DISSENTING OPINION OF JUDGE SHAHABUDDEEN

The *ad hoc* chamber system established in 1945 by Article 26, paragraph 2, of the Statute of the Court is a valuable one. I make it clear at the outset that the burden of this dissenting opinion is concerned not with the system as so established, but only with certain related procedural arrangements adopted in 1972 and first utilized in 1982. In my view, the Nicaraguan Application arises from, and illustrates, the existence of certain problems in these procedural arrangements. If these problems are resolved, it will be possible for the *ad hoc* chamber system to exercise the authority of the Court more credibly and more convincingly than it can at the moment, and so more effectively fulfil the expectations alike of the founders of the system as of States which have recourse to it, including States wishing to exercise their right under the Statute to apply for permission to intervene in cases pending before such a chamber. To what problems am I then referring?

Judged objectively and by universally accepted judicial standards, the selection of its members having been substantially determined or influenced by the Parties under the procedural arrangements referred to, the Chamber in this case cannot, in my respectful view, discharge the functions of the International Court of Justice, in its character as a court of justice, in relation to an application by a non-party for permission to intervene in the case pending before it. By itself disclaiming jurisdiction and instead leaving the Applicant with no recourse except to the Chamber, the Court effectively denies the Applicant its right to have its Application under Article 62 of the Statute judicially determined in the ordinary way. If, as I consider, this is the reality, the legality of the arrangements which produce so seemingly unacceptable a result would appear to be squarely in issue, with important questions unavoidably arising as to the fundamental nature of the Court itself and its relationship with its chambers. I have given careful thought to the possibility of discovering some way of reconciling my thinking on these matters with the position taken by the Court in the Order made by it today. It is with much regret, courtesy and respect that I find that I have the misfortune to conclude that the existing procedural arrangements for forming *ad hoc* chambers are not valid, but that, if they are, Nicaragua's Application for permission to intervene should have been heard and determined by the full Court. My reasons for so holding are given in Parts I to VI as to the first point, and in Part VII as to the second.

PART I. PRELIMINARY

The Court's Dilemma

The finding of the Court that it is for the Chamber to deal with Nicaragua's Application is based essentially on the ground that the Chamber was formed to deal with the particular case and must also deal with proceedings incidental to it. In the normal case, I would agree. But, in the circumstances of this case, is the decision as logical as the Court suggests? Under the Court's own Rules, as amended in 1972 and revised in 1978, apart from two of the five members of the Chamber being *ad hoc* judges appointed as of right by the existing Parties, the remaining three were elected by the full Court to the Chamber after the Court had taken into account the views of the existing Parties as to the particular Members of the Court who should be so elected. Whether it is in fact so or not — and it is the Court which knows best — the Applicant is entitled to, and, as appears from its Application and written arguments, clearly does, entertain a reasonable apprehension that the three Members so elected were elected in conformity with the expressed wishes of the existing Parties. In substance, therefore, the Applicant is being told by the Court that it has no option but to submit to a Chamber all of whose five members it is reasonably entitled to feel have been practically hand-picked by the existing Parties. Conceivably, Nicaragua may nevertheless accept that option and go to the Chamber, and, if it does so, its Application may conceivably be granted by the Chamber. However, this possibility cannot affect the legal situation, as I see it. For it is not difficult to see why Nicaragua has not so far gone to the Chamber and why it has in fact come to the full Court — an attitude which is in itself the first practical illustration of how far an interested non-party State is likely to regard such a chamber as a legitimate manifestation of the Court. When its presentation is fairly read, Nicaragua obviously takes the view that the Chamber, as it stands, cannot discharge the functions of the International Court of Justice, considered as a court of justice, in relation to itself. That that is the central issue, inescapably presented, seems plain to me. Without first dealing with that issue, it is, in my view, logically impossible to make an intelligent appreciation of the problems raised by Nicaragua's Application.

I have nevertheless asked myself whether it could persuasively be said that this is not the appropriate moment to consider the matter. However, if it is not, I have difficulty in seeing what moment will be appropriate so long as the system continues to operate. On the other hand, should the system cease to operate, it could hardly then be judicially appropriate to consider the matter: it would have become academic. Passivity at this stage is not a guarantee against the occurrence of other and possibly graver problems yet to come, for the implications of the new system cut so deep and run so wide as inevitably to surface one day or another as an issue demanding not to be ignored. I believe that day has come. To fail to

consider the matter now would be but sad proof of the common observation that an innovation, once allowed, gathers momentum which progressively subdues any inclination to inquire, sometimes to the point of producing misgiving that the very assertion of a right to do so might be received with surprise and disbelief. Often, indeed, it is the law which reconciles itself to reality. Still, cases may arise in which that reconciliation cannot be made — cases, for example, in which the application by the Court of a text taken at its received face value yields a result so deeply offensive to basal norms of justice as to make it impossible for the Court responsibly to avert its gaze from the necessity to examine the foundations of the system which leads to that result. It seems to me that here is such a case.

In a highly regarded statement the Court some three decades ago enunciated the reassuring and important principle that the "Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*Northern Cameroons, I.C.J. Reports 1963*, p. 29). If, as I believe, this was not mere judicial rhetoric, that duty rests throughout with the Court and must be discharged by it whether or not invoked by a party (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 323, *per* Judge Gros, dissenting). No doubt, the Court is not required gratuitously to examine problems which are not fairly raised by the circumstances of a case. But I cannot think that that is the situation here.

The problem in this case is, of course, of an institutional character: I state most distinctly that it has nothing whatever to do with the integrity of the very distinguished members of the Chamber. However, it does have everything to do with fundamental concepts of justice. The leading principle, and its applicability to this Court, are not, I think, in doubt. It was cited by Judge Lachs in an admirable reassessment of his earlier stand on the question whether an applicant for permission to intervene should have been heard even if its application was inadmissible. As he recalled, "It is, after all, 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' (Lord Hewart in *The King* v. *Sussex Justices*, ex parte *McCarthy*, 1 K.B. [1924], pp. 256 and 259)" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1986*, p. 171). That principle goes to the root of the claim of the Court to be considered as a court of justice. This being so, the duty of the Court, as the avowed guardian of its own integrity, to consider the implications of that principle in this case does not depend on whether the principle has been specifically invoked by the Applicant: it depends on whether it is presented by the facts themselves. I think it is. As it happens, however, the concern of the Applicant on the point is apparent both from its Application and from its

written arguments as presented in the letter to the Registrar from its Agent of 1 February 1990: the Applicant clearly considers — and this indeed is the heart of its contention — that the methods by which the Chamber has been formed do not allow it to function as a court of justice in relation to the Applicant's case.

The vice, then, in which the Court is held is this. Regardless of ultimate results, the Applicant has a right under Article 62 of the Court's Statute to apply for permission to intervene. However, while closing its own doors to the Applicant, the full Court is unable, in my view, to indicate any judicially acceptable alternative forum to which the Applicant may turn. In consequence, the Applicant is effectively denied its right to have its Application for permission to intervene judicially considered.

If, as I think, this is the dilemma in which the Court is caught, I am not able to see how it could be possible to avoid examining the legality of the arrangements from which that dilemma springs[1]. The line between judicial restraint and judicial abdication has to be observed if a judge's judicial mission is to be fulfilled. For myself, I fear it would be a transgression of that line to remain silent on the point. The justice of the case leaves me no defensible way in which I can avoid dealing with it. I proceed accordingly to consider it below. I am conscious of the length of that which ensues and can only hope that the importance of the matter furnishes some justification.

