SEPARATE OPINION OF JUDGE SHAHABUDDEEN

The operative part of the Order of Court made today, with which I agree, fixes time-limits for pleadings. But, as is shown by the body of the Order and by the oral and written arguments of the Parties addressed to the President of the Court and by him laid before the Court, the real interest in this matter, indeed, the real matter in contention between the Parties at this stage, is the question of law whether a respondent has a right to file a preliminary objection before the filing of the applicant's Memorial. This issue is determined not in the operative part of the Order, but in the last recital. This recital, about which I entertain a reservation which I would like to explain, reads as follows:

> "Whereas, in accordance with Article 79, paragraph 1, of the Rules of Court, while a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, it may nevertheless file its objection earlier."

This statement is accurate as far as it goes, but, with much respect, it seems to me that it does not go far enough. The absolute terms in which the Court, through that statement, for the first time enunciates a right on the part of a respondent to file its preliminary objection before the filing of the applicant's Memorial takes no account of, and gives no weight to, an important qualifying practice of the Court. This aspect is referred to as follows by two of the leading commentators on the Court's practice:

> "As is well known, and as is maintained in this paragraph, the Court's practice is only to take formal preliminary objections by the respondent after the merits have been laid before it in a pleading, normally the memorial, and it will be rare that the application alone will be sufficient to elucidate questions of jurisdiction or admissibility." (Shabtai Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 1983, p. 161.)
>
> "Paragraph 1 [of Article 79 of the 1978 Rules of Court] makes no change in the existing practice by which a formal preliminary objection, of whatever class, need not (in fact should not) be filed until the time-limit for the objecting party's first written pleading." (*Ibid.*, p. 163.)

> "Il semblerait que la Cour ne puisse prendre en considération les exceptions préliminaires soulevées par le défendeur avant le dépôt par le demandeur de son mémoire." (Geneviève Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, p. 508.)

Testifying to the same practice, Prof. Guggenheim, arguing in 1957 for Switzerland against the United States in the *Interhandel* case, said in an unrebutted statement:

> "L'exception préliminaire américaine doit être traitée conformément aux dispositions de l'article 62 du Règlement. La Cour devra donc instituer une procédure particulière, qui commencera après la présentation du mémoire de la Partie demanderesse, c'est-à-dire de la Confédération suisse, mémoire qui se rapportera au fond de l'affaire." (*I.C.J. Pleadings*, p. 449.)

Fifteen years later, in a joint dissenting opinion in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case, Judges Bengzon and Jiménez de Aréchaga likewise said in another uncontradicted and equally categorical statement (quoted more fully below):

> "A preliminary objection must be filed within the time-limit assigned for the Counter-Memorial, that is to say, after the presentation of the Memorial, not before it: it is only then that it may have the suspensive effects provided for in Article 62, paragraph 3, of the [1946] Rules." (*I.C.J. Reports 1972*, p. 185.)

Were these distinguished lawyers and judges wrong? It will be the burden of this opinion that they were not, and that the practice of the Court, the existence of which they attested, constitutes an important qualification to the open-ended terms in which the right of a respondent to file a preliminary objection before the filing of the Memorial has been cast in the recital in question.

In a prefatory way, it may be said that the problem presented is not an unusual one to be thrown up from time to time within the evolution of a living procedural régime, the question in essence being, how are the literal terms of a formal rule of procedure to be reconciled with a variant supervening practice? For I should say at once that I appreciate the force of the respondent's interpretation of the relevant rule but consider that the difficulty is to determine to what extent, if any, the operation of the rule has come to be qualified by the Court's interpretation of it as evidenced by a somewhat different practice. A good beginning would be to look briefly at the legislative history of the relevant Rules.

