DISSENTING OPINION BY JUDGE BADAWI PASHA.

[*Translation.*]

I agree with the Court's findings on the facts, as stated in the Judgment (pp. 12-15), and with its rejection of the contention that Albania herself laid the mines.

The Court then considers the argument that the mines may have been laid with the Albanian Government's connivance, and sums it up in the following words : "According to this argument, the minelaying operation was carried out by two Yugoslav warships at a date prior to October 22nd, but very near that date. This would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines."

To demonstrate this collusion, the United Kingdom Government relied on the evidence of Commander Kovacic and on a number of presumptions of fact or on circumstantial evidence.

The Court considered that,

on the one hand, the facts related by the witness from his own knowledge were not sufficient to prove what the United Kingdom Government claimed that they proved,

on the other hand, that the facts (presumptions of fact), even in so far as they are established, justify no definite conclusion.

Of these facts, the Court expressly mentioned the possession by Yugoslavia of GY mines, which it said not to have been proved, and the conclusion, drawn from the existence of a treaty between Albania and Yugoslavia that those two countries participated in the criminal act of minelaying. But when it said that the facts justified no definite conclusion, the Court evidently meant all the facts, without exception or distinction.

I also agree with the Court on this conclusion, and I think that there may be a strong suspicion of connivance, but that it is not judicially proved.

In order to make clear what follows, I feel obliged to mention all the presumptions on which the United Kingdom Government relies as submitted in its speeches (pp. 980 and 995, Verbatim Record, January 17th-22nd, 1949), and to make a general remark on circumstantial evidence.

The presumptions mentioned on page 980 are five in number and are as follows :

1. The fact that the mines were placed actually in front of and probably in Saranda Bay itself in the territorial waters of Albania suggests that Albania must have been at least to some extent implicated in the laying of this minefield.

2. The conduct of Albania both after the blowing up of the ships on October 22nd and even more after the discovery of the minefield on November 13th was not the conduct which would be expected of a Power which had learned for the first time of the existence in her territorial waters just off a small Albanian port of a dangerous minefield, but rather that of a State embarrassed by a most inconvenient discovery.

3. It is possible to find motives, which Albania may have had for causing the minefield to be laid and therefore for Yugoslavia, at that time her closest friend and ally, assisting her, since Albania did not herself possess the resources for doing so, and no country other than Yugoslavia and Albania had the resources and the motives for laying a minefield here before October 22nd.

4. The minefield consisted of German GY mines, marked with a swastika ; there were available stocks of German GY mines in Yugoslavia ; Yugoslavia had marked these mines with a swastika, and had the means of laying this minefield. The mines therefore must have come from Yugoslavia.

5. Owing to the close friendship and relationship between the two countries, it is inconceivable that Yugoslavia laid the mines without the knowledge of the Albanian Government.

Two other presumptions are given on page 995 :

1. There would have been a serious risk that the minelaying would have been seen from Limion Bay, Denta Point, and St. George's Monastery, if not from other points also.
2. This risk was so serious and so evident that no one intending to lay mines without Albania's consent would ever have dared run it.

* * *

The general observation is as follows :

In a system of evidence which is based upon free appraisal by the judge, as is the case in national criminal legislation and in international law, circumstantial evidence means facts which, while not supplying immediate proof of the charge, yet make the charge problable with the assistance of reasoning. The elements of such circumstantial evidence must be interpreted and associated in order to draw the relevant inferences and reconstruct the data on which the hypothesis of responsibility is founded. In this process of interpretation and association, there is a risk of commit-

ting errors of appreciation, of letting the imagination fill in the gaps in the evidence, or of reasoning in a specious manner. This method of evidence, which seeks or pretends to arrive at certainty, most often attains only a high degree of probability. The fact remains that under some legislations, circumstantial evidence must be weighty, accurate and concordant. On the other hand, the most reliable doctrine takes the view that "proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing, unusual and contrary to the way of the world". These rules must be a constant guide in weighing evidence.

* * *

The Court then comes to the United Kingdom argument that whoever laid the mines, they cannot have been laid without the Albanian Government knowing of it.

The Court feels bound to state first that "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, not yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof."

The Court then mentions two classes of facts which corroborate one another. The first relates to Albania's attitude before and after the catastrophe of October 22nd, 1946 ; the others concern the possibility of observing minelaying from the Albanian coast.

From facts and observations connected with these two orders of facts which the Court considers as established, the conclusion is drawn that the minelaying which caused the explosions of October 22nd, 1946, could not have been unknown to the Albanian Government.