[1] The issue has been the subject of individual statements, made mostly out of Court, by a number of past and present Members of the Court, and from these I have benefited greatly and gratefully. See Judges Oda, Morozov and El Khani in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Aera, I.C.J. Reports 1982*, pp. 10, 11 and 13 respectively; Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", *American Journal of International Law*, 1973, Vol. 67, p. 1; B. A. S. Petrén, "Some Thoughts on the Future of the International Court of Justice", *Netherlands Yearbook of International Law*, 1975, Vol. 6, p. 59; Mohammed Bedjaoui, "Remarques sur la création de chambres *ad hoc* au sein de la Cour internationale de Justice", Société française pour le droit international, Colloque de Lyon, *La juridiction internationale permanente*, Paris, Pedone, 1987, pp. 73-78; Mohammed Bedjaoui, "Universalisme et régionalisme au sein de la Cour internationale de Justice: La constitution de chambres *ad hoc*", *Liber Amicorum, Colección de Estudios Jurídicos en Homenaje al Prof. Dr. D. José Pérez Montero*, Universidad de Oviedo, 1988, p. 155; Stephen M. Schwebel, "*Ad Hoc* Chambers of the International Court of Justice", *American Journal of International Law*, 1987, Vol. 81, p. 831; Stephen M. Schwebel, "Chambers of the International Court of Justice Formed for Particular Cases", in Y. Dinstein (ed.), *International Law at a Time of Perplexity*, 1989, p. 739; Shigeru Oda, "Further Thoughts on the Chambers Procedure of the International Court of Justice", *American Journal of International Law*, 1988, Vol. 82, p. 556; T. O. Elias, *The United Nations Charter and the World Court*, Lagos, 1989, pp. 16 and 203 ff.; and Hermann Mosler, "The *Ad Hoc* Chambers of the International Court of Justice: Evaluation after Five Years of Experience", in Dinstein, *op. cit.*, p. 449.

The Issues

The principal point concerns the operation of Article 17, paragraph 2, of the 1978 Rules of Court, which requires the President of the Court to ascertain and report to the Court the views of the parties regarding the composition of an *ad hoc* chamber before the Court elects Members of the Court to be members of the chamber to hear the particular case. It is not in question that, as Nicaragua has pointedly recalled, the intention was that, in those views, the parties were to be free to indicate "exactly which individual judges they desire on the Bench for that case" (Edvard Hambro, "Will the Revised Rules of Court Lead to Greater Willingness on the Part of Prospective Clients?", in Leo Gross (ed.), *The Future of the International Court of Justice*, 1976, Vol. 1, p. 368, cited in the letter to the Registrar from the Agent for Nicaragua of 1 February 1990). Does this arrangement open the door to an invasion by the parties of the proper province of the Court?

The available material shows beyond doubt that the framing of Article 17, paragraph 2, of the Rules of Court 1978 (in substance Article 26, paragraph 1, of the Rules of Court as amended in 1972) was motivated by a desire "to accord to the parties", in the words of one of its principal architects, "a decisive influence in the composition of *ad hoc* Chambers" (Eduardo Jiménez de Aréchaga, *loc. cit.*, p. 2; and see *ibid.*, p. 21). The interesting mechanics employed in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Constitution of Chamber* (*I.C.J. Reports 1982*, p. 3) only served to highlight the lengths to which this purpose could go. In that case, the parties made it unmistakably clear to the Court that the litigation would not proceed unless the selection, as well as the timing of the selection, of members of the chamber conformed in every material detail to their expressed wishes. And the Court did exactly as was required. It is scarcely worthwhile to seek to put a gloss on this as being other than the practical result of the plainly promulgated will of the parties. Is this speculation? Here is the declaration made by Judge Oda:

> "While I voted in favour of the Order, it should in my view have been made known that the Court, for reasons best known to itself, has approved the composition of the Chamber entirely in accordance with the latest wishes of the Parties as ascertained pursuant to Article 26, paragraph 2, of the Statute and Article 17, paragraph 2, of the Rules of Court." (*Ibid.*, p. 10.)

The choice of language employed in Article 26, paragraph 1, of the Rules of Court 1972 might have led, on the one hand, to some obscuring of the possibility of the new provision being pressed to the extent to which it was later pressed in the *Gulf of Maine* case, and might, on the other hand, have been thought to leave open the possibility of an answering argument that notification of the views of the parties to the Court still left the Court

with the final say on selection of personnel, as indeed it did: the Court can elect judges other than those proposed by the parties. But, to adopt the words of Judge Gros, an approach of this kind may not unfairly be regarded as resting on the "supposition that words can be used to suppress a problem rather than deal with it" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 368). Delicacy in legislative formulation could not really conceal the fact that one way or another the parties were being conceded a substantial, if not indeed a "decisive", say in the selection of particular judges, for it could not be supposed that they were being accorded a right to express views which the Court was free entirely to disregard. Judge Jiménez de Aréchaga's statements leave no room for doubt on the point. Neither do those of Judge Petrén (B. A. S. Petrén, *loc. cit.*, p. 64).

Leaving aside the question of effective dictation, the question which arises — and it is desired to emphasize that this is the question — is whether the new Rules could, consistently with the Statute of the Court and the Charter of the United Nations, confer on the parties to a case a right to influence the election of regular Members of the Court to sit on an *ad hoc* chamber of the Court to hear and determine that particular case. For it is possible to grant the good faith of, and even to commend — as I do — the intention to promote the use of the Court, while respectfully asking whether the steps taken in pursuance of that intention resulted in the creation of a body different from any chamber authorized by the Statute. True, as was observed in 1972 by the then President of the Court, "there is nothing sacrosanct about the International Court of Justice itself in its present form and structure" (President Sir Muhammad Zafrulla Khan, speaking on the occasion of the fiftieth anniversary of the World Court, *I.C.J. Yearbook 1971-1972*, p. 139). As he noted, within the Court's Statute provision already existed, though not up to then utilized, for the appointment of *ad hoc* chambers. Clearly, however, if something was to be done to encourage use of that mechanism, it would be necessary to bear in mind that, while there might be nothing sacrosanct about the Court itself in its then form and structure, if that form and structure were in consequence to be changed, the prescribed procedure for effecting the change should be employed.

In addition to the foregoing question of constitutionality, a second and a third question consequentially arise. The second question concerns the validity of the amended Rules of Court in so far as they seek to give a judge elected to an *ad hoc* chamber a tenure which is greater than that of a judge not so elected. The third question concerns the power of the Court to reverse its previous decisions on the right of parties to influence the composition of *ad hoc* chambers, and to discontinue the practice which those decisions initiated. The first question is examined in Parts II and III. The second and third questions are examined in Parts IV and V respectively. Part VI sets out the general conclusions as to the status of the existing arrangements relating to *ad hoc* chambers. Part VII considers the Nicara-

guan Application on the assumption that the existing Chamber is validly constituted.

Limits of the Court's Rule-Making Power

In a general sense, the matter turns on the limits of the rule-making power of the Court, and this aspect may accordingly be taken up in this Preliminary Part. Article 30, paragraph 1, of the Statute reads: "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure." Changes made in 1945 in the English text of the corresponding provision of the Rules of Court of the Permanent Court of International Justice were only intended to bring it into harmony with the previous French version (see Manley O. Hudson, "The Twenty-Fourth Year of the World Court", *American Journal of International Law*, 1946, Vol. 40, p. 28; and *P.C.I.J., Series D, Third Addendum to No. 2*, report by Sir Cecil Hurst, p. 758). Accordingly, recourse may be had to the learning relating to the earlier provision in elucidating the meaning of the existing provision. As a matter of necessity, the power conferred by the earlier provision was used to fill certain lacunae in the Statute (Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, New York, 1943, p. 275). It could also cover questions of internal organization of the Court (*ibid.*, p. 270). And, no doubt, within any applicable limitations, the Court was free to determine the content of its Rules. It is not in issue, however, that —

> "[t]he chief object with which rules of procedure are made is to inform those who are responsible for the conduct of a case before the Court what steps have to be taken, and when and how, for the purpose of submitting that case to the decision of the Court" (report by Sir Cecil Hurst, *loc. cit.*).

It seems safe to assume that, as regards *ad hoc* chambers, the existing Statute left no lacunae which might require remedial exercise, on grounds of necessity, of the rule-making power of the Court. In this case, nothing was being filled in: something was being changed. Previously the selection of serving judges to be members of an *ad hoc* chamber rested with the Court to the strict exclusion of the parties. That was undoubtedly the legal position. And it was a position which involved no gaps waiting to be filled before the established mechanism could legally function (see René-Jean Dupuy, "La réforme du Règlement de la Cour internationale de Justice", *Annuaire français de droit international*, 1972, Vol. XVIII, p. 270). What was undertaken in 1972 was a modification of that mechanism with a view to making it more attractive to potential users. That did not involve the filling in of any legal lacuna. Nor could it be said that the change made could be justified as an exercise of the rule-making power of the Court in

relation to matters of its internal organization. That power, as generally understood, does not comprehend power to confer rights on external entities over the Court's internal organization. The residual question then is whether the change could be justified as an exercise of the rule-making power in relation to litigation procedure.

