JOINT DECLARATION OF JUDGES BEDJAOUI, GUILLAUME AND RANJEVA

[Translation]

Article 31, paragraph 5, of the Statute — United Kingdom and United States parties in the same interest — United Kingdom not being entitled to choose a judge ad hoc.

1. The question arose in this case as to whether or not the United Kingdom was entitled to choose a judge *ad hoc* in the present phase of proceedings relating to the jurisdiction of the Court and the admissibility of the Libyan Application. The Court answered this question in the affirmative. It nevertheless did not see fit to state reasons for its decision, merely recalling it in paragraph 9 of the Judgment. This unexplained decision appears to us to be inexplicable and we therefore feel it our duty to explain at this point just why we were unable to endorse it.

The Issue and the Solution Adopted by the Court

2. At present the Members of the Court include President Stephen M. Schwebel, who is of United States nationality, and Judge Rosalyn Higgins, who is of British nationality. Under Article 31, paragraph 5, of the Statute of the Court, each had the right to sit in both cases, Libya *v.* United States, and Libya *v.* United Kingdom.

However, Article 32 of the Rules of Court states: "If the President of the Court is a national of one of the parties in a case he shall not exercise the functions of the presidency in respect of that case." President Schwebel was thus required to surrender the presidency of the Court to the Vice-President in the case of Libya *v.* United States. In the circumstances, he also decided to relinquish the presidency in the Libya *v.* United Kingdom case. The decision mirrored that taken in comparable circumstances by Sir Robert Jennings, the then President, when the Court considered Libya's request for the indication of provisional measures in 1992[1].

Judge Rosalyn Higgins moreover informed the Court that, having acted as counsel for the United Kingdom during the early phases of the case of Libya *v.* United Kingdom, she could not take part in the proceedings. In view of the circumstances in which the Memorials of the Parties

[1] Order of 14 April 1992, *I.C.J. Reports 1992*, pp. 3 and 114.

had been prepared, Judge Higgins also felt that she must ask to be excused in the case of Libya *v.* United States.

Her decision, like that of President Schwebel, reflected laudable scruples. Nonetheless it was to raise awkward issues of procedure.

3. On 5 March 1997, the United Kingdom notified the Court that it had been informed of Judge Higgins's decision and that, pursuant to Article 31 of the Statute of the Court and Article 37 of the Rules of Court, it had chosen Sir Robert Jennings, K.C.M.G., Q.C., former President of the Court, to sit as judge *ad hoc* in the forthcoming oral proceedings in the case of Libya *v.* United Kingdom.

4. The choice seemed on the face of it to be in conformity with Article 31, paragraph 3, of the Statute of the Court, under which: "If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose" a judge *ad hoc.*

Nonetheless it raised a difficulty with regard to paragraph 5 of the same Article, which states:

> "Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

5. Articles 36 and 37 of the Rules of Court determine the applicability of Article 31 of the Statute. Article 37, paragraph 1, provides that:

> "If a Member of the Court having the nationality of one of the parties is or becomes unable to sit in any phase of a case, that party shall thereupon become entitled to choose a judge *ad hoc* within a time-limit to be fixed by the Court, or by the President if the Court is not sitting."

Paragraph 2 then adds that:

> "Parties in the same interest shall be deemed not to have a judge of one of their nationalities upon the Bench if the Member of the Court having one of their nationalities is or becomes unable to sit in any phase of the case."

6. The question therefore arose whether the United Kingdom and the United States were to be regarded as "parties in the same interest" against Libya, at least in the current phase of proceedings. If they were not, the United Kingdom was entitled to choose a judge *ad hoc* in the case between itself and Libya (but not in the case involving the United States). If they were, the United Kingdom could not choose a judge *ad hoc* since the Court already had on the Bench, in both cases, a judge *ad hoc* chosen by Libya and a judge having the nationality of the United States, a country which was a party in the same interest with the United Kingdom.

7. The Court appears to have long hesitated over the solution. First, the Registry followed its usual practice by transmitting the United Kingdom's letter to the Agent of Libya, who was invited to submit any relevant observations by 7 April 1997. The Court received no comment from Libya within that time-limit.

