SEPARATE OPINION OF JUDGE SHAHABUDDEEN

Today's Order, which is related to a small category of Orders of recent vintage, involves legal issues the importance of which is not lessened by reason of their not being readily apparent on the face of the document. One such issue concerns the precise legal character of the Order. It seems to me that there could be a serious question as to what it is in law that the Court is doing in making the Order. On one possible interpretation I could not support the Order, on another I could. I feel obliged, therefore, to explain the basis on which I do support it, lest my support be understood as implying acquiescence in an interpretation which I cannot accept.

As indicated in the Order, there is no objection by El Salvador to the choice by Honduras of a replacement *ad hoc* judge. It being the case that the Court itself has no objection, and there being no doubt on the matter, it follows that no decision is called for under Article 35, paragraph 4, of the Rules of Court. So far as any objection or doubt is concerned, therefore, the question whether a formal Order is required does not arise.

The remaining questions which fall for consideration are (i) whether an Order is otherwise required, and, if so, (ii) whether it is required for the purpose of legally constituting another person as a replacement *ad hoc* judge, or (iii) whether it is required for the purpose of simply recording such replacement. Ordinarily, I would answer the first question in the negative and thus not reach the second and the third. In the circumstances of this case, however, I would answer the first in the affirmative, the second in the negative and the third in the affirmative. My reasons follow.

As to the first question, since the Order of Court of 8 May 1987 (*I.C.J. Reports 1987*, p. 12) did formally mention the names of the two *ad hoc* judges who were to be members of the *ad hoc* Chamber thereby formed, it would seem to follow as a logical extension of the drafting of that Order that the death of one of them and his replacement by another person should be reflected in an appropriate amendment of that Order by a new Order. That, in brief, is the ground on which I agree with the making of the new Order.

The second and third questions involve an inquiry into the precise juridical character of the new Order. The present state of the law being seldom, if ever, ascertainable without recourse to the past, it appears to me that the inquiry referred to cannot be intelligently pursued in isolation from previous legal developments. The matter is in particular

complicated by the circumstance that it has not been customary to make a formal Order relating specifically to the appointment of *ad hoc* judges (as distinguished from entitlement to appoint), the fact of their appointment being generally simply recited as part of the procedural history of the case in the introductory parts of the next Order or decision of the Court in the case. Two exceptions relate respectively to the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1985*, p. 7) and the present case (*I.C.J. Reports 1987*, p. 12). The Orders of Court in these two cases show the election of three named Members of the Court and the addition of two named *ad hoc* judges (who, indeed, had been chosen before the election of the other judges), making a Chamber of five. That was not the course taken in the first *ad hoc* Chamber case, namely, the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (*I.C.J. Reports 1982*, pp. 8-9). In that case the Order of Court constituted a Chamber comprising five named Members of the Court elected by it (including a Member of United States nationality), and went on to note the fact

> "that the Acting President, in the exercise of his powers under Article 31, paragraph 4, of the Statute of the Court, has requested Judge Ruda [one of the five elected judges] to give place in due course to the judge *ad hoc* to be chosen by the Government of Canada, and that Judge Ruda has indicated his readiness to do so".

The choice later made by Canada was not made the subject of a specific Order of Court; it was merely narrated as a fact in the recitals of the subsequent Order by which time-limits were fixed for pleadings (*I.C.J. Reports 1982*, p. 16).

A movement in favour of mentioning the names of *ad hoc* judges in the Order of Court setting up an *ad hoc* Chamber seems to have occurred in association with a movement away from the procedure observed in the *Gulf of Maine* case whereby a Member of the Court, having been elected to the Chamber, would stand down at the request of the President in favour of an *ad hoc* judge to be later named by the State concerned. This standing-down procedure was required in the case of all *ad hoc* judges in all chambers. It is still required by Article 31, paragraph 4, of the Statute in relation to all chambers and by Article 17, paragraph 2, of the Rules of Court (amended specifically in 1978 to provide for this) in relation to *ad hoc* chambers in particular. The subsequent movement away from that procedure, as it was applied in the *Gulf of Maine* case, seemed inextricably linked with, and to have followed as the practical consequence of, the working of another part of Article 17, paragraph 2, of the Rules of Court (first introduced as Article 26, paragraph 1, of the 1972 Rules) which in substance sought to confer on the parties a right to have their views taken

into account by the Court as to the particular Members of the Court who should be elected by the Court to an *ad hoc* chamber. The object seems to have been "to accord to the parties a decisive influence in the composition of *ad hoc* Chambers" (Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, Vol. 67, 1973, p. 2).