To the question thus stated, the answer seems plainly "No". Nevertheless, it is proposed to examine the question, first, from the point of view of consistency of the character of an *ad hoc* chamber, as modified by the new Rules, with the substantive character of the Court as visualized by the Charter and laid down by the Statute, and, second and more specifically, from the point of view of consistency of the new Rules with the controlling provisions of Article 26 of the Statute. These two areas are dealt with in Parts II and III respectively.

PART II. CONSISTENCY OF THE CHARACTER OF *AD HOC* CHAMBERS AS MODIFIED BY THE NEW RULES WITH THE CHARACTER OF THE COURT

The single most important question in this matter is to what extent, if any, did the constitution of the Court visualize that parties to a case could have any influence in determining which Members of the Court should sit in that case. An understandable predisposition to assume a general right to exert some such influence is observable in the case of an international tribunal, as distinguished from a municipal court; and that predisposition, in a measure, probably underlies attitudes favourable to the new arrangements. But the precise answer to the question posed in the case of this particular Court must turn, I believe, on the exact juridical character of the Court and, by extension, of its chambers. In this respect, it seems to me that the essential distinction is that alluded to by Nicaragua in its reference to "the institutional conception of the Court as a judicial organ — and not one of arbitration . . ." (letter to the Registrar from the Agent for Nicaragua, 1 February 1990). I believe that distinction can bear retracing and emphasis.

That the Court is a court of justice is obvious. Yet it may be that in that very obviousness lurks a danger that the primal considerations involved may be taken for granted. So it is proposed to revisit briefly the historical character of the Court, not only with the object of regaining a feel for the real nature of the Court, but also with a view to determining whether the original concept still has validity, and, if it has, what are the limits of tolerable derogations from the norm. It is particularly important to do this for the reason that, although it would be wrong to view an international court of justice as if it were a carbon copy of a municipal court of justice, it would be equally misleading to suppose that there is a total absence of

analogy in respect of the basic elements of the concept of a court of justice.

The well-worn distinction between an arbitral tribunal and a court of justice need not be recited (see *inter alia* James Brown Scott, *The Status of the International Court of Justice*, 1916, p. 24). There was, indeed, some early concern with the question whether the Permanent Court of International Justice could be regarded as an arbitral body if it was competent to adjudicate on purely political disputes as distinguished from legal disputes involving political features (see Secretariat of the League of Nations, "Memorandum on the Different Questions Arising in Connection with the Establishment of the Permanent Court of International Justice, Appendix", set out in *Permanent Court of International Justice, Advisory Committee of Jurists, Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice*, 1920, p. 115). But that possibility does not appear to have been seriously pursued and need not detain inquiry: the Court does not regard itself as competent to decide questions not governed by legal principles (see *inter alia* Judge Kellogg's observations in the case of the *Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 24*, pp. 29-34; the *Certain Norwegian Loans* case, *I.C.J. Reports 1957*, p. 66, *per* Judge Lauterpacht; and the case concerning *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), I.C.J. Reports 1988*, p. 91, para. 52). The whole evolution of the thinking leading to the creation of the Permanent Court disclosed a settled intention to create a court of justice in the sense generally understood in municipal law. A principal feature of the new body was that its judicial personnel were to be preordained: unlike an arbitral body, particular judges were not to be selected by the parties for particular cases.

In one way or another this important point was repeatedly hammered home. Its essentials were to be found in the justly famous instructions issued by Secretary of State Elihu Root to the United States delegation to the 1907 Hague Conference (see Secretary of State Elihu Root to Mr. J. H. Choate and others, in James Brown Scott (ed.), *Instructions to the American Delegates to the Hague Peace Conferences and Their Official Reports*, 1916, pp. 79-80. The instructions were quoted in part by Judge Kellogg in the case of the *Free Zones of Upper Savoy and the District of Gex, loc. cit.*, pp. 36-37). The principle was affirmed in the course of the proceedings of the Advisory Committee of Jurists, 1920. The Committee clearly accepted the understanding of the League of Nations Secretariat that the new Court, as visualized by Article 14 of the Covenant, would "be a Court of Justice in the technical and restricted meaning of the term. Its character would be similar . . . to that of the Courts of Justice of the different countries" ("Note on the Nature of the New Permanent Court of International Justice", in *Documents, op. cit.*, p. 113; and see, *ibid.*, p. 7). The continuance of the Permanent Court of Arbitration side by side with the new

Court — and indeed in the same building, as is still the case — was regarded as confirmatory of "the conclusion that the new Court will be in principle a Court of Justice" (*Documents, op. cit.*, p. 115). The coexistence of the Permanent Court of International Justice with the Permanent Court of Arbitration and other tribunals of arbitration was expressly recognized in Article 1 of the Statute of the Court reading:

> "This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement."

Parties could always go to arbitration. Now, on a potentially global basis, they were being given a choice between that and a new piece of machinery — a court of justice (see also B. C. J. Loder, "The Permanent Court of International Justice", in *Report of the Twenty-Ninth Conference of the International Law Association*, London, 1920, p. 148).

M. Léon Bourgeois, the distinguished and learned delegate of the Council of the League of Nations, alluded to these ideas when, addressing the inaugural meeting of the Committee of Jurists on 16 June 1920, he said:

> "The Court of Justice must be a true Permanent Court. It is not simply a question of arbitrators chosen on a particular occasion, in the case of conflict, by the interested parties; it is a small number of judges sitting constantly and receiving a mandate the duration of which will enable the establishment of a real jurisprudence, who will administer justice. This permanence is a symbol. It will be a seat raised in the midst of the nations, where judges are always present, to whom can always be brought the appeal of the weak and to whom protests against the violation of right can be addressed. Chosen not by reason of the State of which they are citizens, but by reason of their personal authority, of their past career, of the respect which attaches to their names known over the whole world, these judges will represent a truly international spirit which is by no means, as some people pretend, a negation of the legitimate interests of each nation, but which is, on the contrary, the safeguard of these interests, within the very limits of their legitimacy." (Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes*, The Hague, 1920, pp. 7-8.)

The Report of the 1920 Advisory Committee of Jurists in turn stated:

> "In the Court of Arbitration, it falls to the parties to choose their judges, after the commencement of the dispute; whereas in the case of the Permanent Court of International Justice, the contesting parties no longer have the choice of the judges." ("Report of the Advisory Committee of Jurists", Annex No. 1 to the *Procès-Verbaux, op. cit.*, p. 695.)

Then, after referring (p. 696) to M. Bourgeois's opening speech, the Report added:

> "In contradistinction to the Court of Arbitration, the Permanent Court of International Justice will really deserve its name, as it will consist of judges, who will continue to sit from one case to another; the parties will not have to choose them for this purpose, and with one exception, which will be dealt with later in connection with summary procedure, the parties may not fix the number of judges." (*Ibid.*, p. 698.)

The exception seemingly referred to draft Article 26 of the Statute reading:

> "With a view to the speedy despatch of business the Court shall form, annually, a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure." (*Ibid.*, p. 719.)

The parties could fix the number of judges only in the sense of opting for this chamber with its prefixed membership of three.

How was all of this understood when the new Court was eventually established? Addressing the Court on 15 February 1922 on the occasion of its official opening, the Dutch Foreign Minister, M. Van Karnebeek, said:

> "Your responsibility is the greater because the States, who will have recourse to you for justice, will have renounced the right of freely choosing their judges, an outstanding feature of the system of arbitration which exists side by side with you under this roof." (*P.C.I.J., Series D, No. 2*, p. 322.)

To which President Loder agreeably replied:

> "The jurisdiction of this Court differs from arbitration. The judges are no longer to be nominated by the parties. They form a permanent Court.
>
> The procedure has no longer to be framed; it is laid down in the Statute and in the Rules of Procedure.
>
> The two institutions exist side by side; each fulfils its special duty; each possesses its own sphere of action; both live peacefully together in this same building, like an older and a younger sister.

> Is the younger organisation perfect? Will its Statute never require amendment? Nothing is perfect in the hour of its birth. Here also the law of evolution will make itself felt." (*P.C.I.J., Series D, No. 2*, pp. 329-330.)