The Court then instructed the Registry to inform the three States concerned that it was also ready to receive from them, by 30 June at the latest, any observations they might wish to make in respect of Article 31, paragraph 5, of the Statute. The United Kingdom filed a Memorial setting forth the reasons why, in its opinion, there were no parties in the same interest in the case. The United States took the same view. In an extremely short letter, Libya took the opposite view. On 16 September 1997 the Court informed the Parties of its decision. Over six months thus elapsed between the choice made by the United Kingdom and the decision of the Court.

JURISPRUDENCE ON PARTIES IN THE SAME INTEREST

8. This decision seems on the face of it to conflict with the jurisprudence on parties in the same interest of both the Permanent Court of International Justice and the International Court of Justice; which precedents must be looked into before we consider the facts in this case.

9. This jurisprudence emerged in the initial years of the Permanent Court.

In the case concerning *Territorial Jurisdiction of the International Commission of the River Oder*, the British, Czechoslovak, French, German and Swedish Governments which were in the same interest with Denmark against Poland did not have a judge of their nationality on the Bench. They were nevertheless not called upon to choose one, a Danish Judge sitting opposite the Polish Judge[2].

In the advisory proceedings on the *Customs Régime between Germany and Austria*, having heard the Parties in advance of any discussion of the merits, the Court held that the German and Austrian Governments on the one hand, and the Czechoslovak, French and Italian Governments on the other, were respectively parties in the same interest. Furthermore, the Court noted that it included upon the Bench judges of French, German and Italian nationality. It deduced "that there is no ground in the present case for the appointment of judges *ad hoc* either by Austria or by Czechoslovakia".

That was when the Permanent Court first identified the criterion for determining whether States were in the same interest. Hesitation was legitimate since the English text of the Statute referred to "parties in the same interest", whereas the French version spoke of parties which *"font cause commune"*. Clearly, the English was broader in scope and would

[2] Judgment No. 16 of 10 September 1929, *P.C.I.J., Series A, No. 23*, p. 5.

have excluded the choice of judges *ad hoc* in more cases. The Permanent Court, however, abided by the French text and held that the provision concerned was applicable only if the States concerned were in a situation of *"litis consortium"*[3]. In its Order of 20 July 1931, it noted that "all Governments which, in the proceedings before the Court, come to the same conclusion, must be held to be in the same interest for the purposes of the present case"[4]. It then held that "the arguments advanced by the German and Austrian Governments lead to the same conclusion" whereas the arguments of the other three Governments "lead to the opposite conclusion"[5]. It concluded that on either side the Governments in question were in the same interest.

10. The International Court of Justice, for its part, encountered this problem for the first time in the *South West Africa* cases in regard to Applications filed respectively by Ethiopia and Liberia against South Africa. Neither State had a judge of its own nationality on the Bench and, in advance of the filing of the Memorials, they both stated their intention of choosing a judge *ad hoc*. South Africa did likewise.

The Court waited until the Memorials had been filed before giving its decision, by an Order of 20 May 1961. In the grounds for that Order, the Court first and foremost echoed the decisions of the Permanent Court, stating that "all Governments which, in proceedings before the Court, come to the same conclusion, must be held to be in the same interest". In so doing, it laid down a general principle without restricting the solution chosen to that particular case.

The Court then found that the submissions contained in the applications and the Memorials were *mutatis mutandis* identical and that "the text [of the applications and Memorials] themselves are, excepting in a few minor respects, identical". It therefore deduced that Liberia and Ethiopia were "in the same interest" before the Court and were "therefore, so far as the choice of a judge *ad hoc* is concerned, to be reckoned as one party only"[6].

For those various reasons, the Court joined the two proceedings, found that the Governments of Ethiopia and Liberia were in the same interest and fixed a time-limit of slightly less than six months for them, acting in concert, to choose a single judge *ad hoc*. South Africa for its part, had chosen such a judge, thus preserving the balance between the applicants and the respondent.

