The Statute of the International Court of Justice

A Commentary

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Article 26

(1) The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.

(2) The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

(3) Cases shall be heard and determined by the chambers provided for in this article if the parties so request.

(1) La Cour peut, à toute époque, constituer une ou plusieurs chambres, composées de trois juges au moins selon ce qu'elle décidera, pour connaître de catégories déterminées d'affaires, par exemple d'affaires de travail et d'affaires concernant le transit et les communications.

(2) La Cour peut, à toute époque, constituer une chambre pour connaître d'une affaire déterminée. Le nombre des juges de cette chambre sera fixé par la Cour avec l'assentiment des parties.

(3) Les chambres prévues au présent Article statueront, si les parties le demandent.

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A. Introduction

Under Art. 26, the Court may form two types of chambers: chambers dealing with particular categories of cases and chambers dealing with a particular case. They are usually referred to as, respectively, special chambers and *ad hoc* chambers. Article 26 is complemented by Art. 29, which provides that every year the Court has to form a chamber for the speedy dispatch of business.[1] Under the Rules of Court, this chamber is referred to as the chamber of summary procedure.[2] Apart from the different purpose in view of which they are established, the three types of chambers provided by the Statute differ in other aspects, notably their formation, composition and procedure. However, certain features characterize the chamber system provided by the Statute and are common to the three types of chambers. Moreover, the functioning of the various chambers is in many regards regulated by the same rules, since many provisions of the Rules apply to all chambers without distinguishing between the different types. It seems therefore appropriate, before entering into the examination of the specific features of each type of chambers, to consider some general issues that do not call for a separate treatment. 1

I. Relationship between the Court and the Chambers

First, it is necessary to assess the relationship between the Court and the chambers formed under Arts. 26 and 29. In this respect, two main solutions could be envisaged. Chambers may be regarded as the Court sitting in a particular formation; alternatively, they may be qualified as organs which, although established by the Court, are distinct from it and which therefore cannot be considered as acting on behalf of the Court. The latter solution has been advocated in relation to *ad hoc* chambers, mainly because of the role played by States with regard to the decision to establish them.[3] However, the former view is to be preferred as it takes account of the fact that the chambers are an integral part of the organization of the Court.[4] They are formed of judges who are at the same time members of the Court. Their activity is regulated by the Statute and Rules of the Court. Above all, under Art. 27, the decisions of chambers are to be considered as rendered by the Court.[5] Under the practice of the PCIJ, the two judgments rendered by a chamber for summary procedure were given as judgments of 2

[1] For background information *cf.* Palchetti on Art. 29, especially MN 1. [2] Art. 15, para. 1.

[3] *Cf.* Rosenne, *Law and Practice*, vol. I, p. 425, who denies that *ad hoc* chambers could act in the name of the Court, since the parties were merely 'taking advantage of a faculty made available to them by the Statute with the co-operation of the Court'.

[4] *Cf.* Decleva, pp. 267 *et seq.*; Shahabuddeen, pp. 171–173; Escobar Hernández, pp. 291, 316. For the consideration that the Court sitting as a chamber is one of the exceptions referred to in Art. 25 *cf.* Palchetti on Art. 25 MN 7.

[5] But *cf.* Palchetti on Art. 27 MN 3 for a summary of the different interpretations of this provision.

the 'Court sitting as a Chamber of Summary Procedure'.[6] While this formula has not been employed in judgments rendered by *ad hoc* chambers, this is not to be taken as modifying the relationship between the Court and the chambers. It is significant that the Court usually, when referring to its own precedents, also includes decisions rendered by chambers.[7]

3 Seen from a different perspective, one may ask whether, under the Statute, the full Court retains a sort of supervisory function in relation to the activity of the chambers. In fact, though established by the full Court, chambers are not subject to the control of the full Court in the performance of their judicial function.[8] The powers of the full Court in relation to a case submitted to a chamber only relate to questions concerning the composition of the chamber, such as electing the members of the chamber or filling any vacancy in its membership.[9] For all other purposes, chambers in principle have the same powers as the full Court.[10]

II. Agreement of the Parties as a Condition for a Case to be Heard and Determined by a Chamber

4 Article 26, para. 3 provides that the chambers referred to in paras. 1 and 2 can deal with a case only if the parties so request. Under Art. 29, resort to the chamber of summary procedure is subject to the same condition. Thus, the Court could not decide, on its own motion, to refer a case to a chamber, although it could suggest that parties submit the case to a chamber.[11] The fact that the consent of the parties is a necessary condition for the use of chambers is a salient feature of the chamber system established by the Statute. It shows that, within the organization of the Court, the main purpose the chambers are designed to serve is not to guarantee an efficient distribution of the Court's work. Rather, chambers are an instrument put at the disposal of States, which they can use to

[6] Hudson, *PCIJ*, pp. 346–347; and *cf. Case Concerning the Interpretation of Article 179, Annex, Para. 4, of the Treaty of Neuilly*, PCIJ, Series A, No. 3, pp. 4 *et seq.*, and *Interpretation of Judgement No. 3*, PCIJ, Series A, No. 4, pp. 4 *et seq.*

[7] *Cf.* Shahabuddeen, p. 173, as well as the statement of the President of the *ad hoc* chamber in the *Gulf of Maine case*, Roberto Ago, at the first public sitting of the chamber: 'La Chambre est la Cour. C'est au nom de la Cour que la Chambre agira et rendra son arrêt. C'est à ce titre que sa décision aura un caractère obligatoire' (ICJ Pleadings, vol. VI, at p. 5).

[8] Collier/Lowe, *Settlement of Disputes*, pp. 128–129.

[9] In the order of 28 February 1990 in the *Case Concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening), reference was made to a general power of the Court to form a chamber, 'and consequently to regulate matters concerning its composition', ICJ Reports (1990), pp. 4 *et seq.*, p. 5. While the reference concerned *ad hoc* chambers, the proposition should apply also in relation to the other two types of chambers.

[10] *Cf.* however Art. 92, para. 1 of the Rules, which leaves to the Court the power to fix time-limits for the submission of written pleadings in cases pending before chambers. For further discussion *cf. infra*, MN 19.

[11] In the *Case Concerning the S.S. Wimbledon*, the PCIJ considered whether it was appropriate to draw the attention of the parties to the possibility of referring the dispute to the special chamber for cases relating to transit and communication disputes established by Art. 27 of the PCIJ Statute. The Court concluded in the negative because the case involved legal rather than technical questions: PCIJ, Series E, No. 3, p. 189. In the *Case Concerning the Payment of Various Serbian Loans Issued in France*, in which the full Court could not meet due to the lack of the quorum, the Registrar of the Court invited the parties to consider whether they would refer the case to the chamber of summary procedure. That suggestion was unacceptable to one the parties in view of the importance of the case: PCIJ, Series C, No 16-III, p. 792. *Cf.* further Mosler, pp. 449, 457, who has taken the view that 'the Court, on its own initiative, is not prevented from consulting the parties on their views to deal with their case by a Chamber *ad hoc*'.

their advantage. The main benefit of the chamber system of the Statute seems to be that it can render resort to the Court more attractive for States.[12]

While the Rules regulate the question of the time-limit within which a request to refer a case to a chamber has to be filed,[13] there is no indication which form the agreement of the parties would have to take.[14] The request of the parties is usually contained in the text of the special agreement establishing the jurisdiction of the Court.[15] In one case, which was brought to the Court by unilateral application based on a compromissory clause embodied in a bilateral treaty, the request was addressed unilaterally by the applicant in the document instituting the proceedings; the consent to this request was later expressed by the other party in a letter addressed to the Court.[16] Also, the parties' agreement to submit a case to the chamber may be contained in the treaty in which the compromissory clause is embodied. Furthermore, a State could include the request for a chamber in a declaration made under Art. 36, para. 2 by making its acceptance of the Court's jurisdiction dependent on the fact that cases to which it is a party would have to be decided by a chamber. The effect of a reservation of this kind would be that the Court's jurisdiction would become dependent on the acceptance of the chamber procedure by the other party. A State could even condition its acceptance of the Court's jurisdiction on the fact that the chamber would have a composition which is acceptable to it—a solution which, admittedly, could be applied only in relation to *ad hoc* chambers. In that case, the 'compulsory' jurisdiction of the Court would apply only if the parties were able to reach an agreement on the composition of the chamber.[17]

[12] Guillaume, pp. 57, 77–78.

[13] *Cf.* Arts. 17, para. 1, and 91, para. 1 of the Rules. The time-limit for filing the request differs in relation to the type of chamber concerned and will be therefore examined below (*infra*, MN 26).

[14] But *cf.* Art. 91, para. 1 of the Rules.

[15] *Cf. e.g. Treaty of Neuilly case, supra*, fn. 6, (and for the text of the Special Agreement PCIJ, Series C, No. 6, p. 9), *Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine* (Canada/United States of America), ICJ Reports (1984), pp. 246 *et seq.*, pp. 253–255, *Case concerning the Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 557–558, *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, ICJ Reports (1992), pp. 351, 356–358; and the *Case concerning the Frontier Dispute* (Benin/Niger), ICJ Reports (2002), pp. 613 *et seq.*

[16] *Case concerning Elettronica Sicula S.p.A. (ELSI)* (United States of America/Italy), ICJ Reports (1989), pp. 15 *et seq.*, pp. 17–18. Another case submitted to a chamber, which has been brought by means of unilateral application, is that concerning the *Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua Intervening)* (El Salvador/Honduras), *cf.* ICJ Reports (2002), pp. 618 *et seq.* However, this case presents a distinctive feature in that the chamber was constituted to deal with a request for revision. For further analysis *cf.* Palchetti on Art. 27 MN 5, and Zimmermann/Geiss on Art. 61, especially MN 27, 38, 49, and 51 *et seq.*

[17] One might object that this type of reservation would be contrary to the Statute, since, in substance, it would have the effect of depriving the Court of its power to decide on the composition of the chamber (but contrast the Court's position in the *Gulf of Maine case*, as discussed *infra*, MN 34). Furthermore, it has been held that a declaration of this kind would not be consistent with the Statute or the Rules, particularly because it would not oblige the State concerned (which could always obstruct the agreement about the composition of the chamber) to accept the Court's jurisdiction. *Cf.* for these and other objections to the validity of the type of declaration mentioned in the text *cf.* Zimmermann, *Dickinson JIL* 8 (1989), pp. 1, 12; Ende, D. J., 'Reaccepting the Compulsory Jurisdiction of the International Court of Justice: A Proposal for a New United States Declaration', *Washington Law Review* 61 (1986), pp. 1145–1183, p. 1181. Others have argued that a declaration of this type would not contravene the Statute or the Rules of the Court: *cf.* Leigh/Ramsey, pp. 106, 117–122.

