DISSENTING OPINION BY JUDGE KRYLOV.

[*Translation.*]

1. *Albania's connivance has not been proved.*

The Court has rightly rejected the allegation made by the United Kingdom that the laying of mines in the North Corfu Channel was effected with the connivance of Albania.

I agree with the opinion expressed in this part of the Judgment, but I feel compelled to make the observations which follow.

In support of their contention the British alleged in their Reply that the mines were laid near Saranda just before October 22nd, 1946, by the Yugoslav warships *Mljet* and *Meljine*. The British submitted to the Court the affidavit of the witness Kovacic, a deserter from the Yugoslav armed forces. This witness, giving evidence before the Court, said that about October 18th, 1946, in the port of Sibenik in Yugoslavia, he had seen German GY mines loaded on the above-mentioned ships.

By way of strengthening Kovacic's testimony, the British filed with the Court an affidavit by a man named Pavlov, who had deserted from a Yugoslav merchant ship. Pavlov stated in his affidavit that during October, 1946, he had seen a warship of the *Mljet* type at Boka Kotorska. Hence, the British drew the conclusion that the *Mljet* and *Meljine* had left the port of Sibenik and paid a visit to Albanian waters.

After examining Pavlov's affidavit, the Court considered that it was unnecessary to hear his evidence at a public sitting.

As regards Kovacic's testimony, it was found to be full of errors. The visit paid by the Court's Experts to Sibenik deprived it of any value, as the Experts found that many of his categorical statements about things he was said to have seen were materially impossible.

But there is more. Even if some part of Kovacic's deposition was true, his evidence is still not sufficient to prove that the mines in question were laid by the Yugoslav ships. Kovacic alleged that he had seen the Yugoslav ships loaded with German GY mines in the port of Sibenik. He stated that he had heard a Yugoslav officer (whose name he was unwilling to give) say that the mines had been laid in Albanian waters ; he added that this officer had not himself taken part in laying the mines but had merely been told about it by another officer.

Kovacic's statement is therefore nothing more than what the British call "hearsay", indeed it is "hearsay in the second degree". Kovacic's deposition does not, and cannot, afford any kind of proof in the present case.

In the municipal law of several countries, indirect proof (circumstantial evidence) is sometimes considered adequate. The well-known British author Wills has explained this point in regard to "common law" in his book *Principles of Circumstantial Evidence* (see the combined English and Indian edition, 1936).

However, I doubt whether, by founding oneself on indirect evidence, it is possible to conclude that a State is responsible vis-à-vis another State. I do not believe that international justice could be content with indirect evidence of the sort that has been produced in the present case, which affects the honour of a State, a subject of international law, and its position in the community of nations.

For these reasons, I cannot found my opinion on the deposition of Kovacic, and I feel bound to declare that, up to the present, the criminal who laid the mines in the Corfu Channel has not been discovered.

It is not contested that Albania herself had no means of laying the mines. Neither can it be affirmed that Albania was an accomplice in the minelaying operation. The assertion of such complicity would be a departure from juridical logic. If there is no evidence to show who was guilty of laying the mines, how can the Court find that Albania was an accomplice in the minelaying operation ?

2. *Albania's cognizance of the mines has not been proved.*

The Court has accepted another of the submissions of the United Kingdom : the alternative submission that Albania was cognizant of the minelaying.

The two following arguments were presented in support of this theory :

(*a*) In the first place, the Albanian Government's attitude before and after the explosion on October 22nd, 1946, and, in particular, the alleged inaccuracies and contradictions in the Albanian diplomatic correspondence. It must not however be forgotten that in 1946 the Albanian Government was a new government without experience in the conduct of international affairs and without the assistance of experts in questions of international law. It is therefore inequitable to found arguments leading to the conclusion that Albania was cognizant of the minelaying, upon errors in the Albanian diplomatic correspondence. This *consequentia non valet*. Nor is there ground for asserting that Albania sought to conceal the fact that she was cognizant of the minelaying. Although she was not informed as to the events on October 22nd, 1946, she did not delay in addressing herself to the United Nations and in asking them to have these events elucidated.