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[3] See *Statut et Règlement de la Cour permanente de Justice internationale — Elements d'interprétation,* 1934, p. 190. See also Hudson, *The Permanent Court of International Justice*, p. 334, note 73.

[4] Order of 20 July 1931, *P.C.I.J., Series A, No. 41,* p. 89.

[5] *Ibid.*, p. 90.

[6] *South West Africa, Order of 20 May 1961, I.C.J. Reports 1961,* p. 14.

11. The issue arose a little differently in the *North Sea Continental Shelf* case. The Federal Republic of Germany signed two separate Special Agreements, one with Denmark and the other with the Netherlands. Furthermore, on the same date the three Governments concluded between themselves a protocol in which they agreed to request the Court to join the two proceedings, adding:

> "The three Governments agree that for the purpose of appointing a judge *ad hoc* the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands shall be considered to be parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute of the Court."[7]

Within the time-limit fixed for the filing of the Counter-Memorials, Denmark and the Netherlands notified the Court, in separate letters, that they had each chosen Mr. Sørensen as a judge *ad hoc*. After the filing of the Counter-Memorials, but before the Parties had requested the joinder of the proceedings in accordance with the Protocol, the Court delivered its decision by an Order of 28 April 1968. In that Order it recalled the circumstances in which Denmark and the Netherlands had chosen a judge *ad hoc*, together with the arrangements approved by the Parties. It also, however, expressed the wish to ascertain for itself on the basis of the written pleadings whether the two Governments were indeed in the same interest, and found that

> "the Counter-Memorials submitted by the Governments of Denmark and the Netherlands confirm that the two Governments consider themselves to be parties in the same interest since they have set out their submissions in almost identical terms".

The Court then concluded that the two Governments "are, so far as the choice of a Judge *ad hoc* is concerned, to be reckoned as one Party only"[8].

The Judgment thus confirms the criterion previously established for determining whether two States are parties in the same interest: their submissions alone are determinative in this respect. The Judgment also establishes, however, that it is for the Court — not the parties — to take the necessary decision. In that case the two Governments had chosen the same person to sit as a judge *ad hoc*. The Court might merely have decided to record the fact. It chose instead to determine whether or not they were parties in the same interest. But, here again, it did not just go by what the parties asserted; it verified the position in the light of the submissions of both States.

12. The jurisprudence of the Court, thus reaffirmed and elaborated,

[7] *North Sea Continental Shelf, Order of 26 April 1968, I.C.J. Reports 1968,* p. 10.

[8] *Ibid.*

had further occasion to be applied in the *Fisheries Jurisdiction* cases. Two Applications were successively filed against Iceland, by the United Kingdom on 14 April 1972 and by the Federal Republic of Germany on 5 June 1972. By parallel Orders of 17 August 1972 the Court indicated certain provisional measures and fixed the following day as the time-limit for the production of Memorials on jurisdiction.

A British judge was sitting in the case, but neither Iceland nor Germany had a judge of its nationality. As early as 21 July 1972 Germany notified the Court of its intention to choose a judge *ad hoc* and, on 31 October, chose Mr. Mosler. Since the Icelandic Government did not react, the Registrar so informed the Agent of Germany and transmitted the case file to Judge Mosler.

However, shortly before the hearings on the Court's jurisdiction in the two cases were to open, the Court had doubts about its composition, and on 4 January 1973 the Registrar addressed to the Agents a letter in which the Court,

> "after deliberating on the question, is unable to find that the appointment of a judge *ad hoc* by the Federal Republic of Germany in this phase of the case would be admissible. This decision affects only the present phase of the proceedings, that is to say that concerning the jurisdiction of the Court, and does not in any way prejudice the question whether, if the Court finds that it has jurisdiction, a judge *ad hoc* might be chosen to sit in the subsequent stages of the case."[9]

The decision was confirmed by the President in the same terms at the opening of the hearings[10].