III. Competence of the Chambers

1. Competence in Contentious Cases

a) The Merits of a Dispute

6 The agreement of the parties to refer a case to a chamber formally has no bearing on the Court's jurisdiction or on the admissibility of the claim. Thus, a party which has consented to submit a case to a chamber is not prevented from raising objections relating to jurisdiction or admissibility subsequently.[18] In the *ELSI case*, an objection to the admissibility of the case was entered by Italy without the chamber questioning the possibility for Italy to do so.[19]

7 In all cases so far submitted to a chamber, the request to refer the case to the chamber was made at the beginning of the proceedings. Therefore, all phases of the proceedings took place before the chamber concerned.[20] With regard to *ad hoc* chambers, however, the Rules of Court provide for the possibility of submitting a request to refer to a chamber until the closure of the written proceedings;[21] it might therefore happen that a case, which has been instituted before the Court, would be transferred to a chamber at the time of the closure of the written proceedings.[22] Conversely, it may be considered whether a case that had initially been submitted to a chamber, might later be transferred to the full Court. On this point, it must be stated that the Court has no power to decide *proprio motu* to transfer a case pending before a chamber.[23] Implicitly, this seems to be confirmed by Art. 16, para. 3 of the Rules, which, while recognizing the possibility for the Court to decide upon the dissolution of a chamber established under Art. 26, para. 1, specifies that this power of the Court is 'without prejudice to the duty of the chamber concerned to finish any case pending before it'.[24] The possibility of a transfer is also excluded if only one party submits a request to this end. While the consent of all parties is a necessary condition for a case to be referred to a chamber, once a case has been referred, the subsequent wish of one party cannot deprive the other party of its right to have the case heard and determined by the chamber. The situation is different when both parties agree to transfer the case from the chamber to the full Court. Since the Statute leaves the choice between the full Court and the chambers substantially to the parties, it may be thought that, when both parties agree on the transfer of a case from the chamber to the full Court, the Court should grant this possibility.[25] However, for such a request to be acceptable it seems at least necessary that the parties do not submit it when the proceedings are already at an advanced stage, namely after the opening of the oral proceedings.[26]

[18] But contrast Ostrihansky, pp. 30, 48, for a different view.

[19] *ELSI case, supra*, fn. 16, ICJ Reports (1989), pp. 15, 42 (para. 49).

[20] On the different phases of proceedings before the Court *cf.* Talmon on Art. 43, especially MN 17 *et seq.*; on possible modifications in summary proceedings *cf. infra*, MN 17 *et seq.*

[21] *Cf.* Art. 17, para. 1 of the Rules.

[22] For further discussion of whether this would also be possible before the two other types of chambers *cf. infra*, MN 26.

[23] At its preliminary session, the PCIJ decided that a case pending before a chamber for summary procedure could not be transferred to the full Court without the consent of the parties. PCIJ, Series E, No. 3, p. 191; and *cf.* also Hudson, *PCIJ*, p. 296.

[24] For a discussion of some of the problems of this provision *cf.* Rosenne, *Law and Practice*, vol. III, p. 1117.

[25] But contrast Ostrihansky, pp. 30, 48, according to whom the parties, if they wish to go before the full Court, should remove the case from the chamber by an agreed request to discontinue and then institute new proceedings before the full Court.

[26] *Cf.* Zimmermann, *Dickinson JIL* 8 (1989), pp. 1, 24, who argues that Art. 17, para. 1 of the Rules should apply by analogy.

b) Incidental Proceedings

Article 90 of the Rules states that proceedings before chambers are governed by the provisions of Parts I to III of the Rules. Since the provisions concerning incidental proceedings, laid down in Part III, Section D, of the Rules, are included among those provisions, it may be held that, on the basis of Art. 90 of the Rules, the chambers are fully competent to deal with incidental proceedings. The competence of the chambers has been expressly recognized by the Court itself. In its order of 28 February 1990 in the *Land, Island and Maritime Frontier Dispute case*, the Court stated that 'it is for the tribunal seised of a principal issue to deal with any issue subsidiary thereto'.[27] While in that case the question under consideration concerned the competence of an *ad hoc* chamber to decide upon a request for permission to intervene under Art. 62, the *dictum* of the Court seems to be broad enough to be applicable in principle with regard to all types of chambers and to all forms of incidental proceedings.[28] The chamber's power to deal with incidental proceedings has been upheld in various instances. In the *Burkina Faso/Mali case*, the *ad hoc* chamber, on the basis of the power given to it by Art. 41 of the Statute and Art. 90 of the Rules, indicated some provisional measures directed at both parties.[29] In the *ELSI case*, the *ad hoc* chamber decided on an objection to the admissibility of the case entered by Italy.[30] 8

In some cases, a decision on incidental questions may affect the composition of a chamber, especially in the case of *ad hoc* chambers. Since it is for the Court to regulate matters relating to a chamber's composition,[31] it might be held that in such cases the exercise of the incidental jurisdiction should also fall within the competence of the Court. This question was addressed by the Court in the *Land, Island and Maritime Frontier Dispute case*, in relation to Nicaragua's request for permission to intervene. In that case, the request for intervention was substantially coupled with a request that the composition of the chamber should be modified. Nicaragua considered that a favourable response to its request for intervention would have entailed consequential changes in the composition of the chamber.[32] In their dissenting opinions, Judges Tarassov and Shahabuddeen held that, since the question of intervention was strictly related to the question of the chamber's composition, it was for the full Court, and not for the chamber, to decide on both questions.[33] The majority of the Court instead held that the composition of the chamber, being contingent on the decision on intervention, could be addressed only once that decision had been taken. The fact that Nicaragua, in its application for intervention, had raised the question of the composition of the chamber could not 'lead the Court to decide in place of the Chamber the anterior 9

[27] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, ICJ Reports (1990), pp. 4, 5.

[28] Rosenne, *Law and Practice*, vol. III, p. 1394. On the Court's *dictum cf.* also Zimmermann, *ZaöRV* 50 (1990), pp. 646, 652.

[29] Order of 10 January 1986, ICJ Reports (1986), pp. 3 *et seq.* For further comment on interim measures indicated by chambers of the Court *cf.* Oellers-Frahm on Art. 41 MN 51.

[30] Judgment of 20 July 1989, ICJ Reports (1989), pp. 15, 42–43 (paras. 49–52).

[31] *Cf.* further *infra*, MN 12 and 34–35.

[32] *Cf. Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, Pleadings, vol. III, pp. 735, 740 (para. 23); as well as ICJ Reports (1990), pp. 4, 5.

[33] In particular, Judge Shahabuddeen held that 'a request for permission to intervene cannot but be coupled, as in this case, with a request for an appropriate reformation of the chamber. *Ex hypothesi*, the latter is beyond the competence of the chamber, which is thus incapable of dealing with either branch of the application': *cf.* his dissent in the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, ICJ Reports (1990), pp. 18, 57. For Judge Tarassov's view, *cf. ibid.*, pp. 11, 12–13.

question whether that application should be granted'.[34] There are cases in which the decision about incidental issues has a more direct impact on the chamber's composition, so that it would seem difficult to draw a distinction between questions which the Court is competent to decide, and questions falling within the chamber's competence. One may refer, for instance, to a preliminary objection raised with regard to the validity of the formation of a chamber or to a request submitted by the parties in order to transfer a case from the chamber to the full Court.[35] Yet, it seems that the power of chambers to deal with incidental proceedings is broad enough to cover also questions of this kind.

2. Competence to Render Advisory Opinions

10 There is still much uncertainty around the question whether chambers have the power to render advisory opinions. While so far no request for an advisory opinion has been dealt with by a chamber, the terms of the Statute do not offer a definitive answer on the matter.[36] On the one hand, some provisions seem to exclude the possibility of using chambers in advisory proceedings. Thus, Arts. 26, para. 3, and 29 refer to the 'consent of the parties' as a condition for a case to be submitted to a chamber. A reference to the consent of the parties can also be found in Art. 28. Moreover, Art. 27 contemplates only 'judgments' of chambers without mentioning advisory opinions. On the other hand, Art. 68 provides that the provisions of the Statute which apply in contentious cases may also be applied by the Court in the exercise of its advisory function. This might be considered to offer a basis for a chamber to exercise an advisory function. The PCIJ took a position on the matter by expressly excluding, in the Rules of Court, the possibility of advisory opinions of chambers.[37] During the 1978 revision of the Rules of Court, the reference to the exclusive competence of the full Court, laid down in the French version of the Rules, was dropped.[38] The present text of the Rules does not therefore provide a clear indication on the matter.[39] It might be thought that the different types of chambers are not equally suitable for dealing with the advisory function. It seems reasonable that a chamber established for dealing with a particular category of cases could also, in view of its special expertise, render advisory opinions on questions which fall within that specific category. To the same effect, resort to the chamber of summary procedure may be regarded as an appropriate solution for dealing with requests for advisory opinions of minor importance. On the other hand, the reasons which may justify the resort to *ad hoc* chambers in this context do not seem to be equally compelling. Within the context of

[34] *Ibid.*, pp. 5–6. It may be noted that the questions concerning the composition of the chamber, which had been raised by Nicaragua, were later decided by the Chamber itself in its judgment on the application for permission to intervene: ICJ Reports (1990), pp. 92 *et seq.*; and *cf.* Valencia-Ospina, pp. 503, 518.

[35] On the first alternative *cf.* Thirlway, 'Law and Procedure, Part Twelve', p. 53, fn. 56.

[36] Schwebel, pp. 739, 764–766. On balance, however, taking into account also the preparatory work of the ICJ Statute, Schwebel concluded that the question should be answered in the negative. For the opposite view *cf.* Lauterpacht, *Administration of Justice*, pp. 95–98, who however recognized the existence of a 'conflict between two areas of the Court's Statute'.

[37] *Cf.* Art. 84 of the 1936 Rules of the PCIJ, which provided that 'advisory opinion shall be given after deliberation *by the full Court*' (emphasis added). The matter however had not been uncontroversial within the Court: *cf.* PCIJ, Series D, No 2 (3rd Add.), p. 795.