Without examining the legal implications of these developments, but against the background which they represent, I come now to the juridical character of the Order made today: is it constitutive of an appointment made by the Court of a new *ad hoc* judge? Or is it merely a formal judicial record of an appointment of a new *ad hoc* judge made by the State concerned? In short, who appoints an *ad hoc* judge? Is it the Court? Or is it the State concerned?

It is, I believe, common to speak of an *ad hoc* judge being appointed by the State concerned. On the other hand, the case can be made that the admission by the Court of an *ad hoc* judge to the Bench constitutes the exercise of a power of appointment by the Court granted to it by Article 31, paragraphs 2 to 6, of the Statute (see Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. IV, p. 374). This view commands respect, and so I proceed to consider some of the matters which might be opposed to the more common usage.

Article 7 of the Rules of Court relating to the admission of *ad hoc* judges to sit on the Bench of the Court would seem to contemplate the procedure visualized by Article 20 of the Statute reading:

> "Every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."

The requirement to make this declaration is imposed on *ad hoc* judges by Article 31, paragraph 6, of the Statute. It seems reasonably clear, however, that the requirement is directed not to appointment but only to assumption of duties. The text of Article 20 of the Statute implies that the person concerned is a judge even before he makes the declaration. The admission procedure seems, therefore, to leave open the question by whom and as from when is a person appointed an *ad hoc* judge.

Article 35, paragraph 5, of the Rules of Court states, "A judge *ad hoc* who has accepted appointment but who becomes unable to sit may be replaced"; but there seems to be no necessary implication that the "appointment" referred to is one made by the Court. In the *Namibia* case (*I.C.J. Reports 1971*, p. 19, para. 10) and the *Western Sahara* case (*I.C.J. Reports 1975*, p. 15, para. 8), in both of which the Court used the word "appointment" with reference to *ad hoc* judges, it would appear that the question which the Court was seeking to determine was not whether it should appoint *ad hoc* judges (which would have assumed that it had the power to do so), but whether the required conditions were satisfied so as to entitle the States concerned to do so. This, I think,

was how Judge Fitzmaurice understood the position in the *Namibia* case, in which he said (dissenting):

> "The Court's rejection of the South African request to be allowed to appoint a judge *ad hoc* in the present case was embodied in the Order of the Court of 29 January 1971. . ." (*I.C.J. Reports 1971*, p. 308, para. 17.)

That understanding, that the appointment is to be made by the State concerned, does not seem inconsistent with the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1984*, p. 5) where paragraph 3 of the Judgment of the Court reads:

> "Since the Court did not include upon the bench a judge of Libyan or of Maltese nationality, each of the Parties proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. On 27 July 1982 the Libyan Arab Jamahiriya designated Mr. Eduardo Jiménez de Aréchaga, and the Parties were informed on 8 October 1982, pursuant to Article 35, paragraph 3, of the Rules of Court, that there was no objection to this appointment; on 26 April 1983 Malta designated Mr. Jorge Castañeda, and on 30 May 1983 the Parties were informed that there was no objection to this appointment."

Though the matter could be argued both ways, I prefer the view that the notification "that there was no objection to this appointment" could not constitute an act of appointment by the Court itself. On the contrary, it presupposed the existence of an appointment made by some other authority. The language in the quoted passage seemed to be equating a "choosing" by the State concerned with a "designation" by it, and in turn equating a "designation" by the State with an "appointment" by it, all three concepts being used interchangeably.