THE LEGISLATIVE HISTORY

The origins of the problem go back to the fact that, notwithstanding some discussions in the Permanent Court (*P.C.I.J., Series D, No. 2*, pp. 77-78, 201-203, 213-214, 408, 434 and 522), the 1922 Rules of Court

made no provision for preliminary objections. As is well known, the need for some formal rule arose out of the experience gained in the *Mavrommatis Palestine Concessions* case (*P.C.I.J., Series A, No. 2*, pp. 9 and 16) and the *Certain German Interests in Polish Upper Silesia, Jurisdiction* case (*P.C.I.J., Series A, No. 6*, p. 15). In the first case, the preliminary objection was filed after the filing of the Case (or Memorial as it was termed as from 1936) though, such was the procedural uncertainty, that it was filed together with a "Preliminary Counter-Case" (*P.C.I.J., Series C, No. 5-I*, pp. 439-440 and 479). In the second case, the preliminary objection was filed before the filing of the Case (*P.C.I.J., Series C, No. 9-I*, pp. 119-125).

In the light of these differing procedures, in 1926 the Rules of Court were amended by the insertion of a new Article 38, the first paragraph of which read:

> "When proceedings are begun by means of an application, any preliminary objection shall be filed after the filing of the Case by the Applicant and within the time fixed for the filing of the Counter-Case." (*P.C.I.J., Series D, No. 1*, p. 50.)

Judge Anzilotti, the chief sponsor of the provision, had put it forward in opposition to a very different idea proposed by Registrar Hammarskjöld. Referring to the Registrar's idea, the record of the 1926 discussions reads:

> "M. Anzilotti stated that there was an essential difference between his conception and that of the Registrar.
>
> According to the Registrar's proposal, an objection to the jurisdiction must be dealt with separately, if it were submitted by a document which must follow the application and be presented at a time when the Court knew nothing of the case.
>
> M. Anzilotti started from the contrary conception. He thought that the Court should only deal with the question of jurisdiction when it had before it the merits of the case. Having established this fundamental difference, M. Anzilotti saw no objection to dealing at that point with the question of objection to the jurisdiction . . . In his opinion, having regard to the Court's special character, the latter could not deal with objections to its jurisdiction, without also having before it the merits of the case, at all events up to a certain point." (*P.C.I.J., Series D, Addendum to No. 2*, p. 79; and see his written proposal, *ibid.*, p. 266.)

To some extent, these ideas had been anticipated by Judges Beichmann and Moore in 1922 (*P.C.I.J., Series D, No. 2*, pp. 201 and 214). Their vindication in 1926 was however short-lived: new thinking favoured the Registrar's earlier view that a preliminary objection should be taken before the filing of the Case or Memorial. Returning to the fray in June 1933 he said:

> "An essential feature of Article 38 is that preliminary objections are not presented *in limine litis*, but only after the filing of the claimant's first Memorial. It is an open question whether it would be desirable to maintain this principle if the present tendency — at all events in practice — requiring submissions to be formulated as early as in the document instituting proceedings (cf. Art. 35 above) should become sanctioned." (*P.C.I.J., Series D, Third Addendum to No. 2*, pp. 819-820.)

The record of the ensuing discussions in the Court in 1934 then reads:

> "The President pointed out that the first Rules of Court did not contain any provisions in regard to objections. It was in the light of the experience gained in the *Mavrommatis* case that the Court had introduced Article 38 of the existing Rules; that Article precluded the filing of an objection before the submission of the Case. As that rule had, in its turn, led to practical difficulties in a recent suit, the Second Commission had proposed to open the door to the submission of an objection which had nothing to do with the merits of the case, even before the filing of the Case . . ." (*P.C.I.J., Series D, Third Addendum to No. 2*, p. 90.)

Explaining the substance of the new formulation, Judge Fromageot said that

> "the provision, in his text, that the objection must be filed at the latest by the expiry of the time-limit fixed for the filing of the Coun-Case [*sic*, but "contre-mémoire" in the French text], showed that the party concerned was free to raise the objection immediately, if it thought fit" (*ibid.*, p. 89).

On the basis of the related discussions, a revised text of Article 38, first paragraph, was then adopted as Article 62, paragraph 1, of the 1936 Rules of Court, reading:

> "A preliminary objection must be filed at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party." (*P.C.I.J., Series D, No. 1*, 3rd ed., p. 49.)