It was amplified in the Judgment of 2 February 1973 on the jurisdiction of the Court in the *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland)* case, with the statement that:

> "However, the Court, taking into account the proceedings instituted against Iceland by the United Kingdom . . . and the composition of the Court in this case, which includes a judge of United Kingdom nationality, decided by eight votes to five that there was in the present phase, concerning the jurisdiction of the Court, a common interest in the sense of Article 31, paragraph 5, of the Statute which justified the refusal of the request of the Federal Republic of Germany for the appointment of a judge *ad hoc.*"[11]

Iceland, for its part, had nevertheless not appointed a judge *ad hoc.* When the merits phase began, Germany notified the Court that, while

[9] *I.C.J. Pleadings, Fisheries Jurisdiction,* Vol. II, p. 421.

[10] *Ibid.*, p. 120.

[11] Judgment of 2 February 1973, *I.C.J. Reports 1973*, p. 51, para. 7.

maintaining its right to make such an appointment, it would not insist on appointing its own judge "as long as this situation persists"[12].

The solution chosen in the jurisdiction phase nevertheless confirmed previous jurisprudence under which two States were in the same interest when they presented the same submissions, whatever the supporting line of argument. In that particular case the United Kingdom and the Federal Republic of Germany contended that the Court had jurisdiction to hear their case. However, they did so on different grounds with regard to jurisdiction *ratione personae*. The Federal Republic of Germany was in fact in a different situation from that of the United Kingdom. It was not a Member of the United Nations and was not party to the Statute. Therefore it did not invoke a declaration of compulsory jurisdiction deposited under Article 36, paragraph 2, of the Statute (as did the United Kingdom), but instead relied upon a declaration of 29 October 1971 that it accepted the jurisdiction of the Court under Article 35, paragraph 2, of the Statute and under Security Council resolution 9 (1946) of 15 October 1946. Yet Iceland had denied that the declaration could cover proceedings *ratione temporis*[13].

Nonetheless the Court held that the difference in situation between the United Kingdom and Germany was of little importance. What mattered was that both States held the Court to have jurisdiction. That identity of submission implied that the Parties were in the same interest.

Although on the latter point the Judgment merely provides manifest confirmation of previous decisions, it must be noted that such jurisprudence thus had occasion to be applied in a new procedural configuration. In the case concerning the *Customs Régime between Germany and Austria*, referred to the Permanent Court, the intervening States put forward their points of view in single proceedings for an advisory opinion. In the *South West Africa* and *North Sea Continental Shelf* cases the Applicants had brought two separate Applications but in both cases the International Court of Justice joined the Applications and delivered a single Judgment.

By contrast, in the *Fisheries Jurisdiction* cases, the Court did not pronounce a similar joinder and delivered two separate series of Judgments, on jurisdiction and on the merits. However, this did not prevent it from considering that the United Kingdom and Germany were "in the same interest" in the first phase of proceedings. Thus for two States to be "in the same interest" they indeed have to present the same submissions to the Court, whether in a single application or in two separate applications, and whether or not the latter are joined. This procedural detail is of little importance.

[12] *I.C.J. Pleadings, Fisheries Jurisdiction,* Vol. II, p. 457.

[13] *Ibid.*, p. 94; see also Judgment of 2 February 1973, *I.C.J. Reports 1973,* pp. 54 and 55.

13. All in all, the jurisprudence of the Permanent Court and that of the International Court of Justice look perfectly coherent:

(a) *Governments which, before the Court, present the same submissions must be regarded as being in the same interest. The arguments advanced by the parties are not very important in this respect, the submissions alone being determinative* (settled jurisprudence);

(b) when *objections to jurisdiction and admissibility* are submitted *in limine litis,* in the initial phase of proceedings the attitude of the parties to these objections must be evaluated. Thus if the parties submit that the Court has jurisdiction, they must be regarded as being in the same interest (*Fisheries Jurisdiction* cases);

(c) *It is for the Court to decide independently of the attitude of the parties* (*North Sea Continental Shelf* case);

(d) *This solution applies whether the applications are joined* (*South West Africa* and *North Sea Continental Shelf* cases) *or remain separate* (*Fisheries Jurisdiction* cases).