[38] It was held that the intention behind this modification was to recognize the possibility for chambers to render advisory opinions: *cf.* Seidl-Hohenveldern, I., 'Access of International Organisations to the International Court of Justice', in Muller *et al., ICJ*, pp. 189–203, p. 198.

[39] But *cf.* Art. 90 of the Rules, which provides that the rules governing the proceedings before chambers are the 'Rules applicable in contentious cases before the Court'.

contentious cases the requests for establishing *ad hoc* chambers are mainly motivated by the fact that, under the Rules, the parties are granted the right to have a say in the composition of the chamber.[40] Given the nature of the advisory function performed by the Court, it is doubtful whether this consideration equally applies to advisory proceedings. Should the Court accept the possibility of advisory proceedings before a chamber, one may further ask whether the initiative to refer a question to a chamber should lie with the requesting organ or whether the Court could so decide on its own motion. This latter possibility should not be ruled out. The reasons that subject the referral of a case to a chamber to the consent of the parties do not necessarily apply to requests for advisory opinions.[41]

IV. Rules Governing the Activity of the Chambers

1. Overview

The Statute does not regulate in detail questions concerning the organization and composition of chambers, and the procedure before them. In many respects, it has been left to the Court to provide answers to those questions. By availing itself of the rule-making power provided by Art. 30, para. 1,[42] the Court has strongly contributed to shaping the present system of chambers. Yet, the Court has sometimes given the impression of stretching the limits of its power very far. The new provisions introduced after the 1972 and 1978 revision of the Rules, particularly those concerning *ad hoc* chambers, have been the object of sharp criticism, also from within the Court, as being contrary to the Statute.[43] The merits of the objections raised against the solutions adopted by the Court in its Rules will be examined later.[44] A more general question relating to the Statute is whether a provision of the Statute may be interpreted differently depending on whether it applies to the activity of the Court or to the activity of a chamber.[45] That question has been raised in relation to Art. 13, para. 3, which provides that, though replaced, members of the Court shall continue to sit in cases in which they have begun to do so. Articles 17, para. 4, and 33 of the Rules provide different interpretations of the term 'begun'. According to Art. 33 of the Rules, a judge continues to sit in the full Court "until the completion of any phase of a case in respect of which the Court convenes for the oral proceedings prior to the date of such replacement'.[46] On the other hand, Art. 17, para. 4 of the Rules provides that a member of an *ad hoc* chamber, though replaced, 'shall continue to sit in all phases of the case, whatever the stage it has then reached". It has to be noted, however, that the solution adopted in Art. 17, para. 4 11

[40] *Cf. infra*, MN 12 and 34–35, for further information.

[41] For the opposite view *cf.* Ostrihansky, pp. 30, 51. Lauterpacht, *Administration of Justice*, pp. 97–98, while recognizing that the Court might *proprio motu* refer a request to a chamber, specifies that, if the requesting organ adds a specific request that the question be decided by a chamber, 'that would tilt the scales even further in favour of the use of chambers'.

[42] For comment on the basis of this power, and the Court's exercise of it, *cf.* Thirlway on Art. 30, especially MN 4–13.

[43] *Cf.* in particular *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, Diss. Op. Shahabuddeen. ICJ Reports (1990), pp. 18, 19–56.

[44] For a discussion *cf.* also Thirlway on Art. 30 MN 26–34.

[45] *Cf.* Judge Shahabuddeen's criticism based on the interpretation of Art. 13, para. 3: ICJ Reports (1990), pp. 18, 51. For further discussion *cf.* also Thirlway on Art. 30 MN 26–34; and *id.* 'Procedural Law and the International Court of Justice', in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Lowe, V., Fitzmaurice, M., eds., 1996), pp. 389–405, pp. 390–394.

[46] For an analysis of the Court's practice in this regard *cf.* Dugard on Art. 13 MN 11–16.

of the Rules is consistent with the interpretation of Art. 26, para. 2 retained by the Court, according to which proceedings before *ad hoc* chambers are characterized by the special influence that parties can exercise on the composition of the chamber. Since every provision of the Statute is to be interpreted in the light of other provisions, it seems reasonable that the same provision may be interpreted differently depending on the different context in which it has to be applied, provided that the provision at issue is flexible enough to afford the possibility of different interpretations.[47]

2. Common Rules Concerning the Formation and Composition

a) Election

12 The procedure adopted by the Court for selecting members of a chamber is set out in Art. 18, para. 1 of the Rules, which states that judges are elected by secret ballot.[48] The requirement of a secret ballot was intended to ensure that judges would form their views as to the appropriate composition of a chamber as freely as possible.[49] In this connection, it may be observed that, generally, the Court does not give any reasons for its choice of a particular composition.[50] The absence of reasons appears to be a logical consequence of the secrecy requirement in the election of the judges. In practice, however, the judges' freedom of choice is to a certain extent limited by a number of special factors that need to be taken into account when selecting the members of a chamber. These elements are recognized, directly or indirectly, by the Rules of Court. As will be discussed below,[51] Art. 16, para. 2 of the Rules states that, in selecting the members of special chambers provided for in Art. 26, para. 1, judges should have regard to 'any special knowledge, expertise or previous experience which any of the members of the Court may have in relation to the category of case the chamber is being formed to deal with'. With regard to *ad hoc* chambers, Art. 17, para. 2 of the Rules states that, following a consultation held by the President with the agents of the parties, judges are provided with the views of the parties as to the composition of the chamber. This inevitably has a strong influence on the selection of judges forming the chamber.[52] A widely debated issue is whether the Court, when deciding about the composition of a chamber, should respect the requirement of Art. 9, namely to ensure 'the representation of the main forms of civilization and of the principal legal systems of the world'. Since the reference to Art. 9, which was contained in the provisions of the PCIJ Statute dealing with chambers, was dropped at the time of the drafting of the ICJ Statute, it has been held that chambers need not be as representative as the full Court.[53] Yet, despite this deletion, one may reasonably expect the Court to find it proper to

[47] Schwebel, pp. 739, 754, justified the Court's approach in the following terms: '[b]oth interpretations are legally tenable and, it is believed, neither is undermined by the fact that the Rules do not opt only for one of two plausible interpretations'. For a more critical evaluation *cf.* Thirlway on Art. 30, especially at MN 33–34.

[48] With regard to *ad hoc* chambers, it may happen that the election for the formation of such chambers takes place when there are already judges *ad hoc* sitting on the bench of the Court. In this case, one may ask whether judges *ad hoc* have the right to take part in the election of the judges sitting in the chamber. Since Art. 18, para. 1 of the Rules states that, in order to be elected, judges have to obtain 'the largest number of votes constituting a majority of the Members of the Court composing it at the time of the election', and since, according to Art. 1 of the Rules 'the term "Member of the Court" denotes any elected judge', it seems that judges *ad hoc* do not have the right to participate in the election. *Cf.* also Rosenne, *Procedure*, p. 45; but contrast Ostrihansky, pp. 30, 40.

[49] *Cf. Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, Diss. Op. Shahabuddeen. ICJ Reports (1990), pp. 18, 43–45.

[50] Zoller, pp. 305, 307 (with regard to *ad hoc* chambers).

[51] *Infra*, MN 25.

[52] *Infra*, MN 34.

[53] Schwebel, pp. 739, 766.

take into account the rationale of Art. 9 when deciding about the composition of a chamber.[54]

b) Presidency

Under Art. 15, para. 1 of the Rules, the President of the Court is *ex officio* member of the chamber of summary procedure. For the other two types of chambers, Art. 18, para. 2 of the Rules provides that if, when a chamber is formed, the President or the Vice-President of the Court sits as member of the chamber, he or she presides over that chamber; in the alternative, it is for the chamber to elect its President by secret ballot and by a majority of votes of its members.[55] In this context, it has to be noted that in the most recent cases of *ad hoc* chambers established by the Court, the President of the Court has been a member of the chambers.[56] The fact that the President of the chamber is at the same time the President of the Court may be seen as an element which, in line with the institutional link existing between the Court and the chambers, enhances their reciprocal coordination.[57] Article 18, para. 2 of the Rules also provides that the member of the Court who has been elected as President continues to preside as long as he remains a member of that chamber. The fact that this provision refers to the 'member of the Court who presides over the chamber' may be taken as implying that judges *ad hoc* may not be president of a chamber.[58] In the *Land, Island and Maritime Frontier Dispute case*, the member of the chamber who was elected President ceased to be member of the Court when the chamber case was still pending because his term of office had come to an end, while at the same time two members of the chamber were elected President and Vice-President of the Court.[59] The principle embodied in Art. 18, para. 2 of the Rules was given an extensive interpretation in the *Treaty of Neuilly case*. It was then agreed that the member of the chamber of summary procedure who was the President at the time when the chamber rendered the judgment over the merits of the dispute should also preside over the chamber in relation to the case concerning the request for interpretation of that

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[54] Lachs, pp. 203, 207. For further comment on the meaning of the terms 'main forms of civilization' and 'principal legal systems of the world' *cf.* Fassbender on Art. 9 MN 28–37.

[55] *Cf.* Art. 18, para. 2 of the Rules. In the case of *ad hoc* chambers, the President is generally elected at a private meeting of the chamber to be held immediately before the first public meeting. Under Art. 24, para. 4 of the 1936 PCIJ Rules, the President of the chamber was to be appointed at a sitting of the full Court.

[56] *Cf.* the two orders of 27 November 2002 concerning the formation of chambers for dealing, respectively, with the *Application for Revision* (El Salvador/Honduras), *supra*, fn. 16, and the *Frontier Dispute case* (Benin/Niger), *supra*, fn. 15. Judge Guillaume, then President of the Court, was elected member of both chambers: ICJ Reports (2002), pp. 618 *et seq.* and ICJ Reports (2002), pp. 613 *et seq. Cf.* also the order of 2 March 1987, where the then President of the Court, Judge Nagendra Singh, was elected member of the chamber established for dealing with the *ELSI case, supra*, fn. 14: ICJ Reports (1987), pp. 3, 4. When Judge Singh passed away, he was replaced by the new President of the Court, Judge Ruda. It must also be noted that, so far, the President and Vice-President of the Court have been always elected members of the Chamber for Environmental Matters, set up under Art. 26, para.1.

[57] Mosler, pp. 449, 454–455; Toope, pp. 53, 95–96.

[58] Within the context of the chambers system provided by the Statute of the International Tribunal for the Law of the Sea, which is modelled on the system provided by the ICJ Statute, the possibility for a judge *ad hoc* to be elected President of a chamber is not ruled out. *Cf.* Eiriksson, G., 'The Special Chambers of the International Tribunal for the Law of the Sea', in *The International Tribunal for the Law of the Sea: Law and Practice* (Rao, P. C./Khan, R., eds., 2001), pp. 93–108, p. 101.