(*b*) The British have contended, in the second place, that the Albanian local authorities must have seen and heard the minelaying operation. However, this fact has certainly not been proved. The Albanian witnesses described to the Court the organization of the Albanian coastal guards in the Saranda district. In the part of the Albanian coast with which we are concerned, there were in 1946 three posts, namely at Cape Kiephali, at Saranda itself, and at the San Giorgio Monastery. The commander of the coast defences had also at his disposal a battery in the neighbourhood of Saranda.

From a study of the map of this district and of the sketch produced by the Court's Experts on February 8th, 1949, it appears that the Albanian coastal guards were in a position to exercise the necessary vigilance over the whole of the Strait. But that in no way excludes the possibility of a clandestine operation in the waters of the Strait. For the watch kept by the coastal guards, though adequate in normal weather conditions, could evidently not be exercised with the same efficiency in unfavourable weather conditions, for instance in rainy weather or on dark nights, etc.

In their first report on January 8th, 1949, the Court's Experts stated that the minelayers *could have been* observed, even by night, with the aid of binoculars in the part of the coast between Denta Point and the San Giorgio Monastery.

In regard to the possibility of hearing the laying of the mines, the Experts stated, in the same report, that under favourable conditions it would have been possible to hear the minelaying operation from that part of the coast and from Limion Point. But, they added, under less favourable conditions it would be impossible to hear the operation from all the points that had just been mentioned.

The statement of the Experts on this point was based on the results of the test which they carried out under the conditions described in their report. It must be noted, in this connexion, that the Experts were on board a vessel, not on land, i.e., in circumstances which favoured audibility, as was quite correctly pointed out by the Albanian Counsel at the Court's sitting on January 21st, 1949.

The second report of the Experts, dated February 8th, 1949, after their visit to Saranda, does not modify what they said in their first report.

The visibility test was carried out by the Experts from the San Giorgio Monastery during a very calm and clear night (slight breeze from the North-East) by starlight. The Experts were on the look-out, they knew the exact moment when the boat which they were awaiting had left Saranda. They saw the boat when it was 670-800 metres away. But the nearest mine to the Monastery was 2,000 metres away.

The conclusion drawn by the Experts on the question of visibility (they said that they did not carry out an audibility test at Saranda)

was as follows : the two Experts considered that the minelaying operation *must have been* observed from the coast *if* the weather conditions had been normal (i.e., clouds 3-4/10ths, no fog or rainfall, slight easterly breeze, visibility 20 miles), and *if* look-out posts were stationed at Cape Kiephali, San Giorgio Monastery and Denta Point (in regard to the latter post, the Court does not find that its existence was proved).

It need hardly be said that extremely favourable weather conditions may not occur every day, and that the statement of the Experts in regard to visibility must be understood as conditional.

It is quite evident that the Experts' visit to the places in question has not affected the substance of their replies regarding the possibility of seeing the minelaying operation. We still remain in the sphere of possibilities and probabilities.

It must be added that, in his speech on January 17th, the United Kingdom Counsel implicitly admitted that the mines might have been laid without the operation having been seen or heard from the coast.

Accordingly, I do not see any reason for asserting that Albania *had* cognizance of the laying of the mines and still less for determining the exact moment at which she acquired such cognizance.

3. *The* culpa *of Albania has not been proved.*

But is it perhaps the case that the Albanian authorities *ought to* have seen or heard the minelaying operation ?

To answer that question in the affirmative would, in my opinion, be to found Albania's responsibility on the notion of *culpa.*

I employ this term, subject to a reservation. I consider that the terms of Roman law and of contemporary civil and criminal law may be used in international law, but with a certain flexibility and without making too subtle distinctions. There is no need to transfer the distinctions which we sometimes meet in certain systems of municipal law into the system of international law.

Is it then possible to found the international responsibility of Albania on the notion of *culpa ?* Can it be argued that Albania failed to exercise the diligence required by international law to prevent the laying of mines in the Corfu Channel ? Can it be asserted that international law involves an obligation for a coastal State to prevent the laying of mines in its territorial waters ? I do not think so. However perfectly the coastal watch of a coastal State may be organized, the clandestine laying of mines cannot be considered impossible, especially, one might add, in peace time when the coastal guards are not in a state of instant readiness. But the history of maritime war provides plenty of examples of clandestine minelaying.