The corresponding provisions of Article 62, paragraph 1, of the 1946 Rules read:

> "A preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading."

On the substance of the matter in hand, the 1946 provision cannot be usefully distinguished from its 1936 predecessor. Hence, it being clear that the 1936 wording was designed to permit of an objection being filed by a respondent before the filing of the Memorial, this intention would seem to be equally ascribable to the 1946 provision, which continued in force up to 1972.

Now, what was the change made in 1972? Article 67, paragraph 1, of the revised 1972 Rules ran:

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party's first pleading."

This provision has been continued as Article 79, paragraph 1, of the 1978 Rules.

Under the 1972 formulation, the words "within the time-limit fixed for the delivery of the Counter-Memorial" replaced the previous words "before the expiry of the time-limit fixed for the delivery of its first pleading", but, so far as a respondent is concerned, it is not very clear that any material change in meaning was intended. It may conceivably be argued that, under the new formulation, the word "within" impliedly, if elliptically, confined the filing of the objection to the period commencing with the filing of the Memorial and ending with the terminal date fixed for filing the Counter-Memorial. That the words "within the time-limit" may not however be a reliable basis to support the kind of double limitation involved in words such as "within the period" is suggested by the fact that in the case of Article 38 of the 1926 Rules it was judged necessary for the words "within the time fixed for the filing of the Counter-Case" to be coupled with and preceded by the words "after the filing of the Case by the Applicant and . . .". In effect, whereas the 1926 provision prescribed two distinct time-limits — an opening and a closing one — the existing provision prescribes only a closing limit.

THE PRACTICE OF THE COURT

There is much then to support an argument that, on the face of the Rules, a respondent has had a continuous right from 1936 to the present to file a preliminary objection even before the Memorial is filed. In considering whether a different practice has developed it is right to remember that the 1936 change was made in the light of experience of the working of the 1926 Rule and was presumably intended to protect the right of a respondent to employ a preliminary objection (as it was to be later said) "to avoid not merely a decision on, but even any discussion of the merits" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 44. And see the *Panevezys-Saldutiskis Railway* case, *P.C.I.J., Series A/B, No. 76*, p. 24, *per* Judges De Visscher and Rostworowski). A respondent may also have a legitimate

interest in acting with maximum speed with a view to discouraging any contention that a prorogated jurisdiction has impliedly arisen through failure to protest with reasonable promptitude. On the other hand, it is possible that the Court tended in practice to revert to the earlier view that, as Judge Anzilotti had warned, there could be difficulty in entertaining a preliminary objection without the benefit of considering it in the light of the merits of the applicant's case as they might later appear in the Memorial.

Two groups of cases may be considered, namely, those in which the respondent did not appear, and those in which the respondent did appear.

As to the first group of cases, the non-appearance of the respondent meant, of course, that a preliminary objection could not be filed. It is the position, however, that in these cases preliminary issues of a kind which could have been raised on such an objection were heard and determined without any Memorial having been in fact filed (see the *Fisheries Jurisdiction* case, *I.C.J. Reports 1972*, p. 182, and *I.C.J. Reports 1973*, pp. 3 and 93; the *Aegean Sea Continental Shelf* case, *I.C.J. Reports 1976*, pp. 13-14 and 43, and *I.C.J. Reports 1978*, p. 45; and the *Nuclear Tests (Australia* v. *France)* case, *I.C.J. Reports 1973*, p. 106). A similar course seems to have been followed in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (I.C.J. Reports 1984*, pp. 187 and 209, and *I.C.J. Reports 1985*, p. 3) but there also, although the respondent did appear, it was clear that a formal preliminary objection had not been filed (see the United States Counter-Memorial on jurisdiction and admissibility, 17 August 1984, para. 2).

An argument that these cases — and particularly the last-mentioned — involved preliminary objections in substance though not in form is attractive. The approach which they take points plausibly in the direction of the respondent's position in this case. But not perhaps conclusively so; for, although it may appear technical to distinguish between a preliminary objection filed as such and a preliminary issue in the nature of a preliminary objection but not raised as a preliminary objection, the distinction is not an arid technicality: something of substance turns — and turns decisively — on it, in the important sense that the raising of a preliminary issue does not operate to suspend the proceedings unless it is specifically raised as a preliminary objection under Article 79, paragraph 1, of the Rules of Court.