Then, after referring to the Albanian authorities' omission, if not to send a general notification to all States, at least to warn the warships of the danger that they were running into, during nearly two hours, from the moment when they were reported to the Commander of the Coastal Defences by the look-out post at St. George's Monastery, up to the time of the explosion of the *Saumarez,* the Court concludes that Albania is responsible under international law for the explosions and the damage and loss of human life that resulted, and that the Albanian Government must pay compensation to the United Kingdom Government.

It is these two last findings of the Court that, to my regret, I cannot accept.

The two series of facts, on which the Court bases its finding in regard to knowledge, were put forward with others by the United Kingdom in support of the argument of connivance. But after considering this argument, the Court came to the conclusion that, in spite of seven concurrent presumptions, it was still a conjecture.

In any case, it is clear that if connivance or collusion has not been established, the knowledge of the minelaying that would be the consequence of this connivance, is necessarily excluded. To maintain the contrary would be equivalent to saying that arguments insufficient for establishing connivance are sufficient to prove knowledge inasmuch as it is a consequence of connivance—which I think is inadmissible.

In the British argument, knowledge is so confused with connivance, that it is impossible to separate them. But connivance presupposes Yugoslavia's complicity, and the Court, with which I agree, thinks that this complicity is not proved.

How then can the two notions be separated ? Evidently the only way would be to reject the argument that the minelaying operation was the result of a plot and to confine oneself to the material fact of the minelaying, on the assumption that it was carried out by an unknown agency ; it must be ascertained whether the circumstances of the case lead to the conclusion that Albania, quite apart from all connivance, had, or had not, knowledge of the minelaying. By reducing the problem to these terms, we are able, of course, to dissociate knowledge from connivance ; but in that case, physical proof so to speak of knowledge is necessary. Reduced to that abstraction, knowledge could only be established if it were shown that Albania, or, more exactly, the local authorities on the coast, saw the minelaying operation. The question of visibility from the coast then assumes an importance which it would not have in the case of connivance ; for the latter, as the United Kingdom Counsel maintained, could take place at government level, between Belgrade and Tirana, without the local authorities having seen anything. At the same time, the knowledge of the minelaying must be determined in respect of time, i.e., the moment when Albania learned of the minelaying must be determined. Whereas, in the case of connivance, it is of little importance to decide the moment when it took place (for connivance in itself is sufficient to involve the responsibility of the territorial State), the precise moment when knowledge occurred must be determined, in order to decide when the obligation to notify the existence of the minefield first arose, or if there were not sufficient time to make the notification, when arose the obligation to warn the ships which were passing through the Channel of the danger into which they were running.

The United Kingdom stated that this visibility was established beyong dispute, both before the Security Council and in the

early stages of the proceedings. The evidence of the naval officers had the same positive ring. But Counsel for the United Kingdom no longer regards this fact as important in his oral reply (pp. 993-995). He even admitted the possibility that the coastal authorities had neither seen nor heard anything. Knowledge would then have existed at the governmental level between Tirana and Belgrade. But this would not be simple knowledge, but knowledge as a consequence of connivance.

Even in so far as the United Kingdom Counsel, in his speech in reply, held visibility to constitute a presumption of connivance, he did not do so not because it constitutes a certainty, but because it involves such a serious and evident risk for anyone intending to lay mines, that he would never have dared to do so without Albania's consent.

In short, the evidence of knowledge, in the United Kingdom case, is the same as that for connivance. But for the purpose of establishing connivance, it was considered conjectural. Can it be thought otherwise as regards the establishing of knowledge ?

It was thought however that justification for a reply in the affirmative was to be found in the Report of the Committee of Experts appointed by the Court, especially the second Report drawn up after the experiments at Saranda.

The fact is that even in these reports, which barely differ in their general conclusions on this point, the evidence is still conjectural. In the first place, there is only certainty in regard to visibility from Denta Point, and then only provided a look-out post existed there, and that weather conditions (sea, clouds, wind, etc.) were normal.

The existence of a post at Denta Point, which is accessible only from the sea and lacks all means of communication with Saranda, remains a matter of conjecture, as the Court has recognized. On the other hand, it remains to be proved that the look-outs' watch was regular and effective, i.e., covering the whole night, and that weather conditions on the exact day the minelaying took place were normal, the month of October being mostly one in which weather conditions are particularly abnormal.

The day on which the mines were laid is evidently not known. The United Kingdom argues that it was about October 22nd, i.e., October 20th or 21st ; but there is no certainty on this point, and above all, nothing to prevent the date being some other day between May 15th and October 22nd.

On every side, then, there are unknown and vague facts, and this is why, when the Experts state that the operation must have been observed from a certain point under certain conditions, they merely express a scientific probability or certainty, provided all the required conditions are fulfilled. To convert this scientific opinion into human truth or certainty—still more, judicial cer-

tainty—is an entirely different matter. When the indispensable data concerning the conditions are lacking, the only answer, in my view, must be negative.