[59] For details *cf.* Rosenne, S., 'The President of the International Court of Justice', in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Lowe, V./Fitzmaurice, M., eds., 1996), pp. 406–423, p. 421.

judgment, even if he had already been replaced in the function of President of the chamber.[60] As to the powers recognized to the President of a chamber, Art. 18, para. 3 of the Rules states that, in relation to cases submitted to a chamber, the President of the chamber exercises the functions which the President of the Court exercises in relation to cases submitted to the full Court. In this connection, it may be interesting to note that, on the basis of this provision and given also the general competence of the chambers to deal with incidental proceedings, the President of a chamber is entitled to make use of the power, provided for in Art. 74, para. 4 of the Rules, to call upon the parties to act in such a way 'as will enable any order the Court may make on the request for provisional measures to have its appropriate effects'.

c) **Judges *ad hoc***

14 Article 31, para. 4 extends the right of the parties to appoint judges *ad hoc* to proceedings before chambers.[61] It also envisages a procedure that mainly seeks to reconcile the participation of national judges or judges *ad hoc* with the need not to alter the total number of judges composing the chamber. It is provided that the President of the Court shall request a member of the Court forming the chamber to give place to a member of the Court of the nationality of the party or to a judge *ad hoc* chosen by that party. This procedure gives rise to some difficulties. In the first place, Art. 31, para. 4 does not lay down any objective criterion which could guide the President in the selection of the members of the chamber who would have to give place to the judges *ad hoc* nominated by the parties. In the absence of such criteria, the exercise of this discretionary power may raise problems since it implies the possibility of modifying the composition of the chamber in relation to a given case.[62] Moreover, the procedure laid down in Art. 31, para. 4 is not suitable for regulating the participation of national judges or judges *ad hoc* in proceedings before *ad hoc* chambers. Following this procedure, in the *Gulf of Maine case*, a member of the Court was elected member of the chamber and then immediately requested to step down in order to give place to the judge *ad hoc* nominated by Canada.[63] This procedure appears to be unnecessarily complicated. In subsequent cases, the Court proceeded to elect only those members of the Court who, together with the judges *ad hoc* chosen by the parties, should have formed the chamber.[64] This may be

[60] *Treaty of Neuilly case, supra*, fn. 6, PCIJ, Series A, No. 3, p. 4, and *Interpretation of Judgement No. 3 supra*, fn. 6 PCIJ, Series A, No. 4, p. 4. For comment on both cases *cf.* also Zimmermann/Thienel on Art. 60, especially MN 16–17.

[61] This paragraph was inserted during the 1929 revision of the Statute of the PCIJ and was not substantially modified by the drafters of the ICJ Statute. Originally, the Statute of the PCIJ did not provide for the possibility of appointing judges *ad hoc* in proceedings before the chamber of summary procedure, while before the chambers provided in Arts. 26 and 27 that possibility was admitted if otherwise a national of only one of the parties would have sat as judge. The 1929 amendment was introduced in order to render resort to chambers more attractive for States; *cf.* Hudson, *PCIJ*, p. 347. For further information on Art. 31, para. 4 *cf.* Kooijmans on Art. 31 MN 43–47.

[62] *Cf.* the remarks of Judge Anzilotti during the discussions leading up to the 1936 revision: PCIJ, Series D, No. 2 (3rd Add.), pp. 520 and 981.

[63] *Gulf of Maine case, supra*, fn. 15, ICJ Reports (1982), pp. 3 *et seq.*

[64] A different question is triggered by the presence on the bench of an *ad hoc* chamber of members of the Court of the nationality of the parties. Since Art. 31, para. 1 provides that these judges retain their right to sit in the case before the Court, it might be held that they are members as of right of a chamber without their presence being subject to an election by the other members of the Court (*cf.* Bedjaoui, pp. 155, 164; Mosler, p. 454, fn. 22). This the more so since, if they were not elected, their presence would in any case be ensured by the procedure of replacement provided by Art. 31, para. 4. Notwithstanding these arguments, the Court has taken the view that national judges would have to be elected in order to become members of a chamber. *Cf. e.g.* the Order of 2 March 1987 in the *ELSI case, supra*, fn. 16, ICJ Reports (1987), pp. 3 *et seq.*

justified on the basis of an interpretation of Art. 31, para. 4 pursuant to which the procedure envisaged in that provision only applies to the chambers provided in Arts. 26, para. 1, and 29.[65] In connection with that procedure, it may be noted that, under the practice of the Court in relation to chambers (which in this respect differs from the practice followed in proceedings before the full Court), the nomination of judges *ad hoc* by the parties is formally recorded in the order concerning the constitution of the chamber. Reference to this practice may serve to explain why, in a case in which the need arose for the replacement of a judge *ad hoc*, the Court found it necessary to adopt an order recording the replacement and indicating the new composition of the chamber.[66]

While Art. 31, para. 6 ensures that judges *ad hoc* sitting in a chamber take part in the 15
decision of the case on terms of complete equality with the other members, in practice their position differs from that of the judges who are members of the Court. Judges *ad hoc* are not admitted to take part in the decisions which the full Court may have to take in relation to that chamber and the case pending before it. When the full Court is called upon to deliberate on a question concerning the organization or composition of the chamber, as, for instance, in the case of election for the replacement of a member of the chamber, only the members of the Court participate in the decision. This is reasonable since questions of this kind relate to the general functioning of the chamber and not to the specific case submitted to it. Should the full Court deal with a question directly concerning the case pending before a chamber, the solution of excluding judges *ad hoc* from taking part in the decision appears to be less acceptable. So far, this problem has arisen only in connection to the power of the full Court to fix time-limits for the written pleadings in a case pending before a chamber.[67] When, in the *Land, Island and Maritime Frontier Dispute case*, the full Court was called upon to decide on the preliminary question as to whether the full Court or the chamber was competent to deal with the application for permission to intervene submitted by Nicaragua, judges *ad hoc* were not admitted to take part in the decision. However, in that case the exclusion of judges *ad hoc* could be considered justified on the ground that the Court was dealing with a general procedural issue concerning the relationship between the Court and the chambers.[68] Apart from these limits concerning their participation in the deliberations of the full Court, judges *ad hoc* sitting in a case before a chamber formally have the same powers as judges *ad hoc* sitting in a case before the full Court. As a matter of fact, the position of judges *ad hoc* within a chamber is more influential than in a case before the full Court, at least because of the more restricted number of judges composing a chamber.[69]

[65] Schwebel, pp. 739, 759.

[66] *Cf. Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, Order of 13 December 1989, ICJ Reports (1989), pp. 162 *et seq.* For an examination of the legal character of this order *cf.* Sep. Op. Shahabuddeen, *ibid.*, pp. 165 *et seq.*

[67] *Cf.* Art. 92, para. 1 of the Rules. In the *Gulf of Maine case, supra*, fn. 15, the decision concerning the time-limit for the filing of the memorials was taken by the members of the Court, including the national judge of one of the party, while the judge *ad hoc* appointed by Canada was merely invited to be present in the deliberation without the right to vote. *Cf.* Order of 1 February 1982, ICJ Reports (1982), pp. 15 *et seq.* This led Canada to express concern about the status and role of the judge *ad hoc* appointed by it; *cf.* Pleadings, vol. VII, p. 296; and *ibid.*, pp. 297–299 for the reaction by the Registrar of the Court. In the view of Rosenne (*Procedure*, p. 51, fn. 1), the Court's approach in the *Gulf of Maine case* was contrary to the Statute.

[68] *Cf.* Thirlway, 'Law and Procedure, Part Eleven', p. 172.

[69] *Cf.* Jennings, Sir R.Y., 'The Difference between Conducting a Case in the ICJ and in an *ad hoc* Arbitration Tribunal—An Inside View', in *Liber Amicorum Judge Shigeru Oda* (Ando, N. *et al.*, eds., 2002),

d) Assessors

16 Article 30, para. 2 states that the Rules may provide for assessors to sit in any of the chambers of the Court.[70] The 1946 Rules admitted the possibility of assessors sitting in a chamber only with regard to the chamber of summary procedure.[71] The 1978 Rules extended this possibility to the other two types of chambers. Given the special expertise of assessors, their presence seems to be particularly useful in relation to the activity of chambers dealing with specific categories of cases referred to in Art. 26, para. 1.[72] So far, however, the possibility of appointing assessors has never been resorted to.[73] Article 9, para. 4 of the Rules admits that in proceedings before a chamber, assessors are to be appointed by the chamber itself either on its motion or upon a request. This solution appears to be dictated by the consideration that the chamber is in a better position to evaluate whether it is appropriate or not to have assessors sitting in the case. As this is equally valid for all the chambers, there is no reason to argue that Art. 9, para. 4 of the Rules should not apply also to *ad hoc* chambers, given the absence in the Rules of any indication to the opposite.[74] A different question is whether the parties have a say in the decision concerning the number of assessors or their selection. Since Art. 9, para. 2 of the Rules provides that the President of the full Court—the same applies to the President of the chamber—shall take steps to obtain the information relevant to the choice of the assessors, one may consider that, among the relevant information, the President should take into account the views of the parties as well.

3. Common Rules Concerning the Procedure before Chambers

17 Article 90 of the Rules provides that the proceedings before chambers are governed in principle by the same rules that apply to contentious cases before the full Court. The main differences between the proceedings before the full Court and those before the chambers are specified in Art. 92 of the Rules. Following a modification introduced during the 1972 revision of the Rules, the procedure laid down in this provision applies to all types of chambers.[75] The decision to harmonize the procedure applicable to the three types of chambers may appear to be unfortunate. Considering the different purposes of the various chambers, and particularly considering the existence of a chamber whose main feature is to 'hear and determine cases by summary procedure', one would have expected that different rules should apply to proceedings before

pp. 893–909, p. 901. According to Oraison, the influential role of judges *ad hoc* is confirmed by the fact that in many cases decided by chambers, judges *ad hoc* have shared the views expressed by the majority of the chamber; *cf.* Oraison,.A., 'Réflexions sur l'institution du juge *ad hoc* siégeant au Tribunal du Palais de la Paix en séance plénière ou en chambre *ad hoc*', *RBDI* 31 (1998), pp. 272–299, p. 298.

[70] For further information on assessors *cf.* Thirlway on Art. 30 MN 39–41.