Here I have an observation to make. The responsibility of a State in consequence of an international delinquency presupposes, at the very least, *culpa* on the part of that State. One cannot found the international responsibility of a State on the argument that the act of which the State is accused took place in its territory —terrestrial, maritime, or aerial territory. One cannot transfer the theory of risk, which is developed in the municipal law of some States, into the domain of international law. In order to found the responsibility of the State recourse must be had to the notion of *culpa*. I refer to the famous English author, Oppenheim. In his work on international law, he writes that the conception of international delinquency presumes that the State acted "wilfully and maliciously", or in cases of acts of omission "with culpable negligence" (Vol. 1, para. 154). Mr. Lauterpacht, the editor of the 7th edition (1948), adds that one can discern among modern authors a definite tendency to reject the theory of absolute responsibility and to found the responsibility of States on the notion of *culpa* (p. 311).

As I have already stated, I cannot find in the organization and functioning of the Albanian coastal watch—having regard to the limited resources of that small country—such a lack of diligence as might involve the responsibility of Albania. I do not find any evidence of *culpable* negligence.

The confusion which prevails in regard to the facts in this case is apparent in the circumstance that, on the one hand, the majority declare that Albania was exercising special vigilance whereas, on the other hand, some of the judges consider that Albania's responsibility actually results from her lack of vigilance ; the second presumption is diametrically opposed to the first.

Though there is no evidence to show that Albania was cognizant of the minelaying or that she was guilty of *culpa* in not exercising the requisite diligence through the action of her coastal watch, I have still to examine the question whether Albania has incurred responsibility owing to her omission to warn the British ships of their imminent danger on October 22nd, 1946. I will content myself with saying that, even if Albania had known of the existence of the minefield before October 22nd, 1946—and that has not been proved—the Albanian coastal guard service could not have warned the British ships of the fact on that day. Having regard to the circumstances of the passage of the ships on that day, the coastal guards had neither sufficient time nor the necessary technical means for giving such a warning.

In view of the foregoing and owing to the inadequacy of the evidence produced by the British, I am unable to reach the conclusion that Albania was responsible for the explosions which took place on October 22nd, 1946, in Albanian waters. One cannot condemn a State on the basis of probabilities. To establish international responsibility, one must have clear and indisputable facts. In the present case these facts are absent.

4. *The Court has no jurisdiction to assess the amount of the compensation.*

I cannot align myself with the opinion of the majority to the effect that the Court has jurisdiction to determine the amount of the compensation to be paid by Albania.

The text of the Special Agreement signed by Albania and Great Britain on March 25th, 1948, is clear. According to that text, the Court may give judgment on the question of principle : Is there any duty (for Albania) to pay compensation to Great Britain ? It does not follow at all that the Court has jurisdiction to fix the amount of the compensation. In my opinion, that is perfectly clear, not only from the wording of the Special Agreement, but especially from the circumstances in which that Special Agreement was concluded.

In her Memorial, Great Britain asked the Court to award her the sum of £875,000 sterling by way of damages. The signatories of the Special Agreement of March 25th, 1948, and in particular the United Kingdom Agent, cannot have failed to have had that demand in mind. I exclude the possibility of a *reservatio mentalis* on the part of the latter agent ; and so the Special Agreement did not maintain that claim.

At the same time, the Special Agreement put a new question to the Court concerning the lawfulness of the acts of the British Navy in Albanian waters. The Special Agreement is a complete restatement of the case submitted to the Court and does not embrace the question of the amount of money that might have to be paid.

It is true that during the oral proceedings in January 1949 the United Kingdom reaffirmed its claim for the payment of the sum previously mentioned, but this interpretation of the Special Agreement by the British Counsel is in my view contrary both to the letter and the spirit of the Special Agreement of March 25th, 1948, and it was disputed by the Albanian Counsel.

I consider that the Court should interpret the Special Agreement of March 25th, 1948, restrictively, bearing in mind that its jurisdiction is based solely on the consent of the Parties.

The vague references which may be found in the records and the citation of various documents are not adequate to found the jurisdiction of the Court which, in this respect, has exceeded the limits laid down by the Special Agreement.

5. *The passage of the British ships on October 22nd*, 1946.

