DISSENTING OPINION BY Dr. EČER, JUDGE "AD HOC"

[*Translation*]

I agree with Judge Krylov's declaration for the following reasons :

(1) Interpretation of Article 53 of the Statute

The Judgment gives an interpretation of Article 53 of the Statute. The dominating idea in this interpretation is, to my mind, as follows : the default of the respondent—and Albania is the respondent party in the present stage of proceedings—cannot be deemed to be a recognition of the claim and the facts alleged by the applicant. Consequently, the Court is compelled by Article 53 to examine the assertions of the applicant and to satisfy itself that the submissions in the Application are well founded in fact and in law. But in that case, the Court's responsibility is, so to speak, "diminished". The Court is not obliged to examine the facts alleged by the applicant with the same exactness as in the case of an issue raised by the respondent. But I cannot accept this interpretation of Article 53. To begin with, in this case the Court is not faced with a simple default, referred to by Article 53 in the first place : the respondent, having received a copy of the claim (the Memorial), does not reply. Further, when convoked to a public sitting, he does not appear, or he appears and remains silent. Albania did nothing of the sort ; on the contrary, both in the written and in the oral procedure she disputed the United Kingdom's claim in fact and in law. She did not take part in the present stage of proceedings for a juridical reason recognized even by the minority of 6 Judges. The present stage of proceedings is not a new case, such as, in my view, is primarily referred to in Article 53, but the final stage in a case that has to be considered as a whole, from the date of the Application—or at any rate of the Special Agreement—to final judgment.

In the present proceedings, therefore, the Court is faced with a situation somewhat different to that referred to in Article 53. The interpretation of Article 53 therefore, in these proceedings, cannot be the same as in a case of pure default.

The words in Article 53 : "The Court must .... satisfy itself", are clear. "Satisfy itself" is only a synonym for the "firm conviction" of a Judge. The methods of proof themselves are given in the Rules of Court : documents, witnesses, experts, etc. The whole constitutes "judicial proof". An interpretation seems to me superfluous. The only "penalty" that a defaulting respondent incurs, according to Article 53 of the Statute, is this : the Court's task is solely to consider and give judgment on the submissions of the

applicant—whether the claim is well founded in fact and law. The Court's task is therefore made easier only in the sense that it does not consider the submissions of the respondent. That is all. But the Court is obliged to consider the assertions (submissions) of the applicant with just the same care and precision, whether the respondent appears or not.

(2) The rule of *non ultra petita*

This general rule of law within the meaning of Article 38 involves a question of procedure. After pointing out that the amount of compensation claimed by the United Kingdom for the loss of the *Saumarez*, based on 1946 values, is somewhat lower than that assessed for the same damage by the experts, the Judgment decides that the amount claimed by the United Kingdom Government is justified because of the rule *non ultra petita*. Thus a problem rises: can this rule influence the selection of the basis of calculation (1943-1946-1949), or not. In my opinion, the rule *non ultra petita* cannot influence the Court in this matter. If, in determining the replacement value of the *Saumarez*, the Court must have regard to the moment of the unlawful act, or to the moment of the award of compensation (of the judgment), the problem cannot be settled with the help of the rule above mentioned. In my view, the Court, without any reference to this rule, must decide, in the first place and on grounds of law, and not of mathematics, what basis is juridically to be adopted. And if the figure estimated on this basis is higher than the sum claimed, the Court must limit its award in accordance with the rule *non ultra petita*.

(3) The reasons for the Judgment

In my view, the Judgment does not give sufficient grounds for the amount and the calculation of the compensation for the loss of the *Saumarez* and the damage to the *Volage*. The Judgment compares the United Kingdom figures with those of the experts and decides in favour of the former. To begin with, the Judgment makes hardly any reference to the many United Kingdom documents accepted as evidence of damage. I consider that something should have been said on their value as evidence. Then, the Judgment does not submit the expert enquiry to a similar examination. According to a quite general rule of procedure, the Court is not bound by the opinion of experts. The Court may reject or accept it; but it must always give sufficient reasons. This was specially necessary, since Albania had informed the Court that she had observations to submit on the experts' Report, and since even Great Britain informed the Court that it had observations to make, but did not wish to submit them.

(4) Amount of compensation claimed

This is essentially a point of substantive law. It should have been dealt with less briefly in my opinion, having regard to the importance of the case. Just a few words were, I consider, necessary on the law that governs the amount of compensation :

(*a*) The Judgment of April 9th, 1949, stated that "grave omissions" involved the international responsibility of Albania (p. 23). The consequences were certainly grave. But an omission involving the responsibility of a State must be a culpable omission.

But what was the degree of *culpa ? Dolus, culpa lata, culpa levis ?* The words "grave omissions" seem to eliminate *culpa levis*. But in my view, the Judgment should have been more precise on this point. A finding as to the degree of culpability (e.g. *culpa lata*) would form juridical grounds for the decision on *damnum emergens* (the positive damage ; out-of-pocket loss). A few words might thus be said on the relationship between the degree of culpability and the amount of compensation.