The innovative character of the approach taken in the first group of cases in relation to the Rules, the operation of which they effectively qualified, did not pass unchallenged (see the *Fisheries Jurisdiction* cases, *I.C.J. Reports 1972*, pp. 184 and 191). But, granted the competence of the Court through a new practice so to qualify the operation of the Rules, it by the same token follows that the Court was equally competent by its practice to qualify the operation of the Rules in relation to the time for filing a

preliminary objection where there was in fact one. And, it seems to me, that this is what the Court did.

The second group of cases suggests that an approach different from that taken in the first group is adopted where the respondent appears and seeks to file a preliminary objection. Some difficulty does exist in respect of the *Monetary Gold* case (*I.C.J. Reports 1953*, pp. 37 and 44), in which the applicant was allowed to file a preliminary objection before the filing of the Memorial. The special circumstances of the case led the Court expressly to record that its decision did not prejudge the question of the interpretation and application of Article 62 of the 1946 Rules of Court. But, that apart, it seems to me that Italy's preliminary objection was correctly filed within the terms of that provision, this being so worded as to require "a party" to file its preliminary objection before the expiry of the time-limit fixed for the delivery of its "first pleading". Since the Court held that an applicant (as Italy was) could also make a preliminary objection (*I.C.J. Reports 1954*, p. 29), that provision effectively meant that Italy, as "a party", not only could file, but had to file, its preliminary objection before filing its Memorial or "first pleading": it simply could not do so after the filing of the Memorial. In the case of an applicant, this indeed is still the position under the second sentence of the existing provisions of Article 79, paragraph 1, of the 1978 Rules. In the case of a respondent, in terms of the 1946 provision, the first pleading was of course the Counter-Memorial. So a respondent was required then, as it is now, to file its preliminary objection before filing its Counter-Memorial. But the particular circumstances and reasoning in the *Monetary Gold* case would not seem a secure basis for suggesting that the Court in that case would have been equally disposed to countenance a preliminary objection being filed by a respondent before the filing of the Memorial, as in the case of an applicant.

In the *Interhandel* case, following on an application for provisional measures, the respondent filed a document intituled "Preliminary Objection of the United States of America", which expressly stated that it was

> "a preliminary objection under Article 62 of the Rules of the Court, to the proceedings instituted by the Government of Switzerland in the Interhandel case by its application of October 1, 1957, in so far as that application relates to the sale or other disposition of the shares . . ." (*I.C.J. Pleadings*, p. 77).

Thus, the document was by way of preliminary objection to the case itself, even though limited to one branch — a limitation which, in my understanding, was not defeasive of the character of the document as such an

objection. The Court, however, did not deal with it as such but proceeded in due course to make an Order fixing time-limits for filing the Memorial and "the Counter-Memorial or any Preliminary Objections of the Government of the United States of America" (*I.C.J. Reports 1957*, p. 123), a formulation which presumably meant that, so far as time-limits were concerned, the Preliminary Objections should be treated like the Counter-Memorial and that, accordingly, since the Counter-Memorial naturally could not be filed before the Memorial, this would also apply to the filing of any Preliminary Objections. And, indeed, the Preliminary Objections were filed after the Memorial (*I.C.J. Pleadings, Interhandel*, p. 327; cf. p. 144). For these reasons, it would not be convincing to seek to explain the decision on the ground that the Court simply acted on the basis that the rule implied that an Order fixing time-limits must have been in existence before a preliminary objection could be filed, irrespective of the issue whether or not it could be filed before the Memorial. It is not easy to appreciate why the making of an Order fixing time-limits for pleadings should possess such special juridical significance for the question whether the respondent may file a preliminary objection before the Memorial is in fact filed, as to lead to the conclusion that it may do so if such an Order has been made but may not if none has been.