THE CIRCUMSTANCES OF THE CASE

14. In the current phase of this case the United Kingdom and the United States present the same arguments on two different levels. Firstly, they contend in almost identical terms that the dispute brought before the Court does not concern the application or interpretation of the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation and consequently that Article 14 of the Convention does not give the Court jurisdiction to hear the case. Secondly, they state that the Security Council approved various resolutions imposing on Libya an obligation to surrender the suspects, and that these resolutions adopted under Chapter VII of the Charter are binding on Libya under Article 25 and prevail over any treaty obligation (particularly the Montreal Convention) under Article 103. They deduce from this that the Libyan Applications are inadmissible or have become moot.

In its Preliminary Objections, the United Kingdom therefore requests the Court:

> "to adjudge and declare that:
>
> it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya
>
> and/or
>
> the claims brought against the United Kingdom by the Libyan Arab Jamahiriya are inadmissible".

As to the United States, it requests "that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain the case".

In these circumstances, it was clear that in this phase of the proceedings the United States and the United Kingdom present the same submissions to the Court and are therefore in the same interest. Furthermore, such community of interests throws light on President Schwebel's decision not to act as President of the Court in either case and Judge Higgins's decision to stand down in both cases. The existence of the same interest is expressed chiefly in the Judgments delivered by the Court, which are very similar in their legal reasoning and virtually identical in their operative provisions. The British request for the appointment of a judge *ad hoc* ought to have been rejected in accordance with the settled jurisprudence recalled above.

15. In its written observations, the United Kingdom nonetheless sets out four arguments against such a solution, which must be considered in turn.

16. It relies first on "the right of a State party to a case before the Court to have included on the Bench a judge *ad hoc* in circumstances in which there is no elected judge of the nationality of that State able to take part in proceedings". That right is said to be "fundamental".

This argument cannot be upheld. It is true that the Statute of the Court gives States *the right to choose a judge* ad hoc, whether the request is brought before the Court unilaterally or by means of a Special Agreement. However, this right springs from an even more fundamental principle, which is that of the equality of parties. Yet in certain situations such equality may be breached by the very fact of choosing a judge *ad hoc*. This is so when one of the States in the same interest with other States already has a judge on the Bench. In such an event the statutory right to choose a judge *ad hoc* loses any foundation and the principle of equality requires that no such judge be chosen. This is the meaning of Article 31, paragraph 5, of the Statute and this is the situation in the present case.

17. The United Kingdom secondly contends that *Article 31, which uses a form of wording in the singular, "applies separately to each case on the Court's List"*. "In the presence of two separate cases between two sets of parties (even if one party is common to both cases), Article 31, paragraph 5, has no application." In this instance, Libya filed two separate Applications against the United States and the United Kingdom. The text relied upon is consequently not applicable, so it is claimed, "short of joinder of the cases".

Yet, according to the United Kingdom, "it has been the consistent practice of the Court not to order joinder unless the parties to both cases agree". On account, in particular, of the positions of the Parties, it is argued that the conditions for joinder are not fulfilled in this case; the two cases being separate, the Parties cannot be in the same interest.

This argument is far from convincing. It was rejected in the *Fisheries*

Jurisdiction cases, in which the Court found that Germany and the United Kingdom were in the same interest, even though the two States had submitted separate Applications. Nor is there any foundation for it in the applicable instruments. Article 31, paragraph 5, of the Statute and Article 36 of the Rules of Court use neither the singular nor the plural form since there is no reference to "the case" or to "the cases". Only Article 37 of the Rules of Court mentions the eventuality in which a Member of the Court is unable to sit "in any phase of a case". This wording, however, reflects Article 24 of the Statute, which envisages the eventuality that one of the Members of the Court cannot sit in "a particular case". The wording is easily explained in that the choice of a judge *ad hoc* to replace a Member of the Court who has stood down is conceivable only in the case in which the State of which that Member is a national is a party. Moreover in the present case the United Kingdom never requested the appointment of a judge *ad hoc* in the proceedings between Libya and the United States, whereas Judge Higgins also stood down in these proceedings.

