SEPARATE OPINION OF JUDGE RIGAUX

[Translation]

I. Declaration Relating to the Operative Part

I voted with the majority on the two points in the operative part and I did so without reservation as regards point 1. As far as point 2 is concerned, I agree with the decision on jurisdiction therein, but regret that it implicitly limits the jurisdiction of the Court to paragraph 1 of Article X of the Amity Treaty.

II. Observations Relating to the Grounds

As regards the part of the grounds relating to Article I, I am able to support the content of paragraphs 27 and 28 and of paragraph 31. The same cannot be said for paragraphs 29 and 30 which undermine the grounds rather than reinforce them. Although to have regard to the *travaux préparatoires* of an international instrument in order to shed light on its wording if it seems ambiguous is in accordance with the case-law of the Court, the same cannot be said of the absence of any relevant indication in the documents produced by the Parties. That silence may not be invoked in favour of one interpretation rather than the opposite interpretation. We are dealing here in reality with a failure to interpret. It is not surprising that the documents produced do not offer any useful information: it is rare not only for contracting parties — whether they be to an international treaty or to a contract in private law — to take the trouble to agree on the interpretation of the clauses which would have most needed clarification, but even for each of the Parties to have interpreted a provision one way rather than another when that provision may be interpreted in several ways. It is only when the rule is to be applied that the question of interpretation is raised on the occasion of a specific dispute. It is for those reasons that the interpretation given by the Court to Article I of the Amity Treaty appears to me to be weakened by paragraph 29 which contains considerations not referred to in the methods of interpretation provided by the Vienna Convention on the Law of Treaties of 23 May 1969. The "documents" invoked by the Parties do not come under the category of *"travaux préparatoires"*, they provide no information as to the circumstances in which the instrument was drafted and adopted. Reference should be made on this point to the Judgment of 15 February 1995 in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*I.C.J. Reports 1995*, p. 5, especially paras. 41-42, pp. 21-23). See also the enlightening analysis

given by Vice-President Schwebel in his dissenting opinion, pages 28 to 32. In that case, as in the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see *Judgment, I.C.J. Reports 1994*, p. 5, especially para. 55, pp. 27-28), the documents produced by the Parties related to their negotiations and the hesitations or the second thoughts which had occurred when the text was adopted. Whatever the interpretative value placed on such documents, it is altogether different from that of internal documents produced in one of the States between which the Treaty was concluded and that is all the more so since it contains a unilateral interpretation relating to a similar treaty concluded with another State. If the Court considered that, on this point, it should uphold the reasoning of the Parties, it should have refused to see any relevance in documents which did not support either of the two interpretations which form the subject-matter of the dispute between the Parties.

Paragraph 30 gives rise to objections of a different nature. It is hardly appropriate to draw conclusions from the absence of a practice in order to confer one interpretation rather than another on a treaty. The practice would have been relevant if it had shown that the Parties or one of them had interpreted Article I the same way as the Court had or, at the very least, had, if only implicitly, discarded the opposite interpretation. The cases cited in support of the absence of any practice are not very convincing. In the case of the *United States Diplomatic and Consular Staff in Tehran*, the 1955 Amity Treaty only played a subsidiary role and the fact that the Applicant did not rely on Article I of that Treaty in the case of the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)* does not deprive it of the right to invoke it for the first time in the present case. Moreover, in that earlier case the Amity Treaty was not the only or even the principal ground put forward to justify the Court's jurisdiction; and furthermore it was invoked for the first time in the Applicant's Memorial (24 July 1990, pp. 179-184). In its reply to the objection raised in that regard by the United States (Preliminary Objections raised by the United States of America, pp. 109-117), Iran stated that it was "a supplementary basis of jurisdiction" (Observations and Submissions on the Preliminary Objections, submitted by the Islamic Republic of Iran, Vol. I, p. 214, para. 6.31).

Without prejudice to the more general considerations which I shall put forward in the third part of this opinion, the reasons relating to the interpretation of paragraph 1 of Article IV do not appear to support adequately the exclusion implicitly conveyed by point 2 of the operative part and from which I consider that I must dissociate myself. In reality, it is merely a repetition, using different wording, of the content of the provision which is presented as the reasons for the interpretation given by the Court. It is difficult to consider it as having the value of real reasoning. I am therefore respectfully obliged to dissociate myself from such a method of interpretation and from the conclusion set out in the last sentence of paragraph 36.