So the structure of the institution could be changed and might need to be changed. But, meanwhile, its character was that of a court of justice as ordinarily understood. In the light of that character, it is not difficult to imagine what might have been President Loder's reaction to a change sought to be brought about by an amendment to the Rules of Court for the purpose of giving the parties "a decisive influence" in the selection of regular judges of the Court to sit on a chamber established under its Statute, even as recast for the present Court in 1945.

This aspect may be summed up with these observations of Judge Kellogg in the case concerning the *Free Zones of Upper Savoy and the District of Gex*:

> "It is evident from a consideration of the circumstances which called for the creation of this Court and the history of its organization, as well as from a careful examination of the Court's Statute, framed by a special committee of jurists appointed by the Council of the League of Nations, that this tribunal is a Court of justice as that term is known and understood in the jurisprudence of civilized nations." (*P.C.I.J., Series A, No. 24*, p. 33.)

The idea that the Court was a court of justice in contradistinction to being an arbitral body formed the ground of opposition to two important features, namely, that relating to chambers and that relating to *ad hoc* judges. Although in both cases the desired provisions were made, the material leaves little room for doubt that the basic judicial character of the Court was intended to prevail throughout its arrangements and functioning, save in respect of variations clearly authorized by the Statute itself.

As regards the idea of chambers, speaking in the Advisory Committee of Jurists in 1920, Lord Phillimore framed his opposition this way:

> "The idea of 1907 to divide the Court into chambers, also is too closely bound to the idea of arbitration, since these chambers would be formed *in casu.* The Court must sit *in pleno* to be a real Court of Justice . . . the number of judges was of secondary importance; the essential thing was that as far as possible all judges should sit at the same time." (*Procès-Verbaux, op. cit.*, 1920, p. 175.)

Referring to the proceedings of the 1920 Committee, Judge Hudson later wrote:

> "No basis for excluding some members of the Court from sitting was found, and as the debate progressed the 1920 Committee of Jurists came to the view that the unity of the Court required that it should

always sit *in pleno*; its proposal to this effect was embodied in the text as adopted." (Hudson, *The Permanent Court of International Justice*, 1943, pp. 173-174.)

The establishment of chambers was conceded as an exception to this primary rule. As was noted by Lord Finlay, Article 25 of the Statute

> "laid down that the full Court should sit except when expressly provided otherwise. These exceptions were specially dealt with in Articles 26 and 27 of the Statute" (*P.C.I.J., Series D, No. 2*, 11 February 1922, p. 28).

He accepted that the "Statute should be interpreted broadly", but would scarcely have thought this a sufficient warrant for the Court to act through chambers composed otherwise than as expressly authorized by the Statute itself.

In this connection, a point of some interest is that, whereas Article 25 of the 1920 Statute read, "The full Court shall sit except when it is expressly provided otherwise", Article 25 of the present Statute, while retaining those words, prudentially added the words, "in the present Statute" (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XVII, p. 412, Sixth Meeting of the Advisory Committee of Jurists, 12 June 1945). The official records do not show the reason for the change, which Judge Hudson was probably right in characterizing as "merely stylistic" (Manley O. Hudson, "The Twenty-Fourth Year of the World Court", *American Journal of International Law*, 1946, Vol. 40, pp. 24-25). But, while no change of substance was involved, it would seem clear that the stylistic change made was inspired by the thought of bringing out and emphasizing an original principle of pre-eminent importance, namely, that exceptions to the general rule that the full Court should always sit had to be authorized by express language in the Statute itself. Exceptions could not be added by Rules of Court.

The question is: Can it be said that an *ad hoc* chamber, as constituted under the new Rules of Court, falls within an exception which is expressly authorized by the Statute itself to the dominant rule that the Court should sit *in pleno*?

As regards *ad hoc* judges, here too, as is well known, the opposition was mounted on the basis that the appointment of such judges was more appropriate to arbitral tribunals than to courts of justice. The 1920 Committee of Jurists was, of course, aware of possible objections. Referring to a hypothetical case in which both sides had appointed an *ad hoc* judge, its Report stated:

> "In this particular, our Court more nearly resembles a Court of Arbitration than a national Court of Justice. But this variation is necessary. Though our Court is a true Court, we must not forget that it is a Court between States. For the reasons already given, States attach much importance to having one of their subjects on the Bench

> when they appear before a Court of Justice." ("Report of the Advisory Committee of Jurists", 1920, *loc. cit.*, p. 722.)

The Report thus recognized the substance of the point made by M. Loder when he said: "If the right to choose such judges were given to the parties, this would give the proceedings a characteristic essentially belonging to arbitration." (*Procès-Verbaux, op. cit.*, p. 531. See also, *ibid.*, pp. 169-170; and B. Schenk von Stauffenberg, *Statut et Règlement de la Cour permanente de Justice internationale, Eléments d'interprétation*, Berlin, 1934, pp. 181-182.)

Thus, although it was agreed to allow *ad hoc* judges, it was appreciated that this arrangement evinced an arbitral aspect which was not quite in harmony with the fundamental judicial character of the Court as a court of justice. The arrangement had to be fought for and justified on very special grounds (see "Report of the Advisory Committee of Jurists", 1920, *loc. cit.*, p. 721; the remarks of Lord Phillimore in *Procès-Verbaux, op. cit.*, p. 528, and of Mr. Adatci, *ibid.*, p. 529; the remarks of Judge Altamira on 23 June 1926, in *P.C.I.J., Series D, Addendum to No. 2*, p. 26; the "Report Presented by the French Representative, M. Léon Bourgeois, and Adopted by the Council of the League of Nations at Its Meeting at Brussels on October 27th, 1920", in League of Nations, *Permanent Court of International Justice, Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, p. 48; and the Registrar's statement in 1932 in *P.C.I.J., Series D, Third Addendum to No. 2*, p. 18, footnote). And these special grounds are no doubt still valid. But a fair interpretation is that the idea of selection of judges by the parties, which that arrangement involved, was not intended to be extended to cases not clearly authorized by the Statute, whether by express language or by necessary implication.

How alien to the concept of a court of justice — even an international court of justice — is the notion of parties nominating its members, may be gathered from the grounds on which a proposal was made and rejected in the 1920 Committee of Jurists for members of a chamber of the Permanent Court of International Justice to be designated by the parties (*Procès-Verbaux, op. cit.*, pp. 183-184, 517, 524). M. Ricci-Busatti's written proposal to that effect was expressly prefaced with the statement that the "Court of Justice should be connected as intimately as possible with the Court of Arbitration, the functions of which it merely develops" (*ibid.*, p. 183). The summary record of the related discussions not surprisingly showed that, in his presentation,

> "M. Ricci-Busatti personally started from an entirely different conception: he maintained his point of view that too much distinction should not be drawn between the new Court and the old Court of

> Arbitration; that there was no essential difference, especially in international relations, between Arbitration and strict Justice" (*Procès-Verbaux, op. cit.*, p. 177).

So his proposal was frankly arbitral in character. M. Loder (with whom M. de Lapradelle agreed) in consequence had little difficulty in securing its rejection on the ground that, contrary to M. Ricci-Busatti's conception, the Court was indeed intended to be a court of justice (*ibid.*, p. 178; see also, *ibid.*, p. 526; and James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists, Report and Commentary*, 1920, pp. 27-28). Once the latter view of the character of the Court was upheld, as it was, the proposal was bound to fall. Using language uncannily anticipatory of some used in reference to the new Rules, M. Ricci-Busatti had urged that "it was desirable to allow the Parties, either directly or through the President, to have a certain influence on the composition of the section" (*Procès-Verbaux, op. cit.*, p. 526). The idea did not find favour, M. Loder and Baron Descamps, the President of the Committee, pointing out "that this method would too much resemble that proper to arbitration" *(ibid.)*. Can it be said that the juridical character of the present Court is so signally different from that of its predecessor as to justify acceptance now in place of rejection then?

