DISSENTING OPINION BY JUDGE LEVI CARNEIRO

[Translation]

I have voted in favour of the first finding of the Judgment but am, to my regret, unable to agree with the second.

My opinion has been arrived at in view of certain considerations which the Court, in drafting its Judgment, has not regarded as relevant. So far as the first finding is concerned, I do not think that more need be said. But with regard to the second, the considerations which I have referred to were dictated by the necessity of maintaining proper procedural order in the present case and by my conception of the duty and the function of the Court, and I therefore find myself obliged to seek to justify them.

2. By its second Submission in the Application, Italy requested the Court to adjudge and declare

> "that Italy's right to receive the said share of monetary gold must have priority over the claim of the United Kingdom to receive the gold in partial satisfaction of the Judgment in the Corfu Channel case".

By the terms of the Washington Statement, Italy was given an opportunity to make an application to

> "the International Court of Justice for the determination of the question whether, by reason of any right which she claims to possess as a result of the Albanian law of 13th January 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania"

and an opportunity

> "to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise".

Might not the provision as drafted mean that Italy might adopt two different attitudes or take two different steps, in relation to the two separate questions involved : in respect of the first, to "make an application to the Court", in respect of the second, "to accept the jurisdiction of the Court" ? Do not these two expressions indicate two attitudes ?

However, the Italian Application presented the two questions at the same time and asked the Court to adjudicate upon both of them.

It is true that the Italian Government, in its Application, incidentally said :

> ".... once it has been established that Italy is entitled to damages from Albania .... Italy's claim to the gold in question should have priority over the claim of the United Kingdom....".

This statement did not mean that the Court could not decide the priority issue before the claim had been held to be well-founded ; the Applicant, at the time of making the application, set out the grounds on which it based its claim to priority and indeed to preference. Thus, it presented the two questions at the same time and in the same proceedings, making, in its Application, two Submissions relating to the two separate questions. These Submissions were put forward without any link between them, they are entirely distinct, and the second is in no way subordinate to the first. There is not even any form of conjunction between them. Nor, and this to my mind is decisive, is the word *"subsidiairement"* (alternatively) used, as it invariably is, when it is desired to indicate that a question is subordinate to another which has already been raised, and as in fact was done by the United Kingdom Government in the present case, in the Submissions which are set out in the Judgment. Yet the three "Allied Governments concerned", in their written Observations on the Preliminary Question, nowhere indicated that the Application had improperly raised the two questions.

It was after filing its Application that the Italian Government raised the "Preliminary Question", and asked the Court to decide as to its competence to adjudicate upon *"the first Submission"*. Although it indicated that the second question would arise only after the first had been decided, it referred nevertheless to the first Submission only. It never said, either when it raised its objection to the jurisdiction or in its arguments in its written Observations that, as a result, the present Judgment of the Court should relate to the second question as well. Again, its Submissions presented at the end of the oral arguments related exclusively to the first Submission in the Application.

The second Submission was not, and could not be, discussed in the course of the hearings. Here, in particular, the complete independence of the two questions, from the point of view of their judicial determination, was made clear.

3. In the written Statement which it submitted to the Court, the Government of the United States said :

> ".... it seems doubtful whether Albania must have accepted the jurisdiction of the Court and have become a party in the present case before the Court can properly adjudicate on the claims of Italy vis-à-vis the United Kingdom concerning the gold here in question".

It seems to me that the second Submission in the Application has precedence over the first. Counsel for the Italian Government (at the hearing on May 10th) correctly interpreted this statement when he said:

"It is therefore proposed that the priority issue should be considered quite separately from the issue relating to the international responsibility of Albania resulting from the Albanian law."

This, indeed, is what was being done—I think correctly—because the second Submission involves the question which ought first to be decided by the Court. Therefore, even in the absence of finding in favour of Italy on the first Submission, the Court would, in the subsequent proceedings, have to adjudicate upon the second Submission. It has been asked to do so, and there is no reason why it should not.

In the written Observations the French Government said nothing to indicate that it considered the two Submissions interdependent: it merely sought to show that the Court was competent to deal with them. The oral arguments of its Agent merely related to the jurisdiction of the Court to adjudicate upon a question of international law—the effects of the Albanian Nationalization Law.