III. General Considerations on the Method of Reasoning Followed by the Court

The preliminary objection raised in the this case could have been the Court's opportunity to specify in greater detail the nature and the scope of the duties it imposed on itself when it amended its Rules of Procedure in 1972, such as those duties arise today under Article 79 of the Rules of Court.

The three limbs of the choice offered by Article 79, paragraph 7, of the Rules of Court do not carry the same weight. The amendment made by the Court to its Rules in 1972 intended to confer a subsidiary scope on the decision to declare that the objection does not possess an exclusively preliminary character. The Court has set its own priority in cases when it is seised of a preliminary objection, that of choosing between upholding or rejecting the objection. If the objection relates to the very jurisdiction of the Court, the reasons not to defer the decision are all the more pressing: if it decides that the objection is not exclusively preliminary, the Court compels a State to put up a defence on the merits even though the Court has some doubt as to whether it actually has jurisdiction and may ultimately decline jurisdiction. There were two supplementary aspects to the streamlining for which the 1972 reform aimed, to prevent a debate on the merits before the Court has had the chance to make a ruling as to its jurisdiction, but also to avoid the parties having to make submissions twice on the question of jurisdiction. If it rejects the preliminary objection, the Court declares itself to have jurisdiction and it cannot come back on that decision which then has the force of *res judicata*. However, the decision on jurisdiction should not influence the resolution of the dispute on the merits at all, one way or the other. The decision, only reached in exceptional cases, which consists in reality of joining the objection to the merits must be reserved for cases in which the Court cannot decide the objection without itself taking a view on the merits.

For the objection to be exclusively preliminary, it must be possible for the Court to uphold or reject it without expressing any opinion as to the issue of the dispute on the merits. That is why the case-law of the Court relating to cases where it made a finding on the jurisdiction of another court is particularly relevant for the decision it has to take on the preliminary objection of lack of jurisdiction: even if it is for different reasons, it must, in one case as in the other, abstain from getting involved in a judgment on the merits, whether that judgment is removed from its jurisdiction at the outset or whether it would merely be premature to do so.

It is easy to decide to uphold an objection of lack of jurisdiction when that objection consists of denying the existence of a jurisdiction clause, of maintaining that the agreement made between States which contains that clause is no longer in force, that one of the parties has decided not to rely on it or that the facts in dispute occurred outside the time period during which the said clause applied. The decision is harder to reach without

getting involved in the merits when, as is the case here, the Parties do not agree as to the scope of the clause, that is to say as to whether it applies to the category of facts in which the facts in dispute here may be classified. Seised of such an objection, the Court must undoubtedly interpret the treaty provision by which the Parties, by common accord, conferred jurisdiction upon it. In Article XXI, paragraph 2, of the Amity Treaty the decisive words are "any question of interpretation or application" of the present Treaty. In order for it to be able to make a ruling on any of these questions ("any" question), the Court must have jurisdiction to do so. Therefore, the question of jurisdiction is preliminary to any questions of interpretation or application of the other provisions of the Treaty and if the Court were to rule definitively on any of that second series of questions, it would be exceeding the actual subject and the only subject which is immediately within its jurisdiction, the *compétence de la compétence*, and it would be encroaching upon the merits of the dispute, which would compel it not to find that the objection was exclusively preliminary. The problem therefore consists of separating the question of jurisdiction from the questions on the merits, even if it is necessary in order to reply to the first question to embark to a certain extent on the interpretation of the other provisions of the Amity Treaty, *inter alia* those which have been invoked by the Applicant. When a preliminary objection consists of denying that the Applicant's complaints fall within the scope of the provisions of the articles of the treaty which form the basis of the action (in this case Articles I, IV, paragraph 1, and X, paragraph 1), it is absolutely necessary to verify whether there is a sufficient connection between these articles or between one of them and the claims, for there to be a dispute between the parties as to "a" question of interpretation or application of the treaty. Rather than deciding that the relevant criterion is that of a "reasonable connection", which terminology is unknown in the case-law of the Court, we should ask ourselves what is meant by a question. What is "a question of interpretation or application" of one or several articles of a treaty? Faced with a preliminary objection of lack of jurisdiction, the Court must exercise its duty to interpret Article XXI, paragraph 1, on that point. It is necessary, in other words, to decide whether there is a question of interpretation or application of the Amity Treaty without making a premature ruling on the merits of that question. In order to decide whether there is a question, we must inevitably carry out a preliminary examination of the provisions of the treaty whose interpretation or application form the subject-matter of the dispute between the Parties. Certainly, if the claims have no connection with any of the provisions of the Treaty, it is easy to conclude that there is no question of interpretation or application and to uphold the objection of lack of jurisdiction. Conversely, it is not sufficient for the Parties to disagree as to the interpretation of the Treaty for the Court to find that it has jurisdiction. By analogy, one may apply what both Courts have asserted on many occasions in relation to a dispute: that it is possible to decide objectively what is meant by a question as well as by a dispute. More precisely, there