Far from there being any difference, the present Court has repeatedly affirmed, in relation to itself, the substance of earlier pronouncements by its predecessor about its status as a court of justice. Despite some initial doubt as to the precise juridical relationship between the Permanent Court, in its advisory role, and the Council of the League of Nations, as early as 1923 the Court had occasion to observe that the "Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court" (*Status of Eastern Carelia, P.C.I.J., Series B, No. 5*, p. 29). That reference to "the Court, being a Court of Justice", was repeated by the Permanent Court in the case of the *Free Zones of Upper Savoy and the District of Gex* (*loc. cit.*, p. 15). The emphasis has been maintained by the present Court in several cases. See, for example, the case of the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* where the Court said: "The Court as a judicial body is . . . bound, in the exercise of its advisory function, to remain faithful to the requirements of its judicial character." (*I.C.J. Reports 1960*, p. 153.) The case of the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* represents a recent reaffirmation by the Court of its status as a "Court of justice" (*I.C.J. Reports 1988*, p. 29, para. 40). More particularly, using language which differences in context do not render inapplicable to the situation being considered, in the *Northern Cameroons* case the Court said:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There

> may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity." (*I.C.J. Reports 1963*, p. 29.)

At page 30, the Court insightfully added:

> "That [judicial] function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case."

Although certain specific rules were also involved, it seems clear that the refusal of the Court in the *Free Zones of Upper Savoy and the District of Gex* case to accede to the request of the parties that the Court should communicate to them unofficially the results of its deliberations illustrates the operation of an inherent limitation which the Court could not ignore (*P.C.I.J., Series A, No. 22*, p. 12). That limitation flowed essentially from the status of the Court as a court of justice. It is possible to see a similar inherent limitation, relating to the *audi alteram partem* principle, underlying much of the thinking of the Court in the *Status of Eastern Carelia* case (*P.C.I.J., Series B, No. 5*). So too with the cases of the *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco* (*I.C.J. Reports 1956*, p. 77), *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166) and *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1982*, p. 325). In the first of these Judge Winiarski noted that the

> "important problem which the Court had to resolve was to reconcile its advisory function and its character as a Court of Justice, as an independent judicial organ of international law" (p. 104).

A like inherent limitation, it is submitted, prevents the Court from allowing its decision as to which of its regular Members should sit in any particular case to be in the least influenced by the contesting parties.

The history of the creation of the Permanent Court makes it clear that the concept of a court of justice to which the Court was intended to conform was that of a court of justice as generally understood in municipal law. That being so, warnings about the danger of transposing municipal law ideas to the international plane would not seem apt in this context. The fact that the Court was to function on the international plane was not regarded as importing any substantial modifications of the essential elements of that concept in its application to the Court. This would seem to put limits to attempts to justify the new system by reference to the international nature of the Court. It is true, for example, that States which entrust

a dispute to an international tribunal expect to have a say in its composition and functioning (see René-Jean Dupuy, *loc. cit.*, p. 272). But if, as seems to be the case, the framers of the 1920 Statute and its successor did, on that very ground (see the "Report of the Advisory Committee of Jurists", 1920, p. 722, cited above), address their minds to, and did specify, the precise extent to which States were to be permitted to participate in the composition and functioning of the Court, is it competent for the Court itself, by an exercise of its subordinate and limited rule-making power, to enlarge the extent of that permissible participation as defined by the governing instrument? The material makes it clear that the concept of judges being selected by the parties was regarded as being a characteristic of arbitral procedures; that, as such, that concept was essentially opposed to the judicial character of the Court; that, on special grounds, it was, after anxious debate, nevertheless allowed a limited operation within the constitution of the Court in relation to *ad hoc* judges; but that this limited operation could not be extended consistently with the judicial character of the Court without an appropriate enabling amendment of its Statute.

PART III. CONSISTENCY OF THE NEW RULES WITH THE STATUTE OF THE COURT

The conclusion reached above is supported by a consideration of the relationship between Article 17, paragraph 2, of the Rules of Court 1978, and Article 26, paragraph 2, of the Statute of the Court. The latter provision, introduced in 1945, reads:

> "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."

Article 71, paragraph 3, of the Rules of Court 1946 correspondingly required the President of the Court to "ascertain the views of the parties as to the number of judges to constitute the Chamber".

The judicial character of the Court, as sought to be demonstrated above, would seem to support an argument *a contrario* to the effect that the specific reference in Article 26, paragraph 2, of the Statute to the approval of the parties of the "number" of judges of an *ad hoc* chamber (repeated, as it was, in Article 71, paragraph 3, of the 1946 Rules) excluded an intention to give them a say also over the selection of such judges.

Nothing in the records of the Washington Committee of Jurists 1945 and of the subsequent proceedings at San Francisco suggests an understanding that parties could have a right to select, or to influence the selection of, Members of the Court to be members of a chamber (see *Documents*

of the United Nations Conference on International Organization, San Francisco, 1945, Vol. XIV, pp. 200-202, 221-222, 271, 282, 317, 333-334 and 834-835). The closest one gets to any discussion of the matter is through Judge Hudson's much quoted statement in the Washington Committee of Jurists. The relevant part of the official records reads:

> "The next question, the Chairman said, was the number of judges on chambers. Sir Frederic Eggleston (Australia) asked whether the chamber of summary procedure could sit at the same time as the full Court. Judge Hudson pointed out that there had been little use of chambers and that the question had never arisen. He pointed out that under the present Statute the Court elected members to chambers for a given term of years and that the parties did not decide the number or the composition of the chambers. He thought the subcommittee was proposing a wholly different system when it provided for *ad hoc* appointment of chambers with the approval of the parties." (*Ibid.*, p. 199, 16 April 1945.)

Judge Hudson's statement that under the previous Statute "the parties did not decide the number or the composition of the chambers" was of course accurate. The statement also shows that Judge Hudson appreciated that there was a distinction between "number" and "composition". The new provision spoke only of "number", and the clear tendency in the recorded discussions was to refer to it as being so confined. However "wholly different" was the new system, it would require a powerful sidewind to extend the explicit reference to "number" to encompass "composition". As has been seen, the Court itself, through Article 71, paragraph 3, of the 1946 Rules of Court, reflected no such extension: it spoke expressly and deliberately of the President ascertaining "the views of the parties as to the number of judges to constitute the Chamber". One may well suppose that the judges who made that Rule in 1946 were close enough to the making of the new Statute to grasp its meaning correctly on this point. Had the intention of the Statute been to sanction consultation of the parties on composition, it is surprising that it should have taken the Court over a quarter of a century to divine so important a purpose and to incorporate it in its new Rules.

Even if, which is doubtful, Judge Hudson understood matters differently, the record does not suggest that so strange and strained an interpretation was shared by other members of the Washington Committee of Jurists. Two of the later speakers, Ambassador Cordova of Mexico and the Chairman of the Committee, Mr. Hackworth, spoke only of the "number". Ambassador Cordova in particular "pointed out that the Court was

to be given the power to fix the number to sit in the chambers and the parties given the opportunity to approve this arrangement" (*ibid.*). The chairman of the drafting committee did subsequently say that the draft Article 26 "provided that when the Court set up chambers to decide particular cases the approval of the parties should be obtained. This was in harmony with the advice of three judges of the Court" (*ibid.*, p. 221). But it would not be right to suppose that other members could have understood this language as embracing a requirement for obtaining the approval of the parties for the selection of particular judges. Referring to a statement made by Mr. Fitzmaurice on 16 April 1945, the record reads:

> "Mr. Fitzmaurice (United Kingdom) suggested that the Court should not be obliged to set up chambers in advance but if the Court decided to establish standing chambers the number should be fixed by the Court. If chambers were established *ad hoc*, the number of judges would be fixed by the Court with the consent of the parties. The question being put in this form, there were 21 votes in favor, and none in opposition." (*Ibid.*, p. 202.)

The form in which the question was put and unanimously answered could hardly have suggested to any of the participants that it concerned a requirement to obtain "the consent of the parties" for the selection of particular serving judges as members of an *ad hoc* chamber.

Judge Delgado of the Philippine Commonwealth, who spoke in the Committee of Jurists on 18 April 1945, did speak of "the composition of the chambers", but he did so in a manner which showed how utterly unacceptable he would have considered the idea of the parties being given a right to influence selection. The record reads in part:

> "Judge Delgado (Philippine Commonwealth) suggested that the number of judges to compose a chamber should be specified in paragraph 2 [of Article 26 of the Statute] as well as in paragraph 1 . . . The Chairman explained that in paragraph 2 it had been desired to leave the matter to the discretion of the parties . . . Judge Delgado . . . thought paragraph 2 should be consistent with paragraph 1, and he did not wish to have the composition of the chambers determined by political agencies." (*Ibid.*, p. 222.)