Nor can the explanation be found in the fact that the preliminary objection was sought to be used in opposition to the application for provisional measures. It is true that Judge Koo said:

> "Although the objection was raised by the United States in the form of a Preliminary Objection, under Article 62 of the Rules of Court . . . it was, in fact, an objection directed against the Court's jurisdiction to indicate provisional measures . . ." (*I.C.J. Reports 1957*, p. 113.)

But Judge Koo's emphasis on the latter aspect was intended to support his view (with which the Court disagreed) that it was necessary to deal with the objection at the provisional measures stage; it could not reasonably be interpreted as indicating that the fact that the objection was sought to be relied upon by the respondent against the application for provisional measures meant that it was any the less directed to a part of the applicant's main application itself: it was so relied upon because it was so directed (*ibid.*, p. 115, *per* Judge Klaestad, and pp. 117-118, *per* Judge Lauterpacht.)

It does seem more probable that the explanation lay in an unspoken assumption by the Court that Judge Anzilotti's reasoning, which had inspired the making of the revoked 1926 Rule, had retained enough of its original wisdom and virtue to be still operative in practice to justify deferring the filing of a preliminary objection until after the filing of the Memorial. This, I think, is the approach implied in the observation by the Court that —

> "the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court, and . . . if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure" (*I.C.J. Reports 1957*, p. 111).

The Court could not have understood that the objection was not intended as a preliminary objection filed under Article 62 of the 1946 Rules. What it seemed to be saying was that the objection could only be dealt with as such a preliminary objection "in due course in accordance with [the] procedure" prescribed by that provision. In taking this position, the Court seemed to be at one with Prof. Guggenheim whose unrebutted oral argument for the applicant on this point has been quoted above. That argument was not merely that jurisdiction did not have to be decided with finality in order to indicate provisional measures, but that the reason why a preliminary objection could not be heard during such proceedings was because it could only be heard within the framework of the procedure relating to preliminary objections, this being understood by him as indicated in his submissions quoted above, that is to say, as meaning that a preliminary objection had to be filed after the filing of the Memorial (*I.C.J. Pleadings, Interhandel*, pp. 449 and 461-462). It seems to me that this presentation found favour with the Court in the passage from its Order quoted above and was in turn reflected in the course which the proceedings actually took pursuant to that Order.

A course similar to that taken in the *Interhandel* case had been followed in the *Ambatielos* case (*I.C.J. Reports 1951*, p. 11, and *I.C.J. Reports 1952*, pp. 16 and 31) where (as in this case) what was involved was not a preliminary objection as such but a notification of intention to file one (*I.C.J. Pleadings*, p. 522). For this reason, in proceeding to fix time-limits for pleadings the Court referred only to the Memorial and Counter-Memorial, no mention being made of any possible preliminary objections.

Whatever the precise rationale — whether to enable the Court better to appreciate the objections in the light of the merits, and, or, to afford the applicant a fair opportunity to supplement through its Memorial the possibly limited averments of its application before a preliminary objection was filed with immediate suspensory effects — it does appear that, in the case of an appearing respondent, as in the *Ambatielos* and *Interhandel* cases, the Court has in fact proceeded on the basis that a preliminary objection by a respondent should not be filed until after the Memorial has been, even though, as has been seen, the 1936 rule was designed to permit of such an objection being filed before the filing of the Memorial (see Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, 1967, p. 214). This was clearly recognized by Judges

Bengzon and Jiménez de Aréchaga in their joint dissenting opinion in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case where, in contrasting objections made before the filing of the Memorial with objections made subsequently, they said:

> "There are however important differences between these two communications, in particular as to the time of their presentation and this, in our view, makes it impossible to consider the letter of the Icelandic Foreign Minister as constituting a preliminary objection. *A preliminary objection must be filed within the time-limit assigned for the Counter-Memorial, that is to say, after the presentation of the Memorial, not before it: it is only then that it may have the suspensive effects provided for in Article 62, paragraph 3, of the Rules. Otherwise, a respondent might be able to block the proceedings before the Memorial is filed.*" (*I.C.J. Reports 1972,* p. 185. Emphasis added. See likewise the *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* case, *I.C.J. Reports 1972,* p. 192.)