will be a question only if there is a dispute, if the points of interpretation or application of a treaty have given rise to contrasting positions which are sufficiently documented on both sides, and raise a doubt sufficient for the Court to be effectively seised of a question (and, in the present case, of several questions) of interpretation and application of the Amity Treaty.

In the case-law of the Court and of the Permanent Court there are several definitions of what is meant by a dispute. The oldest goes back to Judgment No. 2 of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*P.C.I.J., Series A, No. 2,* p. 11.)

From the case-law of the Court, one may cite the following solutions:

> "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion of 30 March 1950, I.C.J. Reports 1950,* p. 74.)

The objective criterion outlined by the Court in that Advisory Opinion is the following:

> "There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations." (*Ibid.*, p. 74.)

The latter passage is reproduced in the Judgment of 11 July 1996 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (para. 29) which also cites the Judgment of 30 June 1995 in the case concerning *East Timor (Portugal* v. *Australia)* (*I.C.J. Reports 1995,* pp. 99-100, para. 22).

The dispute must also relate to the interpretation or the application of a treaty. Both the Advisory Opinion of 30 March 1950, which has just been quoted, and the recent Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* carefully distinguish that second question from the preceding one. Therefore, according to paragraph 30 of the Judgment of 11 July 1996:

> "To found its jurisdiction, the Court must, however, still ensure that the dispute in question does indeed fall within the provisions of Article IX of the Genocide Convention." (Compare the similar finding in the Judgment in the case concerning *Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2,* p. 11.)

In the Advisory Opinion of 30 March 1950 the dispute related also to the duty of certain States to comply with a clause concerning the resolution of disputes relating to "the interpretation or the performance of treaties" and the Court observes as follows:

> "In particular, certain answers from the Governments accused of violations of the Peace Treaties make use of arguments which clearly involve an interpretation of those Treaties." (*I.C.J. Reports 1950,* p. 75.)

The determination of its own jurisdiction, the only question of which the Court is seised after having invited the Parties to give their views on the preliminary objection raised by the Respondent, is therefore reduced to whether there is a dispute relating to a question of application or interpretation of the Treaty between the Parties. The *compétence de la compétence* is separate from jurisdiction on the merits, that is to say the questions of interpretation and application of the Amity Treaty which the Court should have refrained from deciding. The scission of these two jurisdictions is clearly provided for in Article 79 of the Rules of Court and it makes the case-law relating to two series of cases which are strongly analogous with the present case particularly relevant. The first series of cases is borrowed from the case-law of the Court itself when it has had to rule on the jurisdiction of another court. The second type of scission between the determination of the existence of a question and the jurisdiction to solve that question appears when those two functions are divided between two jurisdictional orders.

In the Judgment in *Ambatielos, Merits* (*I.C.J. Reports 1953*, p. 10), the Court found that the Parties were in dispute on the interpretation of one of the provisions of the Treaty, but that that provision could "lend itself" both to one or the other interpretation without the Court being competent to decide which of the two interpretations appeared to it to be correct. In the same Judgment, the Court uses various expressions which it seems to find synonymous: the arguments put forward by the Greek Government are "sufficiently plausible"; the interpretation according to which the Application is based

> "appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one . . .
>
> In other words, if it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty." (*I.C.J. Reports 1953,* p. 18.)