Judge Delgado was clearly opposed to conceding control, even if limited to "number", lest this should let in political influence over "composition".

In all the circumstances, it would require more than an isolated remark of the kind made by Judge Hudson to evidence a credible intention to effect by indirection an amendment of manifest substance in the inherited scheme of the Statute of the Permanent Court — an amendment of sub-

stance because, as Judge Hudson himself almost certainly knew (see Hudson, *The Permanent Court of International Justice*, 1943, p. 179, footnote 49) and as has been mentioned above, a 1920 proposal to permit parties to nominate the members of a chamber had been rejected on the precise ground that "this method would too much resemble that proper to arbitration". That ground went of course to the heart of the judicial character of the Court. To modify that character on the slender foundation of Judge Hudson's remark would seem a somewhat daunting enterprise. In the *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judge Ammoun made a remark which comes to mind: "But if such had been the intention of the authors of the Convention, they would have expressed it, instead of allowing it to be deduced in such a laborious fashion." (*I.C.J. Reports 1969*, p. 115.)

Opposing arguments have largely founded themselves on a statement, also much quoted, made by Judge Jessup in 1970 when he said:

> "It has been suggested elsewhere that if the difficulty of resort to the International Court of Justice lies in a State's preference for a tribunal in whose composition it will have a say, this result can be achieved by the use of 'a Chamber for dealing with a particular case', as is authorized by Article 26 (2) of the Statute. Under Article 31 of the Statute, the provisions about national judges are applicable to such a Chamber so that the Chamber could be composed of a judge of the nationality of each one of the parties, with a third judge elected by the Court very much as the President of the Court now often is authorized to appoint presiding arbitrators." (Philip C. Jessup, "To Form a More Perfect United Nations", *Collected Courses of the Hague Academy of International Law*, Vol. 129 (1970-I), p. 21.)

The procedure contemplated by Judge Jessup, as illustrated by himself, (Philip C. Jessup, *The Price of International Justice*, 1971, pp. 62-64) involved, first, an election by the Court of three of its Members to be members of the chamber; second, if necessary, the standing down, at the request of the President, of one or two of those elected to allow each party to have its own judge on the chamber; and, third, the appointment of a replacement judge or judges by each party, as may be necessary. That procedure would not involve the parties in having a say either in the election by the Court of the original three members of the chamber or in the decision of the President as to which of them should stand down. If Judge Jessup then intended that the parties should have such a say, he did not say so in the particular passage relied upon for imputing that view to him.

Judge Jessup's proposal for giving the parties a say in the composition of a chamber worked itself out through the appointment of party-selected judges to a small three-member chamber, with one or two elected judges

yielding up their places if necessary. There seems to be nothing in his published model which suggests that he then considered that the Rules of Court could be amended consistently with the Statute to give the parties a say in that part of the procedure by which the Court elects serving judges to be members of an *ad hoc* chamber and the President decides which of them should then stand down. Similar observations apply to the earlier ideas of Mr. James N. Hyde on the subject (James N. Hyde, "A Special Chamber of the International Court of Justice — an Alternative to *Ad Hoc* Arbitration", *American Journal of International Law*, 1968, Vol. 62, p. 439). Both writers would have had good reason for not going so far. The wording of Article 31, paragraph 4, of the Statute strongly suggests that the system regulating the sitting of party-selected judges on an *ad hoc* chamber assumed that the parties had no influence on, and no advance knowledge of, the results of the election made by the Court of serving judges to be members of the chamber. Thus, in the case of litigating States with nationals already on the Bench, it was only in the after-light of the results of the election that a determination could be made by the President of the extent to which it might be necessary to activate the procedure relating to national judges. Nor was it a foregone conclusion that litigating States with no nationals on the Bench would always wish to appoint *ad hoc* judges to a chamber; following on an election they might conceivably be so satisfied with the resulting composition of the chamber as to abstain from exercising their entitlement to appoint *ad hoc* judges, in like manner as some States have abstained from doing so in relation to the full Court. This system, with its associated assumptions as to lack of influence on, or advance knowledge of, the results of an election, was based directly on the Statute itself. And the Statute continues in full force.

Although considering that the names of members of an *ad hoc* chamber who were to be requested by the President to "step down" in favour of judges chosen by the parties could also be the subject of consultation between the President and the parties, Judge Jiménez de Aréchaga clearly recognized that what I would for convenience call the "standing-down procedure", as laid down by Article 31, paragraph 4, of the Statute, would continue to apply to such a chamber even after the 1972 amendments (Eduardo Jiménez de Aréchaga, *loc. cit.*, p. 3). A neglect in the Rules to reflect that fact was rightly cured by an appropriate change made in 1978 in Article 17, paragraph 2, of the Rules. As I sought to point out more fully in the separate opinion which I appended to the Order made in this case on 13 December 1989 (*I.C.J. Reports 1989*, pp. 165-167), the prescribed procedure was correctly observed in the case of the *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Constitution of Chamber* (*I.C.J. Reports 1982*, pp. 4, 8 and 9). It was not applied in the case concerning *Elettronica Sicula S.p.A. (ELSI), Constitution of Chamber* (*I.C.J. Reports 1987*, pp. 3-4) for the reason that (however it came about) the

elected judges included two serving national judges. It was not applied in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Constitution of Chamber* (*I.C.J. Reports 1985*, pp. 6-7) nor in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Constitution of Chamber* (*I.C.J. Reports 1987*, p. 10). The Orders of Court in these two cases simply show the election of three serving judges and the addition of two named *ad hoc* judges. The Court did not, as it ought to have done under the prescribed procedure, elect five serving judges subject to two being asked to stand down in favour of *ad hoc* judges to be *later* chosen by the parties. Contrary to the laid down sequence, the two *ad hoc* judges were chosen by the parties *before* the election by the Court of any serving judges. The observance of the standing-down procedure prescribed by Article 31, paragraph 4, of the Statute made no practical sense in a situation in which the Court was in fact electing serving judges who had been previously designated by the parties (see Shabtai Rosenne, *Procedure in the International Court, A Commentary on the 1978 Rules of the International Court of Justice*, 1983, p. 43). The logic of allowing the parties a right to exercise "decisive influence" over selection would naturally lead to dispensation with that procedure. The question remains whether it was competent for the Court to confer such a right on them by Rules of Court.

A negative answer to that question is suggested by the inescapable fact that the standing-down procedure continues to apply to *ad hoc* chambers by virtue of the express provisions of Article 31, paragraph 4, of the Statute itself. Neither the Rules of Court nor any practice adopted by the Court can vary the scheme as laid down in those overriding provisions of the master law. Indeed, as has been noticed, the applicability of that scheme to *ad hoc* chambers was expressly and correctly recognized by an amendment made in Article 17, paragraph 2, of the Rules of Court in 1978. It applies to other chambers by virtue of Article 91, paragraph 2, of the Rules. What does therefore emerge is that the very decision to dispense with the standing-down procedure in relation to *ad hoc* chambers is an indication of the extent to which practical control over selection of serving judges as members of such chambers has been conceded to the parties; for it is only on this basis that the observance of a procedure still legally commanded both by the Statute and by the Rules would become the pointless ritual which presumably led to the decision to ignore its continuing existence in law.

It is not a persuasive answer to say that the application of the standing-down procedure of Article 31, paragraph 4, of the Statute to chambers dated back to 1936 before the establishment of *ad hoc* chambers was visualized. Article 31, paragraph 4, was in fact modified in 1945 to reflect

other changes made in the new Statute in relation to chambers, in consequence of which an earlier reference in that provision to Article 27 had to be deleted. In so far as concerned the applicability of Article 31, paragraph 4, to the new Article 26, paragraph 2, relating to *ad hoc* chambers, the records of the Washington Committee of Jurists for 18 April 1945 read:

> "*Article 31.* Mr. Fitzmaurice (United Kingdom) raised the question whether paragraph 4 of Article 31 was not already covered by paragraph 2 of Article 26. It was decided to leave paragraph 4 of Article 31 as it stood, and Judge Hudson noted that under paragraph 2 of Article 26 the Court could not appoint *ad hoc* judges. Professor Basdevant (France) noted a mistake in the French text of paragraph 4 of Article 31." (*Documents of the United Nations Conference on International Organization*, San Francisco, 1945, Vol. XIV, p. 224.)