There remains the attitude of Albania, both before and after October 22nd, 1946. This attitude is said to be shown by her diplomatic notes, her opposition or obstruction to the sweeping of the Channel; the indifference she showed after the minefield was discovered: she did nothing to investigate or pursue the author of the minelaying; she showed no surprise, indignation or perturbation after the discovery; she blamed the United Kingdom for violating her sovereignty by sweeping the mines, thus forgetting the more serious violation of that sovereignty represented by the laying of the mines in her territorial waters.

In the eyes of the United Kingdom, this attitude is one of a State embarrassed by a most inconvenient discovery; it is not the attitude of one that has learned of the existence of a dangerous minefield in its territorial waters, just off a small Albanian port.

The correct attitude would apparently have been for Albania as early as October 22nd, the date of the accident, or, at any rate October 26th, the date of the first United Kingdom communication, to have asked for the sweeping of the Channel or to have consented to the sweep, even though she had not been invited to participate; and on November 13th to have opened an enquiry into the origin of the minefield. Albania ought, on the other hand, either to have addressed a protest to the United Nations against the unknown agency which had violated her sovereignty by laying minefields in her territorial waters, and to have requested the United Nations' intervention to discover the guilty State, or else to request a friendly State to sweep the minefield.

It is well-known that in the case of prosecutions under municipal law, when a person is accused of having committed an offence, the conduct of the accused or his behaviour after the crime is often used as a presumption against him. This behaviour sometimes manifests itself as embarrassment or discomfort, accompanied by contradictions when he endeavours to provide an alibi or explain certain circumstances which seem to weigh against him. At other times, this behaviour assumes the opposite form, and the accused protests his innocence vehemently and makes every effort to cast suspicion on others. Both forms of behaviour might well be manifested by an innocent man whose awkwardness or indignation caused him unconsciously to adopt such a suspicious attitude.

The question then of the subsequent attitude of an accused person must be handled with the greatest care, specially when, as in the actual case, this question relates by its nature to connivance more than to knowledge. And still more so when States are involved. The attitude of an individual is generally personal and subjective, and to be explained by his particular psychology; the

actions of a State are generally the result of deliberation, of a compromise between different views, and sometimes of suggestions or advice from foreign sources, or various other considerations which cannot possibly be circumscribed or determined. It would not be right then, where State responsibility is involved, to act on the mere analogy of what occurs in the case of the criminal responsibility of individuals.

In regard to the diplomatic notes, the first United Kingdom communication of October 26th was a short and peremptory notification. The Albanian note of October 31st, in addition to inopportune protests and an unexplainable declaration of non-responsibility in case the sweep should take place in territorial waters, contains a statement that Albania has no objection to the undertaking, although she seems to make the usual confusion between interior waters and territorial waters. The United Kingdom answer to this note, dated November 10th, gives the United Kingdom Government's decision to sweep the Channel on November 12th; the tone of the notification is equally peremptory. The United Kingdom does, it is true, refer to the sweeps of October 1944 and February 1945, undertaken without objection from Albania; and assurance is given that no ship will sojourn in Albanian waters (apparently this expression means interior waters). But Albania's consent is not asked, as the Central Mine Clearance Board had recommended, nor is any invitation made to Albania to send an observer.

Meanwhile, the discussion in the Central Mine Clearance Board in London, of which Albania may have received information, gives the impression of some confusion, and denotes doubt as to the regularity of unilateral action.

It is not inconceivable then that the apparently strange attitude of Albania may have been dictated by suggestions or advice inspired by the international political situation of the moment.

If, on the other hand, account is taken of the fact that States differ in their strength, culture, history, position and a multitude of other circumstances, and consequently do not react in the same way to a given situation, and of the fact that the countries involved are the United Kingdom on one side and Albania on the other, it will be readily admitted that too much attention must not be paid to Albania's attitude.

My conclusion therefore is that there may be strong suspicion of knowledge, just as of connivance; but that this is not sufficiently proved, either by the evidence furnished by the United Kingdom, or by the Experts' Report.

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Since knowledge has not been judicially proved, it is superfluous to consider whether, Albania after learning of the minelaying, was,

in the hypothesis—the only one envisaged by the United Kingdom —that mines were laid on October 20th or 21st, in a position to notify the existence of the minefield in the Medri channel, or at least to warn the British fleet when it was steaming towards the Channel, and whether, by her failure to do so, Albania's responsibility was involved. In any case, the necessary facts to establish such a possibility have not been reported or discussed.

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It remains to be seen whether, apart from connivance or knowledge, Albania committed a fault which may have caused the explosion, and upon which her international responsibility for the damage suffered may eventually be founded.

The United Kingdom did not maintain, as an alternative ground of responsibility, that such a fault existed. Counsel for the United Kingdom even declared formally that, unless she had knowledge, Albania was not responsible.