Thus, four expressions seem equivalent: an interpretation "of a sufficiently plausible character", one of those "that may be placed upon [that provision]", an "arguable construction" that is to say one "which can be defended".

The Advisory Opinion of 23 October 1956 on the *Judgments of the*

Administrative Tribunal of the ILO upon Complaints Made against Unesco, which refers to the Judgment on the merits in the *Ambatielos* case, and also relates to the interpretation of an international instrument for the determination of the jurisdiction of a court other than the Court itself, uses a flexible form of words, namely "that the complaint should indicate some genuine relationship between the complaint and the provisions invoked . . .", "it is necessary to ascertain whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts" (*I.C.J. Reports 1956*, p. 89).

There is also established case-law of the Permanent Court of International Justice on that point. According to Judgment No. 2, cited above:

> "The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the mandate." (*P.C.I.J., Series A, No. 2*, p. 16.)

In the cases most similar to the present one, where the Court has ruled on a preliminary objection relating to its own jurisdiction, it has never explained the grounds on which it found that it had jurisdiction, whilst abstaining from prematurely deciding the questions of interpretation on which it was to exercise its jurisdiction at the appropriate time. According to the Judgment of 26 November 1984 relating to the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, the Court dismissed the objection of lack of jurisdiction by seemingly being satisfied that "on the basis of the facts . . . asserted" in Nicaragua's Application "there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the Treaty" (*I.C.J. Reports 1984*, p. 428, para. 83). See also the conclusion of that paragraph, page 429. In that Judgment, the Court justified its jurisdiction by viewing the Amity Treaty as a whole without, *a priori*, excluding any of its provisions. Paragraph 82 of the Judgment (p. 428) contains a summary analysis of five Articles of the Amity Treaty which the Applicant relied upon in its Memorial without the Court going further into the respective merits of those various provisions in order to reach a decision regarding the preliminary objection. It is regrettable that in the present case and for the first time, it would seem, the opinion of the majority diverged from that method. In its Judgment of 11 July 1996 concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* the course taken by the Court seems to be inspired by the one it followed in the Judgment of 26 November 1984, although that latter Judgment is not cited. In order to reject the fifth preliminary objection raised by Yugoslavia, the Court

> "observe[s] that it is sufficiently apparent from the very terms of that

> objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions, including Article IX. For the Court, there is accordingly no doubt that there exists a dispute between them relating to 'the interpretation, application or fulfilment of the . . . Convention, including . . . the responsibility of a State for genocide . . .', according to the form of words employed by that latter provision (cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* pp. 27-32)." (*I.C.J. Reports 1996,* pp. 616-617, para. 33.)

The Judgment of 11 July 1996 does not go into any more detail than the Judgment of 26 November 1984 about the provisions making up the Treaty containing the jurisdiction clause.

The second analogy between the scission of jurisdiction and the exercise of jurisdiction on the merits may be sought by examining the scission of certain jurisdictions between two jurisdictional orders. That is the case for the application of Article 177 of the EC Treaty by virtue of which the Court of Justice of the European Communities is seised, by way of preliminary reference, of a question of interpretation of a provision of Community law. Here the distribution of jurisdiction consists of separating application from interpretation. The Community Court is merely competent to give an interpretation (which is sometimes described as an abstract) of a provision whose application is entirely governed by domestic courts. This distribution of jurisdictions raises a problem very similar to the one that is presently before the Court. Indeed, as it is the only court competent to apply Community law, and, if necessary, to declare that a domestic law is incompatible with Community legislation, the national court must decide whether the question of interpretation is relevant to the resolution of the dispute before it and, even, whether such a question arises. There is extensive case-law of the Court of Justice of the European Communities on this point the gist of which must be sought in the opinion of Advocate General Lagrange given prior to the two oldest judgments on the subject. The distribution of jurisdictions between the two jurisdictional orders follows a rule which, according to that Advocate General, is "very simple":