So the relationship between Article 31, paragraph 4, and the new Article 26, paragraph 2, relating to *ad hoc* chambers did receive consideration. It is reasonable to assume that if Article 31, paragraph 4, was left in a form which made it applicable "as it stood" to the new provisions relating to *ad hoc* chambers, this was because this result was deliberately intended. And it was deliberately intended because the Statute was not based on any idea of parties having any influence over the selection of serving judges to be members of such a chamber. It is only if a different view is taken on this pivotal point that the application of the standing-down procedure of Article 31, paragraph 4, to *ad hoc* chambers can appear aberrant (cf. Geneviève Guyomar, "La constitution au sein de la Cour internationale de Justice d'une chambre chargée de régler le différend de frontières maritimes entre les Etats-Unis et le Canada", *Annuaire français de droit international*, 1981, Vol. XXVII, p. 220). Far from appearing aberrant to Judge Jessup, that procedure constituted an essential building block of his 1970 model.

With respect to the argument that the express reference to "number" excludes "composition", it has been said: "This objection is not of a very important character since nothing in the Statute would forbid the President to consult." (Edvard Hambro, *loc. cit.*, p. 369.) It is submitted that there is indeed something in the Statute which forbids the President from doing so, and that the objection based on it cannot be brushed aside as being "not of a very important character". The whole nature of the Court, as a court of justice, constitutes a prohibition, no less clear for being implied, against giving the parties any say in the selection of judges to hear a case, whether through the Rules of Court or otherwise, and whether in whole or in part, except in the case of *ad hoc* judges. So fundamental was that prohibition to the character of the Court as a court of justice, as distinguished from an arbitral body, that it was no more necessary to express it

in its Statute than it would have been to do so in the constitution of any other "court of justice" within the normal acceptation of the meaning of this expression.

This implied prohibition is not neutralized by approaching the matter from the point of view of the doctrine of implied powers. True, the fact that specific powers are conferred on a body does not necessarily imply the non-existence of others. But the latter do not float around at large. In the last analysis, all the powers of a body must be conferred by its constituent instrument, whether expressly or impliedly. Speaking of the powers of the United Nations, the Court said:

> "It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence *required* to enable those functions to be effectively discharged." (*Reparation for Injuries Suffered in the Service of the United Nations, I.C.J. Reports 1949*, p. 179; emphasis supplied.)

At page 182, the Court added:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being *essential* to the performance of its duties." (*Ibid.*; emphasis supplied.)

Putting greater emphasis on the extent to which such additional powers must be so required, Judge Hackworth, dissenting, stated:

> "Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted." (*Ibid.*, p. 198. See also, by him, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954*, p. 80.)

The need for some limitation was also recognized by Judge Fitzmaurice in *Certain Expenses of the United Nations* (*I.C.J. Reports 1962*, pp. 208, 213). (See also, by him, "Hersch Lauterpacht — The Scholar as Judge" — Part III, *British Year Book of International Law*, 1963, Vol. 39, p. 154, footnote, and his separate opinion in the *Golder* case, European Court of Human Rights, judgment of 21 February 1975, Series A, Vol. 18, p. 32.)

However elastic may be the test to be applied in determining the existence and extent of implied powers — and undue rigidity is surely to be avoided — it seems in any event clear that a constituent instrument cannot be read as implying the existence of powers which contradict the essential

nature of the organization which it creates to exercise them. Powers of that kind could not be described as "required" or "essential" (within the meaning of the *Reparation* case) to enable the organization effectively to discharge the functions laid upon it by its organic text.

As sought to be shown above, the basis on which the Court was created leaves no room for doubt that, notwithstanding the limited extent to which the appointment of *ad hoc* judges was permitted, the Court was intended to function as a court of justice as generally understood. As I have had occasion to opine in the case of the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*I.C.J. Reports 1989*, p. 213), the chief characteristic of a court of justice is that it is invested with judicial power. In the normal case, some external agency possessed of appropriate legislative competence over the jurisdiction of a court of justice, or, failing that (as in this case), the machinery competent to amend the constitution of the court, may well have authority to modify the extent of the court's original endowment of judicial power; but, however that may be, the court itself is powerless to alienate any part of its grant. The definition of judicial power can be a matter of difficulty, but it is reasonably clear that it includes not merely the power to hear and determine, but also, where necessary, the power to decide what particular members of the court shall hear and determine any particular case. The latter is part of the process by which the Court determines how it will exercise judicial power.

Absent any specific guidance in the literature of the Court, and the matter being one of general jurisprudence, I turn to the approach taken at the municipal level in *Reg.* v. *Liyanage* ((1963) 64 N.L.R. 313, at p. 359, considered in *Liyanage* v. *The Queen* [1967] 1 A.C. 259, P.C.) in which the Supreme Court of Ceylon struck down a law purporting to authorize a Minister to designate three serving judges to try certain persons on particular charges, the ground given by the Court being that the power to select judges to hear particular cases was part of the inalienable judicial power of the Court. The reasoning in that case is not applicable here in its entirety. But it is in large part. It may be observed, in particular, that, mirroring in principle the position in that case, throughout the history of the World Court right up to the 1972 changes, the selection of serving judges of the Court to be members of a chamber rested exclusively with the Court itself. It is inconceivable that the Court would have regarded that right as anything other than an integral part of its judicial power. It is useful also to note certain references in the cited case to possible exclusion of some judges from rightful participation in the exercise of the Court's judicial power, the risk of undignified treatment of the head of the Court, and, more pertinently, the possibility of judges being selected by a party interested in the litigation. The case was, of course, decided at the municipal level. But it seems to me that it would be rash to dismiss it entirely on that account: except where clearly provided otherwise in the Statute, it would

be a profitless, if not dangerous, affectation to appeal to the international status of the International Court of Justice to suggest that it occupies a materially different position in respect of matters normally regarded as inconsistent with the basic concept of a court of justice under municipal law.

The Ceylon case involved the municipal law concept of separation of powers, and this, it has been held, is "not applicable to the relations among international institutions for the settlement of disputes" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984*, p. 433). But this dictum has no application to the question whether the Court itself may allow such judicial power as has in fact been vested in it to be exercised by persons other than itself. True, also, the Ceylon case involved an outright designation of judges by an agency external to the court, whereas the system under review only gives to the parties a say in the designation, which remains ultimately with the Court itself, with the right to decide differently if it wishes. But there is difficulty in conceding that this should make any legal difference. A proper concern for the preservation of the juridical wholeness of the Court does not suggest that this is an area in which fascination with forms can be suffered to prevail over regard for substance. As mentioned earlier, Judge Jiménez de Aréchaga, a principal architect of the new system, had said that the "main change introduced . . . [was] to accord to the parties a decisive influence in the composition of *ad hoc* Chambers" (Eduardo Jiménez de Aréchaga, *loc. cit.*, p. 2). No reason appears for thinking that this authoritative statement of purpose differed from actual practice up to the time when the Chamber in this case was established. Even if not "decisive", the influence accorded is certainly substantial, for, as earlier observed, it could not be supposed that the Court was being required to ascertain the views of the parties as to the composition of a chamber while being entirely free to ignore them. Whether "decisive" or "substantial", the influence so given to the parties was, in my respectful opinion, an illicit conveyance of an essential part of the Court's patrimony.

It is true that the secrecy requirement in elections of judges as members of an *ad hoc* chamber continues to apply. But so also does a connected requirement, no less compelling for being assumed, that such elections must also be free. Arguments in opposition to the new system assert that it leads to an infringement of the secrecy requirement in the sense that the result is known in advance. Perhaps, in that sense, there is an infringement, even though the formal procedures do remain secret. But a stronger argument would seem to be that the new system violates a certain freedom of choice which the secrecy provision was intended to insulate against

pressure and extraneous influences[1]. In an election of serving judges to be members of a chamber, the voting judge is electing fellow members of a court of justice to hear and determine a case at arm's length between contesting parties. That is a purely domestic exercise of the Court, in relation to which the views of the parties are at best irrelevant, at worst injurious. The effective result of the system under review being to accord them a "decisive influence", it is neither credible nor acceptable to aver that elections made on that basis can realistically claim to represent a free exercise of the will of the Court.