[71] *Cf.* Art. 7 of the 1946 Rules.

[72] In this regard, it is significant that the Statute of the PCIJ provided for technical assessors to sit only in the special chamber for labour cases referred to in Art. 26, and in the special chamber for transit and communications cases referred to in Art. 27. The Statute also admitted that the technical assessors could sit in the full Court when dealing with such categories of cases.

[73] In the *Gulf of Maine case, supra*, fn. 15, the parties asked the chamber to appoint a technical expert: *cf.* order of 30 March 1984, ICJ Reports (1984), pp. 165 *et seq.* However, the person appointed was expressly qualified in the order as an expert under Art. 50. On the difference between experts and assessors, *cf.* Tams on Art. 50 MN 23–24; Escobar Hernández, p. 306.

[74] But contrast Ostrihansky, pp. 30, 47.

[75] The correspondent provision of the 1946 Rules had merely applied to proceedings before the chamber of summary procedure.

different types of chambers.[76] However, the procedure provided in Art. 92 of the Rules is flexible enough to be adapted to the peculiarities of each chamber. Moreover, under Art. 101 of the Rules, the chambers, with the agreement of the parties, may adopt modifications and additions to the Rules that they consider appropriate in relation to a particular case.[77]

Compared to the procedure before the Court, the procedure laid down in Art. 92 of 18
the Rules should ensure a more expeditious handling of the case. In principle, written proceedings in a case before a chamber should consist of a single pleading by each side. Moreover, with the agreement of the parties, a chamber may decide to dispense with oral proceedings. Practice, which, admittedly, relates only to proceedings before *ad hoc* chambers,[78] has however shown that the length of proceedings before a chamber is almost the same as that of proceedings before the full Court.[79] This is mainly due to the attitude of the parties, which have so far shown no willingness to take advantage of the simplified procedure provided for in Art. 92 of the Rules. Hence they have always requested the Court to have more than one round of written pleadings, and they have never contemplated the possibility for oral pleadings to be dispensed with. For their part, chambers have preferred to accommodate the requests of the parties.

When a request to refer a case to one of the standing chambers established under Arts. 19
26, para. 1, and 29 has been submitted to the Court, the President of the Court has to convene the chamber at the earliest date compatible with the requirements of the procedure.[80] When the parties agree to refer a case to an *ad hoc* chamber, the chamber may be convened as soon as the Court has elected its members. Once a chamber has been convened, all decisions concerning the proceedings before it have to be taken by the chamber. An exception in this regard is provided in Art. 92, para. 1 of the Rules, which confers on the Court, in consultation with the chamber concerned if it is already constituted, the power to fix the time-limits for the first round of written pleadings.[81] This power of the Court constitutes an anomaly in relation to the general principles governing the distribution of powers between the Court and the chambers.[82] The solution adopted might be justified on the basis of procedural economy and reduction of costs.[83] However, one fails to see the usefulness of giving to the Court the power to fix time-limits in cases in which the chamber is already constituted. Apart from this, a major

[76] For further discussion on this point *cf.* Palchetti on Art. 29 MN 5. Ostrihansky, pp. 30, 50, rightly observes that the harmonization of proceedings before the chambers diminishes the probability of a case being instituted before the chambers provided in Arts. 26, para. 1, and 29.

[77] Art. 101 of the Rules was modified in 1978 in order to insert an express reference to the chambers. Rosenne, *Procedure*, p. 190, emphasizes the relevance of this provision with respect to proceedings before *ad hoc* chambers.

[78] In the *Treaty of Neuilly case, supra*, fn. 6, the chamber of summary procedure authorized the submission of replies but did not find it necessary to institute oral proceedings: PCIJ, Series A, No. 3, pp. 4 *et seq.*

[79] *Cf.* the remarks of Oda, S., 'The International Court of Justice Viewed from the Bench', *Rec. des Cours* 244 (1993), pp. 9–190, pp. 60–61; Valencia-Ospina, pp. 503, 508–509.

[80] *Cf.* Art. 91 of the Rules.

[81] Art. 72 of the 1946 Rules gave this power to the President of the chamber. It might be noted that Art. 92 of the Rules does not specify who has the power to fix the time-limits for further written pleadings which the parties may be authorized to file. In practice, however, these time-limits have been fixed by the chamber concerned or by its President. For references *cf.* Escobar Hernández, p. 309.

[82] Rosenne, *Procedure*, p. 190, characterizes this provision as 'an exception to the general concept of the chambers within the context of the Court as a whole'.

[83] From this point of view it is to be welcomed that the Court, in its more recent practice, has fixed time-limits for the filing of the written pleadings directly in the order constituting the *ad hoc* chamber: *cf.* the two orders of 27 November 2002 in the *Application for Revision case* (El Salvador/Honduras) (*supra*, fn. 16), and the *Frontier Dispute case* (Benin/Niger), *supra*, fn. 15, ICJ Reports (2002), pp. 618 *et seq.* and pp. 613 *et seq.*, similarly the order of 2 March 1987 in the *ELSI case, supra*, fn. 16, ICJ Reports (1987), pp. 3, 4.

problem is the practical inconvenience arising from the fact that judges *ad hoc* sitting in a chamber are not entitled to participate in the decision of the full Court.[84]

B. Chambers Dealing with Particular Categories of Cases

I. Historical Development

1. PCIJ

20 Articles 26 and 27 of the Statute of the PCIJ had provided for the establishment of chambers, composed of five members and two substitute members, for dealing, respectively, with labour cases and with transit and communications cases.[85] Under Art. 26, the judges were to be assisted by four technical assessors sitting in the chamber without the right to vote. With regard to the chamber for transit and communications cases, technical assessors could be appointed when the parties so agreed or the Court so decided. During the drafting of the Statute, the Director of the International Labour Office had repeatedly stressed the need to establish a special procedure for labour cases, given that the Treaty of Versailles conferred upon the future Court jurisdiction in this regard.[86] In particular, the Director suggested that some of the Court's judges should be experts in labour law. It was thought, however, that in order to develop within the Court a special competence in labour cases, a better solution would be to provide for the establishment of a chamber dealing with those cases, which allowed a group of judges to specialize in this field. Since the Treaty of Versailles also provided for the jurisdiction of the Court with respect to cases relating to transit and communications, a proposal was advanced to the effect that the Statute should contemplate also a chamber for dealing with these latter cases. Under the practice of the PCIJ, no case was referred to either chamber.[87]

2. ICJ

21 Given that States had shown no interest in the system of chambers provided by Arts. 26 and 27 of the Statute of the PCIJ, a number of proposals were submitted during the drafting of the ICJ Statute in order to remodel the structure and functions of chambers. In particular, in its report of 1944, the Inter-Allied Committee on the Future of the Court put forward two proposals for the constitution of regional chambers of the Court.[88] While recognizing the need to revise the provisions of PCIJ Statute dealing with special chambers, the Washington Committee of Jurists found it useful to contemplate a general power of the Court to authorize the establishment of chambers for dealing with specific categories of cases. The modification introduced by the Committee was later endorsed by the San Francisco Conference. It was there recognized that this change might facilitate, under certain circumstances, recourse to the Court by States.[89] Compared to the system envisaged under the PCIJ, the solution adopted leaves to

[84] *Cf. supra*, MN 15.

[85] For background information *cf.* von Stauffenberg, pp. 152–157 and pp. 161–165 respectively.

[86] For information of the drafting history of Arts. 26 and 27 *cf.* also Hudson, *PCIJ*, pp. 175–179.

[87] As noted *supra*, fn. 11, the possibility to refer a dispute to the special chamber for transit and communications cases was taken into consideration by the Court in the *Wimbledon case*. It is worth mentioning that in several instances the Court was required to render advisory opinions concerning the interpretation of the Constitution of the ILO. In all such cases, the request for advisory opinion was dealt with by the full Court.

[88] Paras. 97 *et seq.* of the Report, reproduced in *AJIL* 39 (1945), Supplement, pp. 1–42.

[89] UNCIO XIV, p. 834. For the discussion *cf. ibid.*, 109 *et seq.*

the Court a broad discretionary power. Under Art. 26, para. 1, it is up to the Court to decide whether to establish a special chamber, to define the category of cases which the chamber would deal with, and to determine the number of judges composing it. Several proposals were advanced, also from members of the Court, for the establishment of chambers competent to deal with cases arising in different fields of international law, such as law of the sea, space law and environmental law.[90] In 1993 the Court for the first time made use of the power given to it by Art. 26, para. 1 by establishing a seven-member Chamber for Environmental Matters.[91] So far, no case has been submitted to this chamber.

II. Function and Competence

Article 26, para. 1 provides the Court, whose jurisdiction in principle covers international law in its entirety, with a tool to develop a special expertise in relation to disputes arising in specific fields of international law. This, in turn, may be seen as a means for accommodating the expectations of States to have their disputes judged by a court which takes into account the peculiarities of a certain field of international law. Until recently, the Court apparently did not give much thought to availing itself of this procedure. The decision to establish the Chamber for Environmental Matters may be taken as an indication that the attitude of the Court has changed.[92] Two parallel developments—the proliferation of international tribunals and a growing feeling that 'special fields' of international law exist—seem to have played a major role in the decision of the Court.[93] The creation of the Chamber for Environmental Matters may be regarded as an answer of the Court to the view that a special field of international law, such as environmental law, would deserve a new and special international tribunal.[94] It is difficult to say whether the Court will take further steps in this direction. Yet, the fact that no case has been so far submitted to the Chamber for Environmental Matters may deter the Court from taking any further initiative in this sense. 22

Article 26, para. 1 does not specify what should be the type of cases which special chambers are supposed to deal with. In principle, the reference to 'particular categories 23

[90] For a list of these proposals *cf.* Pillepich, pp. 45, 58–59. [91] *Cf.* Ranjeva, pp. 432–441.

[92] The decision to establish this chamber was motivated by the reference to 'developments in the field of environmental law and protection which have taken place in the last few years' and by the consideration that the Court 'should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction'; *cf.* ICJ Yearbook (1992–1993), p. 17.

[93] The view that the creation of special chambers could prevent the proliferation of international tribunals has been held by many authors and by members of the Court. Already 1980, Judge Lachs had criticized the idea of creating an international tribunal for the law of the sea by noting that 'an International Court of Justice Chamber on the Law of the Sea would serve the same purposes more effectively and more speedily, and at the same time manifest the unity of international law'; *cf.* Lachs, M., 'The Revised Procedure of the International Court of Justice', in *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys* (Kalshoven, F./Kuyper, P. J./Lammers, J. G., eds., 1980), pp. 21–52, p. 44. In the same vein, *cf.* Mc Whinney, E., *Judicial Settlement of International Disputes* (1991), pp. 74–75. For an assessment of the Court's relationship with other international judicial bodies *cf.* Gaja, Relationship, *passim*.

