBJECTION)**

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### 1. — EXPOSÉ DE M. KAHREMAN YLLI

(AGENT DU GOUVERNEMENT ALBANAIS)

Monsieur le Président, Messieurs de la Cour,

Peut-être n'est-il pas conforme à la pratique, aux usages de la Cour, qu'un agent prenne la parole immédiatement après le prononcé d'un arrêt. Toutefois, je me permets de retenir encore pour un instant l'attention de la Cour étant donné qu'il s'agit d'un fait dont l'importance dans la présente affaire mérite d'être prise en considération.

La Cour voudra bien se souvenir que j'ai soutenu devant elle que, dans les circonstances de la présente affaire, un compromis s'imposait, sur lequel devait se fonder toute la procédure. Au cours des séances du 28 février et du 5 mars, des déclarations ont été faites par les Parties au sujet de ce compromis. Je ne veux pas revenir maintenant sur ces déclarations, mais je mentionne simplement que M. l'agent du Gouvernement britannique avait exprimé l'avis que le compromis devait être signé immédiatement, alors que, de notre part, notre seule objection était que le délai proposé nous paraissait trop court ; une prolongation de ce délai fut refusée. Mais malgré le peu de temps qui restait à notre disposition, nous avons fait tous nos efforts et, le 19 mars, nous avons proposé au Gouvernement britannique un projet d'accord. A la suite d'un échange de vues, nous avons signé aujourd'hui, à midi, le compromis. J'ai l'honneur de porter maintenant à la connaissance de la Cour le texte sur lequel nous nous sommes mis d'accord ; je vais donner lecture de l'unique exemplaire du texte français.

(M. Kahreman Ylli donne lecture du texte du compromis[1].)

Tel est le texte du compromis que j'ai l'honneur de porter à la connaissance de la Cour avec la demande qui y est incluse.

M. l'agent du Gouvernement britannique donnera lecture du texte anglais.

Ainsi que je l'ai dit plusieurs fois, le Gouvernement albanais a tenu à respecter la décision du Conseil de Sécurité, du 9 avril 1947, en vertu de laquelle le présent compromis est soumis à la Cour internationale de Justice.

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[1] Voir vol. II, p. 28.

## 2.—STATEMENT BY Mr. BECKETT

(AGENT FOR THE GOVERNMENT OF THE UNITED KINGDOM)

May it please the Court. I wish in the first place to confirm the statement made by my friend the Albanian Agent that at 12 o'clock to-day we signed a special agreement. I will, with your permission, read the English text of this special agreement; both texts are of equal authority.

(Mr. Beckett then read the English text[1].)

Mr. President, at the end the special agreement requests the Court to give such directions as it thinks fit for the future procedure in this case, after consultation with the Agents of the Parties. I am, Mr. President, at The Hague at the moment, and I ought to leave it to-morrow morning; I believe my friend, the Albanian Agent, is in much the same position. I do not know whether the Court will wish to take advantage of our presence here at this time to consult us immediately with regard to this procedure, but if that should be the course desired, I am of course at the disposition of the Court.

Mr. President, as the Court will remember, while we always thought that we were entitled to take the course that we did in starting these proceedings by unilateral application—and it is, of course, a natural satisfaction to us that the Court has held almost unanimously that we were so entitled—while we always thought we were entitled to take that course, we said that we did not mind whether the Court decided this case on the basis of a unilateral application, or on the basis of a special agreement. All that we desired was that the Court should be in a position to give a decision on the merits with the minimum of delay. We said at the very end, through the mouth of the Attorney-General, that we remained willing to sign a special agreement with Albania right up to the time when the Court might deliver its judgment. It was two or three days ago, actually, I think, on the 22nd, when the approach which my friend the Albanian Agent has mentioned actually reached us at the Foreign Office; and this morning the Albanian Agent and myself were able to agree upon the text and we signed it at midday to-day. The original signed copies, in English and French, will be filed with the Registry, and the Members of the Court have before them roneoed copies in both languages. Of course, we deliberately signed that agreement before the Court gave its judgment and when we neither of us had any idea of what form the judgment would take.

It is, Mr. President, a considerable satisfaction to us to see this proof of the sincerity of the desire of our opponents, the Albanian Government, that this matter should be decided—the merits of this question—should be decided by the Court. I think perhaps, too, that the Court will find equal satisfaction at this further proof of the respect in which this Court is held and the attachment of two disputing Parties to the proper method of settling legal disputes and to the rule of law.

In conclusion, Mr. President, I respectfully thank the Court for a judgment which will be a most valuable addition to international jurisprudence.

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[1] See Vol. II, p. 29.