It was indeed the United Kingdom Agent who, in his written Observations and in his oral arguments, asserted the complete dependence of the second Submission upon the first. He asked the Court to hold that, by reason of the objection to the jurisdiction raised by Italy, the Italian Application no longer conformed to the conditions and intentions of the Washington Statement; that it had become invalid and void. To justify such a conclusion, it would be necessary to consider that if the Court could not deal with the first Submission in the Italian Application, it would likewise be unable to pass upon the second Submission. Accordingly, the Agent of the United Kingdom Government said (at the hearing on May 12th) that the priority issue—the issue raised in the second Submission—would not arise if the Court should refuse to consider and to adjudicate upon the first Submission relating to Italy's claim.

This did not, however, prevent the United Kingdom Agent from saying at the hearing on May 14th that the issue which arose in the present case was whether a certain quantity of gold should be transferred to the United Kingdom or to Italy—that is to say, the second question raised by the Application.

In his Submissions at the close of the hearings, the United Kingdom Agent asked the Court to find "that, if the Court holds, contrary to the contentions of the United Kingdom, that the Italian Application is still valid and subsisting, the Court has jurisdiction to determine on their merits the questions put to the Court in the Italian Application". Here he was clearly not saying that the Court could not adjudicate upon the second Submission until it had adjudicated upon the first.

4. Counsel for the Italian Government, for his part, in his first address to the Court, on May 10th—while not modifying the

Submissions contained in the Application, which I have already referred to—said that he agreed with the United Kingdom Government that the second Submission was dependent upon the first and could not be dealt with before adjudication upon the first. However, he refused to accept the consequence which the Agent of the United Kingdom Government contended flowed therefrom, namely, that the Italian Application was in effect cancelled or withdrawn.

In his last address to the Court, on May 13th, Counsel for the Italian Government was much less categorical when he referred to the alleged dependence of the second Submission on the first; he in fact said:

> "*The second claim is distinct from the first.* In the Washington Statement it is said that the question of priority would be submitted to the Court if this issue should arise. Consequently, it would seem that according to the Statement itself this second question is dependent upon the first. In any event, if the Court considers that the question of priority between the respective rights of the United Kingdom and Italy can be examined in a hypothetical form, independently of the examination of the first Italian claim, *the Italian Government, for its part, would have no objection*" (my italics).

At the same time, Counsel insisted upon the fact that the Application had not been withdrawn.

5. It has been pointed out that the Washington Statement, with reference to the question of priority, uses the words "if this issue should arise". It has been contended that, in the view of the draftsmen of the Statement, the priority issue could only arise after the Italian claim had been held to be well-founded. This is not so. The Statement provided for the possibility of the question being put, but it did not specify when it would arise. The Italian Government has in fact submitted the question to the Court at the same time as the other, and the Respondents have raised no objection to this course, as I have already pointed out.

6. The only way of ensuring that neither question is dealt with —with the unevitable consequence of setting aside both questions— would be to regard the Application as cancelled or to reject it. It was because the United Kingdom Agent realized this that he asked the Court to hold that, by reason of the interdependence of the two questions, the whole Application was cancelled. The Court has indeed held that the questions are interdependent, but it has refused to regard the Application as cancelled. It has finally refrained from adjudication upon the second Submission in the Application, on the ground that the Parties themselves had asserted the dependent character of this Submission.

The statements of the Parties have not, however, led me to a similar interpretation. In my opinion, if the two questions were inseparably interlinked, the presence of Albania would be just as necessary to make it possible for the Court to deal with the first as with the second. But this proposition was not stated either by the Italian Government, by the Respondent Governments or in the Judgment of the Court.

I do not, in any event, consider that the Court would be obliged to follow any agreement in this connection thought to have been arrived at by the Parties. The Court, having unequivocally decided that the Application has neither been withdrawn nor cancelled, retains full freedom to decide for itself the question of the interdependence of the two Submissions in this Application.

7. If anything remains of the Application, it is its second Submission. If the Court is without jurisdiction in respect of the question raised by the first Submission—on the ground that Italy has not even named Albania, which is directly interested in this question as a Respondent—in respect of the second Submission, Albania has no interest whatsoever.

In short, the priority issue has been submitted—and remains submitted—to the Court, and the only States directly interested in its decision on this question are before the Court. In my opinion, the Court cannot now refuse this decision on the ground that it lacks jurisdiction to decide another and quite separate question raised by the same Application. At the present stage of the proceedings, the Court, in my opinion, having simply to decide the Preliminary Question of its competence to adjudicate upon the first Submission in the Application, is not entitled to go beyond this and to hold, at the same time, that it has no jurisdiction to deal with the second Submission.