(*b*) Lastly, the juridical value of the Judgment would have been increased by a few short observations on causality as a juridical element for determining the amount of compensation. I consider it would be useful, and even necessary to state that the United Kingdom claim amounts to a claim for *damnum emergens*, a notion that *grosso modo* corresponds to those of "direct", or "necessary", or "inevitable", or "proximate" consequences, used in a number of decisions of international tribunals.

(5) Estimation of damage

Here I confine myself to compensation for the loss of the *Saumarez ;* for that is, in point of law, the vital question. The United Kingdom claimed £ 700, 087 under this head. The experts estimated the damage at £ 716,780.

There does not, and cannot exist a universal rule for calculation. Cases differ from one another. Some involve one or several special circumstances, e.g. the present case, which concerns the loss of a warship. It is evident that the calculation would be simpler and the estimate of the damage in figures would be easier if it were a merchant ship. Commercial values have currency as a common denominator, and are more susceptible of calculation in money. But with all reservations and limitations, there are nevertheless two questions of law common to all cases, if something has been lost through an illegal act, and if restitution in kind is not possible, as in the present case :

(1) the question of the moment to be taken by the judge in estimating reparation for the loss. Should it be the moment of the illegal act, or of the court's decision ; or the moment when the thing was made ?

(2) the question of the conditions under which and the extent to which a sum corresponding to the depreciation of the thing (such as would have occurred if the thing had remained in its owner's hands), should be deducted from the amount of the replacement value.

In regard to (1) the basis of calculation. In the present case there are three possible bases : 1943, 1946, 1949.

(*a*) The 1943 basis. The order to proceed with the construction of the *Saumarez* was given by the United Kingdom Government to a company at Hebburn-on-Tyne, on January 9th, 1941 ; the vessel was handed over after completion and received into the service of the Royal Navy on July 1st, 1943 (Mr. Powell's affidavit, paragraph 4). The actual recorded cost of construction of the ship was £ 554,678 (paragraph 5 of affidavit). If the loss of the *Saumarez* is calculated in figures corresponding to ship-building costs in 1943, this decision may be justified by the fact that the sum represents the actual damage sustained by the United Kingdom. The rise or fall in prices is a factor not depending on the author of the illegal act, and therefore one for which he cannot be held responsible. There is no causal connexion between the illegal act and the rise or fall of prices. For this reason, the cost of construction actually paid in 1943 might be taken as the figure for the actual loss of the *Saumarez*.

(*b*) The 1946 or 1949 basis

Salvioli, in his lectures on *La responsabilité des États, la fixation des dommages et intérêts par les tribunaux internationaux* (*Recueil des Cours*, 1929, III, pp. 239-240), says : "The Mixed Arbitral Tribunals introduced the following distinction : where objects were intended to be resold, a sum must be awarded which corresponds to the value of the objects at the time of the act which damaged them—and as regards the decisions mentioned above, at the time of dispossession ; on the other hand, if the object is property which the owner would have *kept* and *used as such*, the replacement value must correspond to its mercantile value *at the date of the award of compensation*" (the italics are the author's). Salvioli expressly refers to the judgment in the Chorzów case.

The grounds for the decisions of the Mixed Arbitral Tribunal and that of the decision of the Permanent Court of International

Justice in the Chorzów case, on this subject, are stated in the decisions themselves and in the works of several writers who have dealt with the question, and I need not quote them.

In my opinion, these reasons are convincing, and there is no juridical ground for a decision to adopt the moment of the illegal act in such a case.

But a difficulty arises in determining the commercial value at the time of the decision, if the property had no commercial value—as in the present case, where it is a warship that has no commercial value.

According to Roth (*Schadenersatz*, 1934, p. 102), in such a case, "the judge must determine the value *ex æquo et bono*, taking account of the special circumstances".

The Court places itself at the moment of the illegal act ; but the Judgment gives no juridical reason for this decision.

(2) Depreciation

The question arises whether there are juridical reasons for deducting a sum in respect of the depreciation of an object, if that object remains in the hands of the owner. The international and national jurisprudence of every country answers this in the affirmative. The experts gave the same reply. They calculated the compensation for the loss of the *Saumarez* in such a way as to deduct 3% for three years of the vessel's "life" (1943-1946), from the cost of building in 1946. At the Court's meeting on December 3rd, 1949, they also gave the rate of this depreciation. It seems that this is quite justified.

I again refer to Salvioli, who expressed the following opinion : "The Court must take account of an increase or decrease in value which the object would have undergone if it had remained in its owner's hands, and if it had not suffered from the illegal act."

When the Judgment agrees with the figure claimed by the United Kingdom as compensation for the loss of the *Saumarez*, it implicitly rejects the rule that a sum in respect of depreciation must be deducted from the building costs, without assigning any reason in law for doing so. What would be the effect of this principle in practice is a matter of calculation.

(*Signed*) Dr. B. Ečer