Furthermore, the traditional jurisprudence of the Court is founded on the very principles that underlie these instruments. Accepting that States cannot be in the same interest unless they are involved in the same proceedings would, in fact, leave the decision concerning the appointment of judges *ad hoc* to the discretion of the applicant(s) and would thus deprive the Court of its jurisdiction conferred by the Statute and the Rules of Court.

Under such a system the Court would be unable to declare that several applicants presenting identical submissions in separate applications are in the same interest. Nor would it be able to establish that several respondents presenting identical submissions in cases which were the subject of separate applications are parties in the same interest. In short, the applicant(s) would be in control of the proceedings and one can readily imagine what advantage they might be tempted to gain from this.

What is more, it is difficult to see why the solution adopted as to whether or not parties are in the same interest should be different depending on whether the Court has before it separate applications (as in the *Fisheries Jurisdiction* cases or in the present cases) or a single application (as in the case concerning *Monetary Gold Removed from Rome in 1943*). Such formalism would be quite unjustified and at variance with the tradition of the Court, "whose jurisdiction is international" and which "is not bound to attach to matters of form the same degree of importance which they might possess in municipal law"[14].

18. It could, however, be argued against this line of reasoning that, faced with separate applications or defences containing identical submis-

[14] Judgment of 30 August 1924, *Mavrommatis Palestine Concessions, P.C.I.J. Series A, No. 2*, p. 34; Judgment of 2 December 1963, *Northern Cameroons, I.C.J. Reports 1963*, p. 28; Judgment of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1992*, p. 265.

sions, the Court would be able to rectify the situation and avoid any fraud by deciding the joinder of proceedings and, once joinder is effected, by finding that the parties are in fact in the same interest.

There is nevertheless a fundamental objection to this solution, namely that *joinder of proceedings and recognition that parties are in the same interest do not obey the same criteria.* The purpose of joining proceedings is to let the Court rule on two separate applications in a single judgment. Joinder may be decided upon in cases between the same parties and with the same subject-matter (as in the case concerning the *Legal Status of the South-Eastern Territory of Greenland*[15]). So may it in cases between the same parties but with a different subject-matter (as those concerning *Certain German Interests in Polish Upper Silesia*[16] and *Appeals from Certain Judgments of the Hungaro/Czechoslovak Mixed Arbitral Tribunal*[17]). Furthermore, joinder of separate proceedings instituted by different States is also possible. It may be effected where the States are parties in the same interest (as in the *South West Africa* cases). Yet being parties in the same interest does not necessarily imply the joinder of proceedings, particularly if the parties themselves oppose it (as proven by the *Fisheries Jurisdiction* cases).

The point is that some States may present identical submissions to the Court while developing different lines of reasoning. In which case they are indeed parties in the same interest but it would be most inadvisable to effect a joinder leading to a single judgment that would have to rule separately on these various arguments. A joinder of proceedings was effected by the Court in the *North Sea Continental Shelf* case because:

> "the legal arguments presented on behalf of Denmark and the Netherlands have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation"[18].

On the other hand, there was no joinder of issue in the merits phase of the *Fisheries Jurisdiction* cases because the Court

> "took into account the fact that while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions"[19].

[15] Orders of 2 and 3 August 1932, *P.C.I.J., Series A/B, No. 48*, p. 268.
[16] Judgment No. 7 of 5 February 1926, *P.C.I.J., Series A, No. 7*, p. 95.
[17] Order of 12 May 1933, *P.C.I.J., Series C, No. 68*, p. 290.
[18] Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 19, para. 11.
[19] Judgments of 25 July 1974, *I.C.J. Reports 1974*, p. 6, para. 8, and p. 177, para. 8.

Moreover, the views of the parties do not influence the decision of the Court in the same way when it comes to determining whether they are parties in the same interest and when the requirement is to decide whether a joinder should be effected. In the first eventuality the decision obeys purely objective criteria and it is for the Court to apply those criteria when deciding. The agreement of the parties is not enough, as shown by the *North Sea Continental Shelf* case, in which the Court determined for itself whether Denmark and the Netherlands were indeed in the same interest, in conformity with the Special Agreement.