[94] According to Oda, *Rec. des Cours* 244 (1993), *supra*, fn. 79, pp. 9, 55, 'the proposed establishment of a World Court for Environmental Questions might have encouraged the parallel establishment of a Special Chamber for environmental questions'. This view is shared by Philippe Sands: *cf.* his observation in *Increasing the Effectiveness of the International Court of Justice* (Peck, C./Lee, R.S., eds., 1997), p. 439. For a similar comment, though based on different arguments *cf.* Ranjeva, pp. 432–441. The possible role of special chambers of the Court in relation to environmental disputes was anticipated by the President of the Court, Sir Robert Jennings, in his statement made at the Conference in Rio de Janeiro in June 1992, reproduced in *Collected Writings of Sir Robert Jennings* (vol. I, 1998) pp. 567–573, p. 573.

of cases' only precludes the Court from establishing chambers with a general competence. Since (as appears from the preparatory work) Art. 26, para. 1 appears to be modelled on the chamber system provided for in Arts. 26 and 27 of the PCIJ Statute, it may be held that the approach contemplated by that article is one of specialization *ratione materiae*. This is also confirmed by the reference to 'labour cases and cases relating to transit and communications' as examples of categories of cases envisaged by the provision. It may be asked whether the specialization *ratione materiae*, in view of which a chamber is established, should mean that only highly technical cases are to be submitted to such chamber or whether this is competent to deal also with cases involving to a large extent questions of general international law. As shown by the wide competence of the Chamber for Environmental Matters, the latter solution should be retained. If one views Art. 26, para. 1 as providing for chambers that are specialized *ratione materiae*, it would provide no basis for the establishment of permanent regional chambers of the Court. This possibility has sometimes been defended on the ground that disputes between States belonging to a given geographical area or to a given legal system might be considered as 'particular categories of cases' under Art. 26, para. 1.[95] However, the idea of establishing regional chambers of the Court, which was the object of a wide debate in the past within the United Nations, seems to have lost much of its attractiveness in recent time.[96] A strong argument against the establishment of a system of regional chambers is the risk that such system would endanger the unity of the Court's case law.

24 If the parties submit to a special chamber a case which does not fall within the categories of cases for which that chamber was created, the exercise of jurisdiction by the chamber in relation to the case in question would not be justified. Since under the Statute a special chamber is formed only to deal with a particular category of cases, the parties could not request the chamber to disregard the limits set by the Statute.[97] Thus, if a dispute did not fall within the scope of the chamber's competence, the request of the parties should be refused.[98] The question may be raised as to whether the decision on this issue has to be taken by the full Court or by the chamber itself.[99] Since it is the Court which determines the category of cases for which the chamber has been established, one could argue that it is for the Court to decide whether the case submitted by the parties falls within that category; moreover, should the special chamber be considered as not competent, the Court would be in a better position for considering, in the light of the views of the parties, alternative solutions, which may include, if the parties so agree, the establishment of an *ad hoc* chamber for dealing with that case.[100] Notwithstanding these considerations, the more convincing view is that the chamber itself should decide whether it is competent to deal with a given dispute. This approach is more consistent with the general principle pursuant to which a judicial body seized with the principal

[95] *Cf.* Pillepich, pp. 45, 61.

[96] On the proposals submitted by States for the establishment of regional chambers of the Court, *cf.* the report of Golsong, H., in MPI, *Judicial Settlement*, pp. 99–118, pp. 109–111.

[97] *Cf. Case Concerning the Free Zones of Upper Savoy and the District of Gex*, PCIJ, Series A, No. 22, p. 12.

[98] Ostrihansky, pp. 30, 49.

[99] *Cf.* Rosenne, *Law and Practice*, vol. III, pp. 1117–1118, who argues that only the chamber is competent to take such decision because, under the Rules, the parties are allowed to seise a special chamber directly.

[100] Ostrihansky, pp. 30, 49, seems to admit the possibility for the Court to refer the case to an *ad hoc* chamber even without the express consent of the parties.

issue is also competent to deal with subsidiary issues as well.[101] Also questions relating to the chamber's competence should be included among the subsidiary issues which the chamber would be competent to deal with.

III. Formation and Composition

Article 26, para. 1 provides that a special chamber is to be composed of three or more judges as the Court may determine. Since it is not specified whether the reference to three judges should mean that a minimum of three members of the Court should always sit, it might be possible for a case to be decided by a special chamber composed of a member of the Court and two judges *ad hoc*.[102] The Statute does not fix a maximum number of members. It has been observed that, since, under Art. 25, para. 3, nine judges constitute the quorum of the Court, the number of judges sitting in a chamber should not exceed seven.[103] The Chamber for Environmental Matters is composed of seven judges who are elected for a period of three years. While Art. 16, para. 2 of the Rules merely indicates that judges composing a special chamber should be elected having regard to their 'special knowledge, expertise or previous experience . . . in relation to the category of cases for which the chamber is being formed', in practice, the President and Vice-President of the Court have always been elected members of the Chamber for Environmental Matters. Article 18, para. 3 of the Rules specifies that the Court may decide upon the dissolution of a chamber.[104] 25

IV. Procedure

Under the Rules, the same procedure applies to special chambers and to the chamber of summary procedure. The main difference between this procedure and the procedure before *ad hoc* chambers relates to the rules governing the referral of a case to the chamber. In the first place, under Art. 91, para. 1 of the Rules, the request to refer a case to a standing chamber has to be made in the document instituting the proceedings or has to accompany it. In contrast, in the case of *ad hoc* chambers, the request may be made 'at any time until the closure of the written proceedings'.[105] While the strict time-limit indicated in Art. 91, para. 1 may be justified when a case is referred to the chamber of summary procedure, the reasons for compelling States to decide on the referral to a special chamber at the earliest stage of the case are less evident. In any case, since under Art. 101 of the Rules, the Court, if requested by the parties, may modify or amend the provisions contained in Part III of the Rules, a request of the parties to refer a case to one of the standing chambers could be accepted by the Court, even if it was submitted after the time-limit fixed in Art. 91, para. 1. Another difference with respect to the procedure before *ad hoc* chambers relates to the fact that in principle the referral of the case to standing chambers does not presuppose a decision by the Court.[106] Article 91 of the Rules provides only for a role of the President of the Court in relation to cases submitted to a standing chamber. It is for the President to ascertain whether the parties are in agreement to refer the case to the standing chamber and to ensure the application of the 26

[101] *Supra*, MN 8–9.

[102] *Cf.* Zimmermann, *Dickinson JIL* 8 (1989), pp. 1, 15.

[103] Ostrihansky, pp. 30, 34.

[104] On this provision *cf.* Rosenne, *Law and Practice*, vol. III, p. 1117.

[105] Art. 17, para. 1 of the Rules.

[106] *Cf.* however *supra*, MN 24, for comment on the competence of a special chamber to deal with disputes not falling within the category of cases for which it was created.

procedure for the participation of judges *ad hoc*. After having taken these preliminary steps, the President has the duty to convene the chamber.

V. Evaluation

27 Several reasons may be given for explaining the lack of interest that States have so far shown in the special chambers of the Court. On the one hand, it may be difficult for States to appreciate the advantages of submitting a case to a chamber instead of going before the full Court, since the judges sitting in the chamber are also members of the Court and the procedure is substantially the same.[107] Moreover, as cases submitted to the Court do not raise only technical questions but usually involve also a variety of questions of international law, States may not feel the need for referring their cases to a special chamber.[108] On the other hand, resort to a special chamber of the Court does not seem to be a real alternative to resort to a different international tribunal with special competence on a given matter. For various reasons, resort to a specialized tribunal may represent a better option for States. Judges sitting in a specialized tribunal may be selected from persons who have the knowledge and experience for dealing with highly technical cases. Rules governing the functioning of these tribunals may offer additional advantages, particularly with regard to procedural matters. Seen from this perspective, most of the shortcomings affecting the potential use of the special chambers of the Court are difficult to eliminate, unless States are willing to modify the Statute of the Court.[109] For its part, what the Court could do in order to render resort to special chambers more attractive, is to amend the procedural rules governing proceedings before special chambers, and to introduce real differences compared to the procedure applied by the full Court.

C. Chambers Dealing with a Particular Case

I. Historical Development

1. Drafting of Art. 26, Para. 2 of the ICJ Statute

28 The Statute of the PCIJ did not contemplate the possibility for the Court to form chambers for dealing with a particular case. A proposal providing for such possibility was advanced by the United States and endorsed by the Washington Committee of Jurists.[110] In the intention of the drafters, the new provision, which was later embodied in Art. 26, para. 2, would have served the purpose of facilitating recourse to the Court. However, the record of the San Francisco Conference does not clarify many of the issues involved in the new provision. In particular, the drafting of Art. 26, para. 2 does not shed light on the crucial question as to whether, in the intention of the drafters, the parties should be allowed to have a say in the composition of the chamber. Indeed, the *travaux préparatoires* have been the subject of conflicting readings on this point.[111]

[107] *Cf.* Oda, *Rec. des Cours* 244 (1993), *supra*, fn. 79, pp. 9, 55; Karagiannis, S., 'La multiplication des juridictions internationales: un systeme anarchique?', in *Colloque de Lille. La juridictionnalisation du droit international* (Société française de droit international, ed., 2003), pp. 7–161, p. 40.

[108] *Cf.* Jennings, Sir R.Y., 'The Role of the International Court of Justice', *BYIL* 68 (1997), pp. 1–63, p. 36.

[109] *Cf.* Ranjeva, pp. 432, 441, with reference to the limitations affecting the activity of Chamber for Environmental Matters.

[110] On the drafting history of Art. 26, para. 2 *cf.* Pillepich, pp. 45, 63–65.