The passage of the British squadron through the territorial waters of Albania was made on October 22nd, 1946. These waters extend to the median line of the North Corfu Strait. Was it an innocent passage, having regard to (*a*) its object and (*b*) the methods by which it was effected ?

The question of innocent passage by warships belonging to one State through the territorial waters of another State has not been regulated by convention. The Hague Conference of 1930 for the Codification of International Law failed in its efforts to regulate the régime of territorial waters. The practice of States in this matter is far from uniform, and it is impossible to say that an international custom exists in regard to it. We only dispose of scattered sources—suggestions by international associations, doctrines of learned authorities, etc.

In my opinion, we should adopt the standpoint of the French writer, M. Gidel, who, in his work *Le Droit international public de la Mer*, expresses himself as follows (Vol. 3, p. 284): "The passage of foreign warships through territorial waters is not a right but a tolerance." The reason is that a warship's character is different from that of a merchant ship. The celebrated American jurist, Mr. Elihu Root, in his speech in the North Atlantic Fisheries case, judiciously declared that the passage of warships through territorial waters should not be effected without the consent of the coastal State. Warships constitute a menace—"they threaten", that is not the case with merchant ships: "merchant ships may pass and repass because they do not threaten" (see Hackworth, *Digest of International Law*, Vol. I, p. 646). It will be sufficient to cite in addition the statement on this point in Harvard Law School Research in International Law (1929, p. 295): "There is therefore no reason for freedom of innocent passage of vessels of war. Furthermore, the passage of vessels of war near the shores of foreign States and the presence without prior notice of vessels of war in marginal seas might give rise to misunderstanding even when they are in transit."

Accordingly, the right to regulate the passage of warships through its territorial waters appertains to the coastal State.

Does this right appertain to the coastal State if the territorial waters form part of an international strait? No uniform reply can be given to that question.

Contrary to the opinion of the majority of the judges, I consider that there is no such thing as a *common* regulation of the legal régime of straits. Every strait is regulated individually. That applies to the Bosphorus and the Dardanelles, to the Sound and the Belts, to the Strait of Magellan, etc. The legal régime of all those straits is defined by the respective international conventions. The régime of the Corfu Strait has not been juridically regulated. Owing to its insignificance, the régime of that Strait has not been found worthy of special attention. Suffice it to say, for example, that the Greek writer Jean Spiropoulos, in his manual *Droit international public* (1933), makes no mention at all of the Corfu Strait. If the régime of the strait is not defined by a multilateral convention, it appertains to the coastal State or States to regulate it. When political conditions were normal,

it would have been found possible to regulate the régime of the North Corfu Strait by an agreement between Albania and Greece. In 1946, when Albania was considered by Greece as being in a state of war with the latter, such an agreement was impossible. Therefore, Albania had the right to regulate the passage of warships through her territorial waters provided that she conformed to the rules of international law.

Faced with the decision of Albania to make the passage of warships conditional on a prior authorization, the United Kingdom, instead of utilizing one of the peaceful methods enumerated in Article 33 of the United Nations Charter in order to settle the dispute which had arisen between her and Albania, ordered four warships to make a passage through the Strait.

In accordance with the instructions received from the Admiralty, the British squadron carried out the passage through the Corfu Strait as a special mission, the exact method being specified in an order issued by the admiral commanding the squadron.

I note that this order, entitled XCU (Exercise Corfu), was not produced to the Court by the United Kingdom Government notwithstanding the decision taken by the Court on December 14th, 1948. I am therefore unable to pass judgment on its contents, and I will confine myself to examining the methods by which the passage was made on October 22nd, 1946, and which may reveal the purport and objects of that order.

I will content myself with drawing attention to two facts which show how the order XCU was carried out.

(*a*) It is shown by the records that the British ships were observing the Albanian coast and making notes on the Albanian defences and batteries. That is proved by the chart attached to the British Memorial (Annex 21) and by Admiral Kinahan's report of October 23rd, 1946, paragraph 3 of which shows that the reconnaissance of the Albanian coast defences was being carried out some time *before* the explosions which damaged the British ships.

(*b*) The passage of four British ships revealed the intention on the part of Great Britain to intimidate the Albanian authorities and to make a display of British naval power.

Consequently, it may be affirmed that on October 22nd, 1946, the British ships misused the right of passage. Therefore, the passage of these ships on October 22nd, 1946, ceased to possess the character of an innocent passage and, for that reason, the sovereignty of Albania in her territorial waters was violated.