The fact that this uncontradicted statement formed part of a dissenting opinion in no way impaired its value as authoritative recognition of the actual practice of the Court.

Neither side has cited any case decided by this Court in which a respondent was allowed to file a preliminary objection as of right before the filing of the applicant's Memorial: in one case where that course was taken, it was taken by consent of both parties, the Order of Court expressly reciting that "the Parties are agreed that the issues of jurisdiction and admissibility should be dealt with at a preliminary stage of the proceedings" (case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), I.C.J. Reports 1986,* p. 552; and see *I.C.J. Reports 1989,* p. 6). That the Court thought it appropriate to record that circumstance in its formal Order suggests that it did not consider it as a simple private transaction unimpressed with the juridical significance which attaches to consent under Article 101 of the Rules of Court. In this connection, the letter dated 26 September 1989 from the United States Agent to the President of the Court states:

> "While the United States recognizes that the Court has not previously addressed a preliminary objection prior to the Memorial without the consent of the Applicant, there is nothing in the practice of the Court contrary to the United States reading of Article 79 [of the Rules of Court]."

It seems to me that the recognition prefacing that contention was made consistently with what may be regarded as a generally understood practice to the effect that, while a preliminary objection could be filed by a respondent before the filing of the Memorial, in the normal case the Court

would not entertain it if so filed but would proceed on the basis that it should be filed after the filing of the Memorial (see, generally, Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, Vol. 1, p. 451; also by him, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 1983, pp. 161 and 163; and Geneviève Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, p. 508).

Perhaps I should add that, the decisions of the Court not being as numerous as in the case of national courts, the fact that the practice referred to is demonstrated by not very many cases does not necessarily tell against its existence. A point of greater importance is that presented by Judge Schwebel's able and careful arguments — which I do respect — to the effect that the specific issue as to whether a preliminary objection may be filed before the filing of the Memorial has not heretofore been the subject of direct contest before the Court. But, while this may go to the weight of the decisions in question, it does not, in my view, neutralize their value as indicative of the actual course of the Court's practice: a practice seldom originates in a reasoned decision given after contest on the particular point. Moreover, as sought to be shown above, it does seem to be the position that in the *Interhandel* case the Court had in mind the practice explicitly mentioned in the submissions of Prof. Guggenheim to the effect that a preliminary objection was to be filed only after the filing of the Memorial. While it is possible to interpret the case in different ways, the hard fact which stubbornly remains is that, in that case, a document which was indubitably in the form of a preliminary objection purporting to be filed as such under the applicable rule, but which was filed before the filing of the Memorial, was not entertained as such by the Court, which left it to the respondent to file a fresh preliminary objection after the filing of the Memorial.

The Effect of the 1972 Rules on the Practice of the Court

The question arises whether this practice should be regarded as having been abolished by the 1972 Rules. Two provisions of these Rules suggest themselves for consideration, namely, paragraphs 6 and 7 of Article 67 (corresponding to paragraphs 6 and 7 of Article 79 of the 1978 Rules). They read as follows:

> "6. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.
>
> 7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circum-

stances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings."

As to paragraph 6, in my opinion, the reference therein to jurisdiction being determined "at the preliminary stage of the proceedings" is not synonymous with a determination being made before the filing of the Memorial. The "preliminary stage of the proceedings" was a well-understood concept which was used simply in opposition to the "merits stage". It was not confined to the period before the filing of the Memorial. On the contrary, in the case of a preliminary objection by a respondent the preliminary stage always extended into the period after the filing of the Memorial. Nothing in Article 67, paragraph 6, of the 1972 Rules operated to change this understanding.