[111] *Cf.* on the one hand, Schwebel, pp. 739, 741–744, who, on the basis of an accurate description of the preparatory work, concluded that the new type of chamber was designed to permit the parties to influence the

2. Rules

The 1946 Rules briefly referred to *ad hoc* chambers. On the one hand, Art. 24, para. 2 of the Rules provided that members of *ad hoc* chamber should be elected according to the rules governing the election of judges to other types of chambers. On the other hand, Art. 71, para. 3 of the Rules required the President of the Court to ascertain the views of the parties only as regards the number of judges to constitute the chamber. It was during the 1972 revision of the Rules that the system of the *ad hoc* chambers assumed its present features. The main purpose of the revision was to increase the appeal of the Court, as the substantial inactivity of the Court at the time was regarded with increasing concern.[112] Several proposals were made, also from States, to reconsider the rules governing recourse to chambers so as to give to the parties a role in determining their composition.[113] The solutions adopted by the Court went in the same direction. The main changes introduced by the Court in 1972, and substantially confirmed in 1978, were two. In the first place, the Rules established that the President of the Court has to ascertain the views of the parties also with regard to the composition of the Court.[114] Furthermore, the judges who are elected members of the chamber, and presumably those indicated by the parties, would continue to sit in a case even if their term of office as members of the Court has expired, whatever the phase of the proceedings.[115] 29

3. Practice

The new procedure introduced by the 1972 Rules was first tested in 1981–1984 in the *Gulf of Maine case*.[116] In that case the expectations of the parties to see their views as to the composition of the chamber accepted by the Court were satisfied. In the subsequent five years, three more *ad hoc* chambers were established by the Court.[117] Thus, between 1981 and 1987 four cases, out of a total of nine brought to the Court, were referred to *ad hoc* chambers. From 1987 onwards, however, no new *ad hoc* chamber were established until 2002, when two chambers were formed, one of these for dealing with the request for revision of a judgment rendered by an *ad hoc* chamber.[118] 30

II. Function and Competence

While the reasons for establishing special chambers or a chamber of summary procedure are not difficult to establish (namely the need for specialization or for expeditious proceedings), it is more difficult to say what could be, within the organization of the Court, the proper role of *ad hoc* chambers provided for in Art. 26, para. 2. Apparently, what the drafters had in mind was a venue for dealing with cases which, in the view of the 31

size and composition of the chamber. The opposite conclusion was reached by Judge Shahabuddeen in his dissent in the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, ICJ Reports (1990), pp. 18, 34–37.

[112] For further elaboration on this point *cf.* Thirlway on Art. 30 MN 8; Jiménez de Arechaga, E., 'Amendments to the Rules of Procedure of the International Court of Justice', *AJIL* 67 (1973), pp. 1–22.

[113] For a detailed description *cf.* Schwebel, pp. 739, 744–748.

[114] *Cf.* Art. 26, para. 1 of the 1972 Rules and Art. 17, para. 2 of the 1978 Rules.

[115] *Cf.* Art. 26, para. 3 of the 1972 Rules and Art. 17, para. 4 of the 1978 Rules.

[116] ICJ Reports (1982), p. 3; ICJ Reports (1984), p. 246.

[117] *Cf.* the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, ICJ Reports (1990), pp. 4 *et seq.*, the *Frontier Dispute case* (Burkina Faso/Mali), *supra*, fn. 15, ICJ Reports (1986), pp. 554 *et seq.*; and the *ELSI case, supra*, fn. 16, ICJ Reports (1989), pp. 15 *et seq.*.

[118] *Cf.* the *Application for Revision* (El Salvador/Honduras), *supra*, fn. 16, and the *Frontier Dispute case* (Benin/Niger), *supra*, fn. 15.

parties, were considered to be unsuitable for the full Court.[119] Thus, the intention was to provide for a procedure which would, under certain circumstances, be preferable to States, because it would be potentially less formal, less time-consuming and less costly. While these advantages may still play a role in the decision of the parties to refer a case to an *ad hoc* chamber, there is no doubt that, after the 1972 revision, the main attraction of *ad hoc* chambers lies in the fact that the parties have been given a say in the choice as to the composition of the chamber. As is well known, the role given to the parties in the constitution and in the functioning of *ad hoc* chambers has been the subject of different views. On the one hand, the revision of the Rules has been praised for having allowed the Court to deal with cases which probably would have been otherwise submitted to arbitration tribunals. On the other hand, it has been questioned whether it is the task of the Court to provide States with a procedure which in many respects is more akin to arbitration than to adjudication and which, in any case, impinges heavily on the resources and functioning of the full Court.[120] Both views are based on strong arguments. Yet, since the Court is now dealing with a long list of cases, the idea that in order to increase its appeal, it would have to concede to States the possibility to have their cases decided by a chamber composed of judges chosen by them appears to have lost some of its cogency. This might allow the Court to reconsider the role to be played by *ad hoc* chambers within the dispute settlement mechanism provided by the Statute.

32 Article 26, para. 2 provides that the Court 'may' form a chamber for dealing with a particular case. Thus, the terms of the Statute suggest that, when requested by the parties, the Court has a discretion, and not a duty, to set up an *ad hoc* chamber. At a time when the docket of the Court was almost empty, the idea of the Court refusing to form a chamber appeared to be purely theoretical. While this possibility may still be regarded as remote, the Court might make use of it when it does not appear appropriate that a dispute be referred to a chamber. Article 26, para. 2 does not provide for any express limitation as to the type of cases which may be submitted to *ad hoc* chambers.[121] However, the referral of certain types of cases to a chamber composed of judges chosen by the parties might involve a question of propriety. In particular, one may refer to cases in which the dispute does not have a bilateral character but involves questions which touch upon the interests of a number of third States or of the international community as a whole.[122]

III. Formation and Composition

1. The Number of Judges

33 The Statute does not fix the number of judges constituting a chamber. It only provides that the number has to be determined by the Court with the approval of the parties. However, since Art. 26, para. 2 refers to 'the number of judges', it might be inferred that under the Statute the possibility of a chamber composed of only one judge is

[119] Oda, *AJIL* 82 (1988), pp. 556, 562; Jennings, *supra*, fn. 108, pp. 1, 37; Lachs, *supra*, fn. 93, pp. 21, 43.

[120] Jennings, *supra*, fn. 108, pp. 1, 38–39; Abi-Saab, G., 'De l'évolution de la Cour internationale de Justice. Réflexions sur quelques tendances recentes', *RGDIP* 94 (1992), pp. 273–295, p. 288; Toope, pp. 91–95.

[121] *Cf.* Schwebel, pp. 739, 764.

[122] For further comment on problems arising in this regard *cf. infra*, MN 36. A list of cases that are more suitable to be submitted to *ad hoc* chambers is given by Mosler, pp. 449, 457. According to Collier/Lowe, *Settlement of Disputes*, p. 129, and Escobar Hernández, p. 295, the Court may refuse to establish *ad hoc* chambers; the opposite view is held by Ostrihansky, pp. 30, 43.

excluded.[123] It is more difficult to say whether a chamber may be composed of three judges, possibly one member of the Court and two judges *ad hoc*. It has been noted that, since Art. 17, para. 3 of the Rules refers to the power of the Court to determine 'the number of its members who are to constitute the chamber', *ad hoc* chambers would have to consist of more than one member of the Court.[124] Yet, Art. 17 of the Rules may be given a different interpretation. One may argue that, since, under Art. 17, para. 2 of the Rules, the procedure of Art. 31, para. 4 of the Statute applies also to *ad hoc* chambers, the reference to 'members of the Court' does not exclude an interpretation to the effect that, while at least three members of the Court are to be elected members of the chamber, two of them may be called upon by the President of the Court to give the place to judges *ad hoc* nominated by the parties. It is true, however, that strong reasons militate against the possibility of the Court acceding to a request of the parties for a chamber which includes only one member of the Court. This would imply that a judgment, which under Art. 27 is to be considered as rendered by the Court, could be delivered by a chamber in which non-members of the Court outnumber members.[125] So far, the Court has not had to deal with a request for a chamber with only one member of the Court. The chambers established by the Court have always been composed of five judges, with a minimum of three members of the Court sitting in any chamber.[126]

2. Selection of Judges

Under Art. 26, para. 2 the Court requires the approval of the parties for determining the 34
number of judges composing a chamber. Since this provision does not refer to the composition of the chamber, it may be inferred that the composition is to be determined by the Court without the need for any previous approval of the parties. It has been queried whether under the Statute the parties may be given a say in the selection of the judges who will sit in the chamber. As has been noted,[127] since the 1972 revision, the Rules provide that the President of the Court shall ascertain the views of the parties regarding the composition of the Court and shall report to the Court. The question of the consistency with the Statute of the procedure thus introduced seems to have lost some of its relevance, as this procedure appears now to be well established.[128] It may be interesting to consider whether the Court could decide not to follow the indications

[123] This possibility, which presupposes that the parties renounce to appoint judges *ad hoc*, has been admitted by some authors: *cf.* Hyde, J. N., 'A Special Chamber of the International Court of Justice—An Alternative to ad hoc Arbitration', *AJIL* 62 (1968), pp. 439–441; Meyer, L. H., 'The Ad Hoc Chambers: Perspectives of the Parties and the Court', *ArchivVR* 27 (1989), pp. 414–441, p. 422; Merrills, J. G., *International Dispute Settlement* (3rd edn., 1998), p. 141.

[124] Rosenne, *Law and Practice*, vol. III, p. 1120.

[125] *Cf.* Valencia-Ospina, pp. 515–516; Mosler, pp. 449, 457–458.

[126] The chamber formed to deal with the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 7, provided an exception. Due to the expiration of the term of office of one member of Court sitting in the chamber, the chamber at one point, was composed of only two members of the Court.

[127] *Cf. supra*, MN 29.