When it comes to joinder, on the other hand, the Court sets great store by the wishes of the parties, as shown by the cases concerning the *Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria)* and *Nuclear Tests* (1973) and as the Court itself stated in the *Fisheries Jurisdiction* cases, noting in support of its decision that "joinder would be contrary" to the "wishes" of the Applicants.

In such circumstances, the wisdom of the traditional jurisprudence of the Court becomes plainer. As scholarly opinion has already noted, a joinder of proceedings and the choice of a judge *ad hoc* when the parties are considered to be in the same interest are clearly two different hypotheses not necessarily coinciding[20]. Two distinct concepts — joinder of proceedings and parties in the same interest — cannot be confused, and the latter cannot be made dependent on the former: there are circumstances in which parties are in the same interest in separate proceedings yet joinder of the proceedings is not desirable. The Court must nonetheless be able to determine that the parties are in the same interest.

19. The United Kingdom thirdly states that almost all the cases before the Court in the past "involved parallel proceedings brought by two Applicants against a single Respondent". In this case, however, *two Respondents face a single Applicant*. The situation is therefore claimed to be very different and a different solution essential.

It is nevertheless difficult to see why the Statute and the Rules of Court should be applied differently to respondents and applicants on this point. The aforementioned texts refer to the parties in general and it is clear that they may be parties in the same interest both as respondents and as applicants.

In the initial phase of proceedings, the submissions of applicants in the same interest necessarily aim to secure recognition for the jurisdiction of the Court and the admissibility of the application(s) (as in the *South West Africa* and *Fisheries Jurisdiction* cases). In the same initial phase, the submissions of respondents in the same interest aim to deny the jurisdic-

[20] G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, p. 300.

tion of the Court and the admissibility of the application(s) (as in the *Lockerbie* cases). It is difficult to see why these two scenarios should be treated differently.

20. Lastly, the United Kingdom states that the *arguments* which it develops, starting in this phase of the proceedings, while "compatible" with those advanced by the United States, *"are not identical"*. Each has developed "arguments on the factual and legal aspects of its case as it considers best". On this further ground, it is argued, they are not parties in the same interest.

This line of reasoning arises from a confusion between the "submissions" and "arguments" of the parties (which States appearing before the Court all too often confuse, as the Court explicitly noted in the case concerning *Minquiers and Ecrehos (France/United Kingdom)*)[21].

Two States which advance the same submissions are parties in the same interest, even if their arguments diverge somewhat. Indeed, in all legal systems, parties "in the same interest" jointly seek the same result, presenting submissions to the same end[22]. And it is indeed because they seek a single end that the framers of the Statute provided for the appointment of a single judge *ad hoc* in such cases. It would be all too easy for two or more States to circumvent this rule by presenting identical submissions based on a different line of reasoning and so obtain the appointment of several judges *ad hoc*. The submissions, and the submissions alone, must be taken into consideration for the application of Article 31, paragraph 5, of the Statute.

Furthermore, it is not without interest to note that in the present case the actual arguments advanced by the United States and the United Kingdom are extremely similar. In both cases they rest upon a common, restrictive interpretation of Article 14 of the Montreal Convention and on the impact of the Security Council resolutions.

CONCLUSION

21. All in all, in this phase of proceedings the United States and the United Kingdom have presented the same submissions, on which the Court has ruled in two Judgments with similar legal reasoning and almost identical operative parts. They were parties in the same interest and consequently the United Kingdom was not entitled to choose a judge *ad hoc*. The Court decided otherwise, which gave us the pleasure of sitting once more alongside Sir Robert Jennings and again appreciating

[21] Judgment of 17 November 1953, *I.C.J. Reports 1953*, p. 52.
[22] *Dictionnaire de la terminologie du droit international*, pp. 104 and 105.

his eminent qualities. This does not prevent us, however, from regretting a decision for which no reasons were stated, which is a first in the history of the Court, and which appears to us to be contrary to the Statute, to the Rules of Court and to the jurisprudence of the Court.

(Signed) Mohammed BEDJAOUI.
(Signed) Gilbert GUILLAUME.
(Signed) Raymond RANJEVA.