Earlier usage of relevant terms may also be consulted. Article 27 of the second part of the Root-Phillimore plan read: "If . . . there is no judge upon the Court belonging to one of the litigating States, that State shall . . . appoint a judge" (Permanent Court of International Justice, *Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes*, The Hague, 1920, p. 327). Judge Hudson spoke similarly, using the word "chosen" interchangeably with the word "appoint" (Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, New York, 1943, pp. 181, 276, 361-364, and the references therein given). So also did Fachiri (A. P. Fachiri, *The Permanent Court of International Justice*, 2nd ed., 1932, p. 59; and see later Shabtai Rosenne, *The Law and Practice of the International Court*, 1965, Vol. 1, pp. 205-210). Absolute consistency of usage cannot be predicated. Thus, the records of the Washington Committee of Jurists 1945 state that "Judge Hudson noted that under paragraph 2 of Article 26 [of the Statute] the

Court could not appoint *ad hoc* judges", language which might be thought to suggest that, in cases in which an *ad hoc* judge could be appointed, it is the Court which makes the appointment (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XIV, p. 224). Generally speaking, however, almost all of the references in the relevant correspondence and discussions were to *ad hoc* judges being appointed by the parties (see, for example, *P.C.I.J., Series D, No. 2*, pp. 177, 215; *P.C.I.J., Series D, Third Addendum to No. 2*, pp. 26, 31-33, 306, 386-394, 422, 478-491; the *Losinger* case, *P.C.I.J., Series C, No. 78*, pp. 392-393; League of Nations, *Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes*, Geneva, 1929, p. 53, *per* M. Fromageot; and the "Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice", *American Journal of International Law, Supplement*, Vol. 39, 1945, p. 12, para. 41). The Permanent Court of International Justice itself spoke in terms of *ad hoc* judges being appointed by the parties. Thus, in the case of the *Customs Régime between Germany and Austria* (*P.C.I.J., Series A/B, No. 41*, p. 90), the Court formally decided that there was "no ground in the present case for the appointment of judges *ad hoc* either by Austria or Czechoslovakia" (see also *P.C.I.J., Series C, No. 53*, p. 189). Similar language was used by the Court in the case of the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (*P.C.I.J., Series A/B, No. 65*, pp. 70-71. And see *P.C.I.J., Series E, No. 4*, p. 296).

In the course of the 1922 discussions of the Permanent Court held to prepare its first set of Rules, President Loder said "that a text would be drafted, making it clear that", if a judge nominated under Article 31 of the Statute were affected by the provisions of Article 17,

> "by virtue of the last paragraph of Article 31 of the Statute, the nomination of [such] a judge could, in such circumstances, be declared null and void by the Court; in this case the right of the parties to nominate a judge of their nationality would lapse" (*P.C.I.J., Series D, No. 2*, p. 119).

I incline towards Judge Hudson's opinion that the last sentence was not a necessary consequence of what went before (Hudson, *op. cit.*, p. 364. Cf. Geneviève Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, 1983, p. 212). As to what went before, it is noteworthy that the suggested text, if it was drafted, was never promulgated. The explanation is not clear, but I should not be surprised if it was connected with possible argument that Article 17, paragraph 2, of the Statute takes the form of a prohibition directed to an existing Member of the Court against participating in the decision of a case in certain circumstances, with the result that, strictly speaking, a decision of the Court under Article 17, paragraph 3, of the Statute is confined to the effect of that prohibition on

participation and does not encompass questions as to the validity of membership itself. Be that as it may, it would not appear that the power to declare a nomination null and void implies that it is the Court which is vested with the power of appointment. Judge Fromageot put the matter this way in 1932:

> "The right of a party to appoint a judge *ad hoc* was not subject to the Court's authorization; but the Court could consider whether in a particular case the conditions to which the exercise of that right was subject were fulfilled; if they were not, the Court could deliver an order declaring the appointment inadmissible, but not without hearing arguments on the point." (*P.C.I.J., Series D, Third Addendum to No. 2*, p. 18, footnote.)

Thus, the Order of the Court declaring the appointment inadmissible does not diminish the fact that the appointment is nevertheless made by the party concerned and is not subject to the Court's authorization. Paragraphs 4 and 5 of Article 35 of the Rules of Court are to be read harmoniously with this overriding position under the Statute.