[128] As is well known, strong doubts as to the consistency with the Statute of the procedure laid down in the Rules were expressed by Judge Shahabuddeen in his dissent in the *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, ICJ Reports (1990), pp. 18–53; for a similar view *cf.* Abi-Saab, *supra*, fn. 120, pp. 273, 287. In contrast, a number of arguments have been advanced in support of the Court's approach. For example, Schwebel, pp. 739, 767, seemed to justify the procedure by qualifying the power of the Court to consult the parties as an implied power of the Court; for a similar view *cf.* also Lauterpacht, *Administration of Justice*, p. 93. Lachs, pp. 203, 206, simply noted that there was nothing in the Statute to prevent the possibility of the parties also having a say in the composition of chambers.

of the parties with regard to the composition of a chamber. Apart from the obvious consideration concerning the possible reactions of the parties, it has been held that the Court cannot in fact take into account anything but the views of the parties, given the lack of alternative criteria for the selection of the judges.[129] It has also been observed that in practice the Court would be prevented from disregarding the views of the parties because this would show a lack of confidence in the judges who, though proposed by the parties, have not been elected by the Court.[130] Yet, the need for the Court to retain a certain freedom in the selection of the judges should not be undervalued. It may be in the Court's interest that certain general criteria be followed in the selection of judges composing a chamber. For instance, the presence of the President or Vice-President of the Court on the bench of the chamber may be seen as a means of ensuring the proper coordination, and of reinforcing the institutional link between the Court and the chamber.[131] Furthermore, in view of an efficient distribution of work among the various judges, it would be reasonable that, under certain circumstances, a judge who is already sitting in one chamber should not be elected member of another one.[132] In the same vein, while it is true that in the text of Art. 26 there is no reference to the need to preserve the principle laid down in Art. 9, one may expect that, when forming a chamber, the Court may find it proper to avoid an unequal representation of different judicial systems.[133] Since the views of the parties as to the composition of the chamber are usually not made public, it is difficult to say with certainty to what extent the decision taken in each case by the Court reflects the wishes of the parties. As one can also infer from the views sometimes expressed by members of the Court,[134] the impression is that the Court has always managed to accommodate those wishes. In the first dispute referred to a chamber, in the *Gulf of Maine case*, the parties made clear their intention to dictate to the Court the composition of the chamber by providing in a separate agreement that, if the composition of the chamber did not reflect their views, they would discontinue the proceedings and settle their dispute by arbitration.[135] It was understandable that the Court had to respond positively to the expectations of the parties at the time. Yet, now that the Court's case-load has substantially increased, it seems that the Court is in a stronger position when entering into a dialogue with the parties about the composition of the chamber. One may expect that the Court will try to persuade the parties to accept a composition which also accommodates the interests of the Court.

35 As has been seen, under Art. 17, para. 4 of the Rules, a member of an *ad hoc* chamber whose term of office as member of the Court has expired continues to sit in all phases of the case, whatever the stage it has then reached. The purpose of this provision is clearly that of avoiding that the composition of the chamber, which in most cases would reflect the wishes of the parties, be subjected to modifications. However, should a member of the Court become unable to sit, the Court would follow the same procedure and ascertain the parties' views in order to determine the new judge who will sit in the chamber.[136]

[129] Oda, *Rec. des Cours* 244 (1993), *supra*, fn. 79, pp. 9, 58.

[130] Schwebel, pp. 739, 768; Oellers-Frahm, pp. 316, 321. [131] *Cf. supra*, MN 13.

[132] Lachs, pp. 203, 207; Singh, *ICJ*, pp. 114–115. [133] *Cf. supra*, MN 12.

[134] *Cf.* for instance, the declaration of Judge Oda appended to the order of the Court for the constitution of the chamber for dealing with the *Gulf of Maine case*, ICJ Reports (1982), p. 10.

[135] Pleadings, vol. I, pp. 7 *et seq.*

[136] *Cf. e.g.* the order of 20 December 1988 in the *ELSI* case adopted to fill the vacancy left by the death of one member of the chamber; ICJ Reports (1988), pp. 158 *et seq.*

3. Problems Concerning the Composition in Case of Intervention by Third States

When Art. 17, para. 2 of the Rules provides that the President of the Court has to ascertain the views of the parties with regard to the composition of the chamber, it clearly refers to the original parties which have submitted the dispute to the Court. However, if, under Arts. 62 or 63, a State is given permission to intervene in proceedings pending before an *ad hoc* chamber, the question may be raised as to whether the intervening State is entitled to request the Court to reconstitute the chamber by taking into account also its views, and whether it has the right to appoint a judge *ad hoc* sitting in the chamber. It seems reasonable that, if the third State intervenes as a non-party, it cannot claim any right in relation to the composition of the chamber. This was the solution adopted by the *ad hoc* chamber dealing with the *Land, Island and Maritime Frontier Dispute case*.[137] Having granted Nicaragua's request to intervene as a non-party under Art. 62, the chamber did not consider that Nicaragua had any procedural right concerning the composition of the chamber. Should a State be admitted to intervene as a party,[138] it is difficult to say what could be its rights in this regard. In its order of 28 February 1990 in the above-mentioned case, the Court, in order to justify the competence of the chamber to decide on a request to intervene, stated that the State requesting to intervene 'must, for the purposes of the decision whether that request should be granted, take the procedural situation in the case as it finds it'.[139] One may hold that the same principle would preclude the intervening State from requesting the reformation of the chamber. In any case, if the intervening State has acquired the status of a party, it should at least be considered as entitled to appoint a judge *ad hoc*.[140] It may be interesting to note that, in its application for permission to intervene, Nicaragua complained of the fact that the Court, when deciding on the constitution of the chamber for dealing with the *Land, Island and Maritime Frontier Dispute case*, had not taken into account the possible existence of interests of third States involved in the dispute, thereby suggesting that propriety should have prevented the Court from accepting the request of the parties to refer the case to a chamber.[141] 36

4. Dissolution of a Chamber

Since under Art. 26, para. 2, *ad hoc* chambers are established only for dealing with a given case, usually, once the final judgment has been delivered, the chamber becomes *functus officio*. It may however be that the instrument conferring jurisdiction on the chamber entrusts the chamber with additional tasks concerning enforcement of the judgment. If the exercise by the chamber of the power thus conferred by the parties is consistent with the Statute and the Rules, and the chamber accepts that task, the 37

[137] ICJ Reports (1990), pp. 3 *et seq.* On the chamber's decision *cf.* further Chinkin on Art. 62, especially MN 41–49.

[138] Indeed, the chamber seemed to leave open the possibility for a State to intervene as a party. *Cf.* on this point, Palchetti, P., 'Opening the International Court of Justice to Third States: Intervention and Beyond', *Max Planck Yearbook of United Nations Law* 6 (2002), pp. 139–181, pp. 153–154.

[139] ICJ Reports (1990), pp. 3, 5.

[140] This would raise a further problem, since it is not clear whether the judge *ad hoc* would simply add to judges composing the chamber or whether instead the procedure of Art. 31, para. 4 should apply. *Cf.* Zimmermann, *ZaöRV* 50 (1990), pp. 646, 655.

[141] *Land, Island and Maritime Frontier Dispute case, supra*, fn. 9, Pleadings, vol. III, pp. 735, 738 (para. 12).

chamber may reconvene after rendering the final judgment.[142] However, a chamber established for dealing with a given dispute could not be reconvened in order to settle another dispute between the same parties if that other dispute concerned a different, albeit related, subject-matter, even if the instrument conferring jurisdiction in relation to the first dispute contemplated the possibility for the parties to submit to the chamber also the other dispute.[143] Since in this case the parties would substantially be submitting a new dispute, a new chamber should be established by the Court.[144]

IV. Procedure

38 In recognition of the role of the parties within the procedure for the establishment of *ad hoc* chambers, Art. 17, para. 1 of the Rules provides that a request for the formation of such chambers may be filed at any time until the closure of the written proceedings.[145] Thus, unlike the rules governing the procedure before standing chambers, Art. 17, para. 1 of the Rules gives parties a wide discretion to decide when to submit the request for the formation of *ad hoc* chambers. This could imply that, before referring a case to a chamber, the Court may have to pronounce on incidental proceedings arising in connection with that case.

V. Evaluation

39 Following their initial success, the prospect that *ad hoc* chambers could become a real alternative to the full Court prompted many critical reactions. The influence of States on the formation and functioning of *ad hoc* chambers was regarded as a dangerous shift towards transforming the Court into a series of arbitral tribunals. Others expressed concerns that the use of *ad hoc* chambers would compromise the representative character of the Court and the unity of its jurisprudence. Some of the criticism voiced against *ad hoc* chambers may now appear to be excessive.[146] In any case, the substantial decrease in the number of chamber proceedings, together with the parallel strong increase in the number of cases submitted to the full Court, has silenced the above-mentioned criticisms.[147] On the whole, the current situation, in which the great majority of cases are taken to the full Court while only one case, concerning a strictly bilateral frontier dispute, is dealt with by an *ad hoc* chamber, may be regarded as better reflecting the

[142] *Cf.* the order of 9 April 1987 rendered by the chamber established for dealing with the *Frontier Dispute case* (Burkina Faso/Mali), *supra*, fn. 15, ICJ Reports (1987), pp. 7 *et seq.* In this order, which was adopted after the final judgment had been rendered, the chamber appointed three experts which should assist the parties in the demarcation of their frontier in the disputed area.

[143] A situation of this kind was apparently contemplated by the Special Agreement between United States and Canada granting jurisdiction to an *ad hoc* chamber in the *Gulf of Maine case*. Article VII of this Agreement provided that, under certain conditions, the parties could decide to submit to the chamber a question, concerning the seaward extension of the maritime boundary, which was not included among those which the chamber was requested to decide. *Cf.* ICJ Reports (1984), pp. 246, 255.

[144] Oellers-Frahm, pp. 316, 324; and *cf.* also Zimmermann, *Dickinson JIL* 8 (1989), pp. 1, 31.

[145] Since Art. 26, para. 2 provides that the Court may 'at any time' form an *ad hoc* chamber, the time-limit fixed by the Rules has been criticized as restricting excessively the power of the parties to submit a request for the referral of the case to a chamber. *Cf.* Rosenne, *Law and Practice*, vol. III, pp. 1119–1120. Yet, reasons of good administration of justice seem to militate against the possibility that the forum competent for deciding a dispute be changed at a very advanced stage of the proceedings.

[146] *Cf.* Jennings, pp. 197–201.

[147] It is difficult to say whether the rather frequent use of chambers during the 1980s may have contributed to enhancing the confidence parties currently place in the Court. For comment on this point *cf.* Valencia-Ospina, pp. 503, 508.

original function assigned to *ad hoc* chambers under the Statute. It conforms to the idea of *ad hoc* chambers as additional instruments put at the disposal of States for the settlement of disputes of minor, technical or regional character. Seen in this perspective, the fact that, notwithstanding the role parties may have in the constitution of chambers, States prefer to submit their dispute to the full Court, is not surprising. Since the Court is now dealing with a relatively heavy case-load, it may be thought that the use of chambers may contribute to expedite the Court's work. Yet, under the current practice, this assumption does not prove to be right. Proceedings before a chamber are not necessarily more expeditious than proceedings before the full Court. Moreover, the functioning of chambers seriously affects the time available for the full Court.[148]

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[148] *Cf.* the report of the study group established by the British Institute of International and Comparative Law on 'The International Court of Justice. Efficiency of Procedures and Working Methods', reproduced in Bowett, *ICJ*, pp. 63–64.

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