> "before the procedure of referring a question for a preliminary ruling on interpretation can be set in motion, there must clearly be a *question*, and that question must be relative to the *interpretation* of the provision involved; otherwise, if the provision is perfectly clear, there is no longer any need for interpretation but only for application, which belongs to the jurisdiction of the national court whose very task it is to apply the law. This is what is sometimes described, not perhaps very accurately and in a way which is often misunder-

> stood, as the theory of the 'acte clair' (a measure whose meaning is self-evident): really, it is simply a question of a demarcation line between the two jurisdictions. Of course, as always in such a case, there can be doubtful cases or borderline cases. When in doubt, obviously, the court should make the reference."[1]

The Court of Justice of the European Communities has adopted the views of its Advocate General in a long series of Judgments, one of the most recent of which noted that there was "established case-law" in the following terms:

> "it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Dismissal of a request from a national court is possible where it is plainly apparent that the interpretation of Community law or the consideration of the validity of a Community rule, requested by that court, has no bearing on the real situation or on the subject-matter of the case in the main proceedings."[2]

Although they are applied to the relationship between two orders of court, the principles set out here may be transposed to the case in which a court separates the question of jurisdiction and the question of merits, when the first is dependent on there being a question of interpretation or application of a treaty text. To decide whether there is such a question, there is no need to prejudge the outcome, it is sufficient to note that the text or texts to be interpreted allow for various readings. As soon as a doubt may reasonably be raised on the interpretation of a text, one must conclude that there exists a question of interpretation, and that that doubt does not call in question the jurisdiction of the Court since, on the contrary, it is such a doubt which confirms that the Court has jurisdiction. And it is only if the question of interpretation (or application) had "no bearing on the real situation or on the subject-matter of the case in the main proceedings" (according to the wording of the Judgment of 3 March 1994 cited above which seemed to echo the words of the International Court of Justice in its Advisory Opinion of 23 October 1956 cited previously, *I.C.J. Reports 1956*, p. 89), that the Court could uphold an objection of lack of jurisdiction in relation to a jurisdiction clause

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[1] Opinion of Advocate General Lagrange given prior to the Judgment of 27 March 1963 in Joined Cases 28/62, 29/62, 30/62, *Da Costa, and Schaake n.v. and Others* v. *Netherlands Inland Revenue Administration,* [1963] ECR 31, at pp. 44 and 45. (The italics are in the text.) See also the opinion of the Advocate General given prior to the Judgment of 20 February 1964, Case 6/64, *Flaminio Costa* v. *E.N.E.L.*, [1964] ECR 585, at p. 600.

[2] Court of Justice of the European Communities, Judgment of 3 March 1994 in Joined Cases C-332/92, C-333/92, C-335/92, *Enrico Italia Srl and Others* v. *Ente Nazionale Risi,* [1994] ECR I-711, at p. I-734, para. 17.

whose object is "any question of interpretation or application". What is described as "the need for a preliminary ruling" in the Judgment of 3 March 1994 refers to the existence of a sufficient doubt for the interpretation to raise questions and such a need was excluded in an earlier judgment when there is a precedent on the same subject or when

> "the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved"[3].

Those words may be perfectly well adapted to review by the Court as to whether it has jurisdiction in relation to a clause by which two States undertook to submit to it "any question" relating "to the interpretation or the application" of a treaty.

CONCLUSION

If the Court had followed the method recommended in the third part of this opinion, it could, after having dismissed the part of the preliminary objection according to which the 1955 Treaty could not apply to questions concerning the use of force, have merely declared that there existed between the Parties a legal dispute as to the interpretation or to the application of the three Articles of the Treaty invoked by the Applicant in support of its action. In order to decide that there was a question of interpretation or application of a treaty containing a jurisdiction clause relating to that type of question, it is sufficient to note the existence of the clause without it being necessary to decide the question, that is to say to exercise jurisdiction prematurely when it would have been sufficient to recognize that jurisdiction in principle.

(Signed) François RIGAUX.

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[3] Court of Justice of the European Communities, Judgment of 6 October 1982 in Case 283/81, *CILFIT, the Ministry of Health,* [1982] ECR 3415, at p. 3430, para. 16.