As to paragraph 7 of Article 67 of the 1972 Rules, the object here was to ensure that preliminary objections were determined as far as practicable before the hearing on the merits and not joined to the latter unnecessarily. This had nothing to do with the particular stage at which a preliminary objection could be filed. The fact that a preliminary objection is filed after the filing of the Memorial should not necessarily lead to its being joined to the merits. The 1972 changes did place a proper emphasis on early determination of preliminary objections, but the focus was on not unnecessarily deferring them to the hearing on the merits.

The letter to the President of the Court from the Agent for the United States of America dated 26 September 1989 invited attention to a learned article by a former President of the Court, the relevant part of which reads as follows:

> "(a) *Time-limit for filing a preliminary objection*: With a view to the acceleration of proceedings and to avoid unnecessary delays it has been suggested that a party should file a preliminary objection as soon as it receives the Application or a short time after receiving the Memorial. While these proposals have an objective that coincides with the main approach followed in the amendments to the Rules of Procedure, they could not be adopted since they might affect the right of defense of the Respondent. As to the first suggestion, that the preliminary objection should be filed as soon as the Application had been received, it was felt that a Respondent had a right to wait for the full development of the Applicant's case in the Memorial before being obliged to file its objection. Otherwise the Applicant, who had had all the time it wished to draft its Application, would also be allowed to shape its Memorial so as to try to defeat the objection it had already been able to study." (Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, 1973, Vol. 67, p. 19.)

This statement is indeed consistent with an assumption that a respondent had a right in law to file a preliminary objection either before or after the filing of the Memorial. But it seems to me that the statement shows something more: for, if "it was felt that a Respondent had a right to wait for the full development of the Applicant's case in the Memorial before being obliged to file its objection", this at the same time assumed the existence of a system under which an applicant was entitled to include in its Memorial matters of law or of fact which might turn out to be of relevance to a possible preliminary objection. This in turn seems consistent with the conclusion reached above that, while on the face of the Rules a respondent had a right to file its preliminary objection before the filing of the Memorial, this right had in fact come to be qualified by a practice under which, if such an objection was filed before the Memorial, the Court could in its discretion decline to recognize or treat with it as such and direct that it be filed after the Memorial — and this precisely for the reason that the Memorial might prove pertinent to the objection when eventually taken. Judge Jiménez de Aréchaga's helpful article does not seem to go as far as to suggest that this practice was being abrogated by the 1972 Rules. He gave no hint of any such effect in the passage quoted above from the joint dissenting opinion in which he participated in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case (*I.C.J. Reports 1972*, p. 185). True, that opinion was based on the 1946 Rules, but it was delivered three months after the 1972 Rules were adopted. If any significant change had been made on a procedural point to which decisive importance was clearly attached by the opinion, he might naturally have been expected to mention it. As has been seen, he did not. Nor is this surprising: there was no material difference on the point between the 1946 Rules and the 1972 Rules. Other commentators, writing after the 1972 changes were made, appear to recognize the continuance of the practice (see Shabtai Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 1983, pp. 161 and 163; and Geneviève Guyomar, *op. cit.*, p. 508). As suggested above, the procedure by consent of parties adopted in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case (*I.C.J. Reports 1986*, p. 551) seemed also to posit its continuance. The United States statement referred to above can scarcely be construed as pointing to a different conclusion so far as the actual practice was concerned.

SHOULD THE RULES PREVAIL OVER THE PRACTICE?

For the reasons given, it may be contended that the practice referred to is not strictly consistent with the terms of the existing rule, in the sense that it tends to inhibit a respondent in the exercise of a seemingly absolute right

available under the strict terms of the rule to file a preliminary objection before the filing of the Memorial. But, however arguable that might be, the possibility of a different interpretation of the rule could not be wholly excluded, and of course the competence to interpret the Rules lay with the Court. It is general experience that formal rules of procedure — at any rate where no conflict with an overriding constituent instrument is involved (a caveat to which I attach importance in this field) — develop through the way in which they are interpreted and applied by the court concerned as evidenced by its practice.