Counsel for the Italian Government himself, in the document entitled "Preliminary Question", has indeed said that "*the second question would raise no problem concerning the jurisdiction of the International Court of Justice*". At the same time, he asserted that the Application had not been withdrawn, that is to say, that its second Submission remained even if, at this stage of the proceedings, the first should be set aside.

8. Procedural considerations would have provided the Court with a good reason for not at present setting aside the second Submission of the Application ; but there was a better ground available to it for reserving consideration of, and a decision on, this other question, that is, the question of priority. The question of priority does not perhaps involve any dispute as to facts, but is to be resolved simply in the light of legal rules. The Court could have decided it, not by basing itself upon a hypothesis, but by

dealing with it as a question of abstract law. It could have done so, subject at most to one condition. It could have decided it quite simply by recognizing the character of the two claims, without prejudging the question of the validity of the claim which has not as yet been established.

I think it unnecessary to recall the widespread and valuable practice of "declaratory judgments" which is adopted in the United States and many other countries. It will be enough to point out that in all civilized countries there are laws governing the classification of creditors—in cases of bankruptcy, *concursus creditorum* following upon insolvency and what in France and other countries is called *"liquidation judiciaire"* (compulsory winding-up). The law strictly lays down orders of priority and of preference. In the present case, the Court should determine whether there is any ground for preference and the basis for priority. It would thus indicate the legal rule to be applied.

In the majority of cases at least, priority is based neither upon the date nor the amount of the debt, nor even upon the character of its title, but rather on the nature of the right itself, its origin, or the specific relationship which may exist between it and the property of the debtor. In the present case, the Italian Government alleges that the two competing rights are identical in origin and of the same nature ; it has already set out in the Application, with great precision and clarity, the only argument which it invokes in support of its claim to priority : it is that Albania's wrongful act as against Italy was earlier in date than Albania's wrongful act as against the United Kingdom. The Italian Government further alleges that its right must benefit from a privilege by virtue of Article 25 of the Convention of March 15th, 1925. That is all. In the subsequent proceedings an opportunity would have been given to the respondent Governments to contest these allegations, and Albania might have decided to intervene (although that country is not directly interested) and the Court could have adjudicated upon the alleged right to priority even without having previously recognized the validity of the Italian claim.

9. Such a decision would have provided a valuable contribution to the solution of the controversy provoked by the question of the allocation of the monetary gold. It would have been all the more useful for having been given before the decision on the first question, that of the validity of the Italian claim, which involves a number of questions of fact and of law. Such a course might have avoided the necessity for evidence and argument which would have ceased to be relevant.

Anyone who studies the terms of the Submissions in the Application of Italy must come to the conclusion that the second Submission must, as I have said, be adjudicated upon before the first. How could the Court hold that the gold should be "delivered to

Italy"—and that is what is asked in the Application—without having previously found in favour of the right of the Italian claim to priority ?

Moreover, whatever might have been the Court's decision on the second Submission, that decision would have provided the "Allied Governments concerned" with a very valuable orientation. If the Court had found that the United Kingdom claim was entitled to priority, the question raised in the first Submission of the Application would have lost all practical interest, since, according to statements which have not been disputed, the amount of the United Kingdom claim is more than twice the value of the gold in question. If, on the other hand, the Court had upheld the right to priority of the Italian claim, it would have given the three Powers the assurance (for which they have asked in one sense or the other) that the delivery of the gold to the United Kingdom could not be validly effected before final adjudication upon the merits of the Italian claim. Finally, there was a third possible solution, that neither claim might be held to be entitled to priority ; in that case, if the Italian claim were held to be well-founded, there would be a proportionate allocation of the gold between the two creditors, it then being possible to deliver at once to the United Kingdom such portion as was due to it.

In any event, the Court, by adjudicating upon the second Submission in the Application, would make the solution of the dispute more simple, clearer and more straightforward. On the other hand, I fear that its refusal to intervene in any way, after the three "Allied Governments concerned" have addressed themselves to the Court "asking it to give them guidance", may well give rise to a deadlock or aggravate the difficulties.

(Signed) LEVI CARNEIRO.