6. *Operation Retail on November 12th and 13th*, 1946.

I agree with the conclusion at which the Court has unanimously arrived on this point, but I wish to present some supplementary observations.

An analysis of the acts of the British Navy on November 12th-13th, 1946, makes it clear that this was a minesweeping

operation organized by the navy of one State in the territorial waters of another State : Albania.

Under cover of the necessity of sweeping the mines, the acts undertaken by the British Navy were nothing else but the intervention of a foreign Power in the affairs of another State—a weak State which possesses no means *vim vi repellere*.

It may be said that international law is unanimous in condemning the "right" of intervention in any forms in which this alleged right may be exercised.

In the present case, a British squadron of twenty-three warships appeared on November 12th, 1946, off the Albanian coast. It proceeded to sweep an area where its larger covering ships (cruisers and aircraft carrier), some eight ships, were stationed for two days, on November 12th and 13th, 1946, full in view of the Albanian coast. On November 13th, under the special protection of aircraft, a minesweeping operation was undertaken near Saranda.

This sweep was effected by a decision of Great Britain without Albania's consent, without an observer of the latter country being allowed to participate and even under a false pretext (see the British notes of October 26th, 1946, and November 10th, 1946, in which the British Government stated incorrectly that the mine-clearance had been approved by the Central Mine Clearance Board —see British Memorial, pp. 43 to 45).

The Albanian note of November 11th, 1946, had proposed the constitution of a mixed commission to delimit the area which was to be swept. But no answer was given to this offer.

In defending the unilateral action of the United Kingdom, its Counsel invoked the alleged right of self-help. He argued that Great Britain merely wished to collect evidence that mines had been laid ; in other words, it was a judicial police operation. He tried to convince the Court that this was a unique and unprecedented case and that Great Britain had no choice but to exercise the right of self-protection, confined to what was strictly necessary.

The Court was unable to accept this argument. The claim to exercise judicial action in the territory of another State is inadmissible because it violates the sovereignty of the State in question. Memory recalls the Austro-Hungarian claim in 1914, before the outbreak of the first World War, to participate in a criminal prosecution which had been opened in Serbian territory. As is known, public opinion throughout the world declared its opposition to this exorbitant claim which violated the sovereignty of another State.

It should be observed that the British argument on this point, i.e., their defence of the alleged right of self-help—which is nothing else but intervention—relies on assertions which have already been outstripped by the further development of international law, especially since the ratification of the Charter of the United Nations.

Since 1945, i.e., after the coming into force of the Charter, the so-called right of self-help, also known as the law of necessity (*Notrecht*), which used to be upheld by a number of German authors, can no longer be invoked. It must be regarded as obsolete. The employment of force in this way, or of the threat of force, is forbidden by the Charter (para. 4 of Art. 2).

In forming juridical opinion of the character of the acts of the British Navy on November 12th and 13th, 1946, it must be noted that Great Britain assembled considerable naval forces, as has been stated above, in order to make a naval demonstration off the Albanian coast. A naval demonstration may be defined as a direct threat aimed at another State (see Frisch, *Kriegerische Demonstration zur See*. Strupp, *Wörterbuch des Völkerrechts und der Diplomatie*, Vol. I, pp. 226-227).

The British forces seemed so overwhelming that, according to evidence given to the Court, the inhabitants of Saranda were preparing to leave the town and take refuge in the mountains. Seeing the British ships stationed and operating in waters adjacent to Albanian territory, the inhabitants of Saranda were seized with panic and expected an invasion. Public peace was thus disturbed on the Albanian shore.

But according to the United Nations Charter (Art. 42) demonstrations and other operations carried out by the air, sea or land forces of Members of the United Nations may only be undertaken in pursuance of a decision by the Security Council. The Charter, therefore, prohibits unilateral military action by its Members.

It follows that the action taken by the British Navy in Albanian waters on October 22nd, 1946, and on November 12th and 13th, 1946, involved the international liability of Great Britain and must be described as a violation, in international law, of Albania's sovereignty.

The statement of that fact constitutes the satisfaction which is justly due to Albania.

(*Signed*) S. KRYLOV.