The matter is complicated by a textual change made in 1945. Article 31 of the 1920 Statute, as amended with effect from 1 February 1936, appeared, in the English text, to be using the words "chosen", "selected" and "appointed" interchangeably in relation to national judges. In particular, persons "chosen" to sit as judges under Article 31, paragraph 2, of the Statute were clearly equated with "judges specially appointed by the parties", as so referred to in paragraph 4 of the Article. Since the word "appointed" was replaced by the word "chosen" in 1945, this might be thought to indicate a change of substance supportive of the opposite view. And the strength of that argument is recognized. But the structure of the machinery remained the same and no change on this aspect was made in the French text, which had used the word "désignés" where the English text had used the word "appointed". This being so, if *ad hoc* judges were regarded as "appointed by the parties" and not by the Permanent Court, it is difficult to see how the mere change of wording in the English text in 1945 could imply that *ad hoc* judges were now to be appointed by the present Court. Possibly the change in the English text was attributable to considerations of style, as indeed was suggested by Judge Hudson (Manley O. Hudson, "The Twenty-Fourth Year of the World Court", *American Journal of International Law*, Vol. 40, 1946, p. 29). The official records of the sixth meeting of the Advisory Committee of Jurists of the San Francisco Conference, where the change was made, offer no explanation (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XVII, p. 413).

It may be added — though here I tread with particular diffidence —

that the relevant words in the French text (which did not materially change on these aspects) were "désigner", "désignation" and "désignés". The word "désignation" has been defined to mean *inter alia*, "Indication d'une personne déterminée pour occuper un poste ou remplir une mission ..." (*Vocabulaire juridique*, publié sous la direction de Gérard Cornu, Presses universitaires de France, 1987, p. 260). The key expression in Article 31, paragraph 2, in the French text of the existing Statute reads, "toute autre partie peut désigner une personne de son choix pour siéger en qualité de juge". The word "désigner", read with the word "choix", may mean something more than a simple choice; it would seem to connote the full juridical act denoted by the English word "appoint". On the other hand, while the word "appoint" may not always mean "choose", it can and sometimes does (see *Corpus Juris Secundum*, Vol. 6, pp. 100-101, and *State of New Jersey* v. *Provenzano* (1961) 169 A 2d 135, 34 N.J. 318). It seems to follow that the English word "choose" and the French word "désigner" were both intended, in the particular context in which they were used, as the juridical equivalent of the English word "appoint".

Against this background, Article 31 of the Statute may now be looked at a little further. Article 31, paragraph 2, says "any other party may choose a person to sit as judge". The import of that language is brought out in the reference in Article 31, paragraph 3, to parties proceeding "to choose a judge as provided in paragraph 2 of this Article". Seemingly, the person chosen under paragraph 2 is regarded as a judge once chosen. Article 31, paragraph 4, likewise speaks of "the *judges specially chosen* by the parties" (emphasis added). And Article 31, paragraph 6, states:

> "*Judges chosen* as laid down in paragraphs 2, 3 and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20 and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues." (Emphasis added.)

The exercise of the power of choice seems directly constitutive of the status of an *ad hoc* judge.

The right to appoint an *ad hoc* judge touches the composition of the Court and consequently is directly governed by the Court's constituent instrument, namely, its Statute. Article 31 is the particular provision of the Statute concerned with the process of constituting a person as an *ad hoc* judge. It does not seem to offer the Court a role at any point in that process, either directly or indirectly through the other provisions referred to in it. The limits of the Court's rule-making power under Article 30 of the Statute (however generously construed) would not enable it, by making Rules of Court, to assume a role in that process not entrusted to it by the Statute. The Statute appears to leave the matter to the State concerned.

This would accord with the fact that the institution of *ad hoc* judges as part of the composition of the Bench of the Court was effectively a limited carry-over from arbitral experience.

In sum, it is difficult to identify any acts of the Court from which an *ad hoc* judge may be said to derive his authority to act. Though recognizing the force of arguments to the opposite effect, on balance I prefer the view that the appointment of such a judge is constituted by the act of the State concerned in choosing him, the role of the Court being limited to the negative one of determining whether any ground (whether or not going to the validity of his appointment) exists for debarring him from sitting in the case. If this is correct, it leads to the view that the Order made today is not constitutive of an appointment made by the Court but is merely a formal judicial record of an appointment made by the State concerned. I would like in turn to record that it is on the basis of this understanding that I support the Order.

(Signed) Mohamed SHAHABUDDEEN.