However, the opinion was expressed that the terms used in the Special Agreement are general and cover all cases of international responsibility, and that it is for the Court to examine whether such a fault can be proved to have been committed by Albania.

Before examining this aspect of the question, it must be stressed that international law does not recognize objective responsibility based upon the notion of risk, adopted by certain national legislations. Indeed, the evolution of international law and the degree of development attained by the notion of international co-operation do not allow us to consider that this stage has been reached, or is about to be reached.

The failure of Albania to carry out an international obligation must therefore be proved, and it must also be proved that this was the cause of the explosion.

Some are of the opinion that a general obligation exists for States to exert reasonable vigilance along their coast and that the failure of Albania to act with due diligence was, in the absence of knowledge on her part, the reason that the minefield remained undiscovered and that it caused the explosion.

Such a general obligation does not exist and cannot exist. Even assuming that it does exist, the causal *nexus* between the failure to carry out the obligation and the explosion remains to be shown.

Others, while admitting that no general obligation to exert vigilance and no absolute criterion exist, maintain that in any case there does exist a degree of vigilance which every State must exercise, but that the extent of such vigilance is to be determined according to the circumstances of each case.

In particular, it is asserted that Albania exaggerated her rights of sovereignty as regards the passage of ships in her territorial waters. This excessive and almost morbid anxiety in regard to

sovereignty implies that, in order to maintain her sovereignty, Albania should have exercised a stricter and more rigorous vigilance than that of countries who recognize freedom of innocent passage.

On the other hand, it is asserted that Albania, through her representative on the Security Council, loudly proclaimed that she was extremely vigilant, in order to prevent incursions and infiltrations by Greeks, precisely in the district where the mines were laid and the explosion took place.

In the first place, to give a decision as to a lack of vigilance or supervision by a State in a particular district, it would be necessary to know the availabilities of that State: resources, organization, situation at the moment, and a number of other considerations.

Secondly, I do not think that her exaggeration of her rights should necessarily involve an aggravation of Albania's duty of supervision. If there exists a duty of absolute or relative watchfulness, international law alone can determine its extent and limits. But this duty cannot be increased or diminished by the conduct of the State in question. This can only result from Albania's possibilities and not from her declarations.

On the other hand, it may be asked whether the United Kingdom argument does not exaggerate the importance of the contradiction in Albania's defence on the question of vigilance—sometimes affirming and sometimes endeavouring to deny it. Does not the vigilance to which the Albanian representative referred seem only to be vigilance against Greek incursions and infiltrations, by landing from small boats; this does not necessarily coincide with the vigilance that would enable a minelaying operation carried out at night at a certain distance from the coast to be seen and distinguished.

Moreover, this exaggeration of her rights and jealousy of her sovereignty seem rather to show the wish of Albania to limit the duty of supervision by means of this preventive barrage, rather than an obligation to redouble her supervision.

Finally, it may be asked whether foreseeing the laying of mines should be considered as a normal obligation and if, consequently, international law lays down, and is justified in laying down, an obligation of watchfulness suitable for preventing or observing such minelaying.

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For these reasons, my reply to the first point in the first question in the Special Agreement is in the negative. This reply governs the reply to the second point, concerning compensation, and the latter must also be in the negative.

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On the other hand, I cannot agree with the Court's decision as to its jurisdiction to assess the amount of compensation.

In my view, the words of the Special Agreement "is there any duty to pay compensation" (*"y a-t-il le cas de réparations à donner"*), compared with those of the submissions in the United Kingdom Application, clearly exclude such jurisdiction. This is confirmed by the fact that the Special Agreement amounts to a novation of the application, resulting from negotiations and therefore implying mutual concessions on the positions originally adopted.

Though they may be obscure, the terms of the Special Agreement must none the less be interpreted in the light of the declarations and of the attitudes of the Parties, as denoting absence of jurisdiction. And if there still were any doubt, the exceptional nature of the Court's jurisdiction, founded on the consent of the Parties and, as a corollary, on the restrictive interpretation of the Special Agreement, should in any case exclude such jurisdiction.

Anyhow, I do not think that the jurisprudence of the Permanent Court of International Justice can be invoked in the particular circumstances of the present case, nor that the Security Council's Resolution can be interpreted without due regard for the terms in which the matter was referred to the Council; these terms did not and could not have any reference to a pecuniary settlement of the dispute.

Finally, the parallelism between compensation and satisfaction is only apparent. Owing to its nature, unlike "compensation", "satisfaction" is not limited to a single form. The fact that the Parties have discussed before the Court the different methods by which satisfaction may be given does not imply that it was intended that the method of assessing the amount of the compensation should also be submitted to the Court's examination.

(*Signed*) BADAWI PASHA.