The real question then is, should this Court at this stage overrule the interpretation of Article 79 of the Rules, which is implicit in its practice, on the ground that it is erroneous? The Court is not committed to any doctrine of binding precedent, but it does respect its own jurisprudence. Consequently, though competent to reverse its previous holdings on the law, the Court is not expected to exercise that competence lightly and without good reason (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 19). It may be too general a way of putting the position merely to say that the Court should act cautiously. But what then should be the criteria guiding the prudence of the Court in a procedural matter of this kind? In the absence of any clear guidelines having been adopted by the Court, it seems to me that, in a case of this particular kind, it would be reasonable for the Court to apply something corresponding to the twin tests of clear error and public mischief as known to the upper levels of judicial activity in many jurisdictions. There should, I think, be clear error in the sense that the Court must be satisfied that the opposing arguments are not barely persuasive but are conclusively demonstrative of manifest error in a previous holding. And there should be public mischief, or something akin to it, in the sense that the injustice created by maintaining a previous but erroneous holding must decisively outweigh the injustice created by disturbing settled expectations based on the assumption of its continuance; mere marginal superiority of a new ruling should not suffice.

In this case, it could plausibly be argued that the test of clear error is satisfied. I am not however convinced that the test of public mischief is met. Under the strict terms of Article 79, paragraph 1, of the Rules of Court, a respondent would be entitled as of right to file a preliminary objection before the disclosure of the merits of the applicant's claim through its Memorial. And that is a right not to be underestimated. But that right has to be balanced against possibly substantial injustice which an applicant might suffer if its case were dismissed on a preliminary objection before it had the opportunity, through its Memorial, of developing and supplementing its application on points of possible deficiency pursuant to a right to do so which it not unreasonably thought it had under the

rule as interpreted and applied by the Court in the course of its own practice. Had it not been for the existence of the practice, such an applicant's application might have been more fully framed in the first instance. In my opinion, the balance when struck speaks with persuasive fairness in favour of the continuance of that practice and of the corresponding interpretation of the Rules which it portrays. If there is to be a change — and there may be good reason why there should be — it should be made by way of a formal amendment of the Rules designed to take effect prospectively, and not by way of a decision of the Court retrospectively invalidating a practice of its own creation upon which reasonable expectations have been founded.

CONCLUSION

Though not without hesitation — for the position is not quite tidy and the logic of development not fully revealed — I reach the conclusion that, while in principle a respondent has a right to file its preliminary objection before the applicant's Memorial is filed and while in some cases recourse to that right may be perfectly justifiable, the Court may exercise a discretion both to decline to recognize or treat with a preliminary objection so filed and to direct that it be filed after the filing of the Memorial. The terms and grounds of the proposed preliminary objections not having been disclosed, there is no apparent basis at this stage for considering a possible departure in this case from the usual way in which it is considered that that discretion should be exercised. In the result, the only course is to make an Order fixing time-limits for pleadings (including any preliminary objections). This has been done, and this I support. But, for the reasons given, I consider that the last recital of the Court's Order lacks internal balance in that —

(i) the recital focuses on the entitlement of a respondent to defer the filing of its preliminary objection until after it has been "informed as to the nature of the claim by the submission of a Memorial by the Applicant" but neglects to balance this by taking account of what, on the other hand, seems to be a recognized entitlement of an applicant to supplement its application through its Memorial on matters of fact or law which could help to protect it against an eventual preliminary objection; and

(ii) the recital focuses on the entitlement of a respondent to "file its objection earlier" (i.e., before the Memorial), but neglects to balance this by taking account of what, on the other hand, seems to be a discretion of the Court to decline to recognize or treat with an objection so filed and to direct that it be filed after the filing of the Memorial.

In sum, the recital in question approaches the procedural situation as if it were designed solely to confer options on a respondent. I am of opinion that the procedural régime actually in force (that is to say, the Rules of Court as well as the practice of the Court) is both more flexible and more balanced, and that, in particular, there are rights and expectations of an applicant which are also to be considered but which the recital does not take into account. I accept that, in law, a respondent has a right to file its preliminary objection before the filing of the Memorial. But that is not the whole picture, and the whole picture is not projected by the recital in question. Whence this reservation to that effect.

(Signed) Mohamed SHAHABUDDEEN.