This, in turn, is why it serves little purpose to seek to down-play the status of the requirement for holding elections on the ground that the requirement exists only under the Rules of Court and not under the Statute. True enough. But what does exist under the Statute is an assumption that the selection, however made by the Court, of those of its Members who are to serve as members of a chamber would represent a free and genuine exercise of the will of the Court. It was perfectly proper for the Rules to seek to ensure this important result by enveloping the procedure within the protective framework of an election by secret ballot.

In the case of the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, construing the word "elected" as it appeared in Article 28 *(a)* of the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organisation, the Court said:

> "The meaning of the word 'elected' in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the context in which it is used so requires." (*I.C.J. Reports 1960*, p. 158.)

The context of that case favoured a restrictive meaning. In this case, the Rules of Court are to be construed in the light of the Statute, and both must of course be viewed in the light of the Charter, of which the Statute indeed forms part. It is in this way that the context is to be ascertained for the word "election", as it appears in Article 17, paragraph 3, of the Rules of Court, and more particularly as it is linked with the words "by secret ballot" appearing in Article 18, paragraph 1, of the Rules. Thus considered, there is nothing in the context which can so validly constrain the freedom normally associated with the concept of an election by secret ballot as to afford the parties any influence over the result, whether "deci-

[1] For the general theory underlying an electoral secrecy provision, see the *Maple Valley Case* (1926) 1 D.L.R. 808, at pp. 814-815; 29 *Corpus Juris Secundum*, para. 201 (1), pp. 557-558; and *Withers* v. *Board of Commissioners of Harnett County* (1929) 146 S.E. 225, at p. 226.

sive" or not. On the contrary, everything in the context prohibits the introduction of any such influence into the process. With that prohibition, fixed as it is by the very nature of the Court as established by the Charter and the Statute, it is vain to seek to interfere by an exercise of the subordinate and limited rule-making power of the Court. The regular judges of the Court, it must be remembered, are elected by the General Assembly and the Security Council, the possible involvement of the Court in that process being merely contingent under Article 12, paragraph 3, of the Statute.

Article 2 of the Statute requires judges of the Court to be "independent". The importance of that quality for the Court as a whole has been rightly stressed in the literature (see *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), I.C.J. Reports 1947-1948*, p. 95, *per* Judge Zoričić; and *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956*, p. 104, *per* Judge Winiarski). It is not easy to think of any concept of judicial independence which is consonant with particular judges being named to sit in a particular case practically at the behest of the parties. Referring to the term "court" in Article 5, paragraph 4, of the European Convention on Human Rights, the European Court of Human Rights observed that

> "[t]his term implies only that the authority called upon to decide ... must possess a judicial character, that is to say be independent both of the executive *and of the parties to the case*" (see European Court of Human Rights, the *Neumeister* case, judgment of 27 June 1968, Series A, p. 44, para. 24; emphasis added).

I cannot think of any reason excluding the substance of this view in the case of an international court.

Do the new arrangements place the independence of the Court at risk? To take one example, in selecting judges as members of a chamber it would, I think, be extraneous and legally impermissible for the Court itself (by which as a whole the selection is ultimately made when forming the chamber under Article 26, paragraph 2, of the Statute) to be guided by a criterion as to the extent to which its jurisdiction is accepted by countries from which particular judges come. No such test is visualized by the Statute, which does not regard a judge as representing his country or his nationality as relevant to his independence (see *Certain Norwegian Loans, I.C.J. Reports 1957*, p. 45, *per* Judge Lauterpacht, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986*, pp. 158-160, *per* Judge Lachs, and p. 528, *per* Judge Jennings). Yet it would seem that the new system is structured in a way which enables litigating parties, if they wish, to exclude judges from an *ad hoc* chamber on the basis of precisely that criterion or criteria similar to it (see Judge Petrén, *loc. cit.*, pp. 61-62; and Mr. John R. Stevenson, in *American Society of International Law, Proceedings of the 80th Annual*

Meeting, 1986, p. 202). If, as I think, the Court itself cannot take such considerations into account when electing judges to be members of an *ad hoc* chamber, can it, by Rules, authorize a procedure which enables such considerations to be indirectly taken by it into account through reception of the views of the parties? That the Court may not in fact be aware of the motivation of the parties does not diminish the risk: on the contrary, it makes the risk even more palpable.

Similar observations apply in relation to Mr. Edvard Hambro's arresting observation to the effect that the new consultation procedure

> "means also in fact although not in law that the rules concerning imcompatibilities of judges have been changed since it may safely be assumed that the parties will scrutinize the background of the judges very carefully and exclude any person who may be considered as 'unfriendly' on account of previous dealings with the same or similar problems, even though such dealings would not be considered by himself, the President or the Court to be of such a character that he would be excluded from sitting in the case" (Edvard Hambro, *loc. cit.*, p. 368).

The grounds of incompatibility are prescribed by Articles 16 and 17 of the Statute itself. Can an amendment to the Rules of Court effectively empower the parties to add to those grounds in the exercise of a practically unreviewable discretion? I cannot think so. And yet that, indeed, is what the new Rules would enable the parties to do.

Arguments in favour of the new system place some reliance on the inapplicability to chambers of Article 9 of the Statute — a provision which relates to the globally representative composition of the Court, in the sense that it was visualized that in the Court "as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured". Under Articles 26 and 27 of the 1920 Statute, judges of the labour chamber and of the transit and communications chamber were to be "selected so far as possible with due regard to the provisions of Article 9". The fact that those chambers consisted of five members each, whereas the Chamber of Summary Procedure consisted of only three members until this was increased to five in 1936, probably accounts, at least in part (accessibility to The Hague might have been another factor), for the origins of the omission of a reference to Article 9 in Article 29 of the 1920 Statute relating to the Chamber of Summary Procedure, it being obvious that a three-member chamber could not possibly hope to achieve anything reasonably approximating to global representativeness. Possibly it was an extension of this reasoning which ultimately led in 1945 to the complete omission from the chambers provisions of the

present Statute of any reference to Article 9. But, whatever the reason, it would not appear that this omission could in any way support an argument in favour of the legality of the new system (cf. Eduardo Jiménez de Aréchaga, *loc. cit.*, pp. 2-3). What is in issue is freedom of choice by the Court in relation to the will of the parties, not the question whether the exercise of that choice should or should not conform to Article 9.

If in fact that freedom of choice is materially impaired under the new system, a question which will arise is this: granted that a chamber need not be representative of the global distribution of civilizations and legal systems, must it not at any rate represent the result of a truly free exercise of the will of the Court itself in order to be able to pass as a credible manifestation of the Court in its capacity as "the principal judicial organ of the United Nations" within the meaning of Article 92 of the Charter? Can a chamber, whose members have each been practically hand-picked by the litigants themselves, pass as the "principal judicial organ of the United Nations"? Was this what the framers of the Charter intended when they so characterized the Court? More particularly, was that the kind of chamber they had in mind when they accepted in Article 27 of the Statute that a "judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court" and should accordingly be enforceable by recourse to the Security Council under Article 94 of the Charter? One may be permitted to doubt it.

I appreciate the argument that, in view of the existence of the Chamber of Summary Procedure, there could have been little point in providing for *ad hoc* chambers in 1945 unless it was intended that the parties should have some say in their composition. My difficulty is that, if this was the intention, it is not to be found in the text of the Statute, and the fundamental character of the Court does not suggest that it can be implied. Further, the assumption of unnecessary duplication in the absence of such an intention may not be well grounded, for it does not seem safe to suppose that it was contemplated that an *ad hoc* chamber would always be of the same size as the Chamber of Summary Procedure, or that it would necessarily be dealing with the same type of cases which might have been thought appropriate for determination by the Chamber of Summary Procedure. Some of the cases which have gone to *ad hoc* chambers could hardly have lent themselves to treatment by a chamber of summary procedure which was intended for "the speedy dispatch of business" as expressly visualized by Article 29 of the Statute.

To sum up, the field of operation of the rule-making power of the Court, as defined by Article 30 of the Statute, is wide but not unlimited. The Court, it may be said, has a certain autonomy in the exercise of its rule-making competence; but autonomy is not omnipotence, and that competence is not unbounded. Rules of Court could only be made in exercise of powers granted by the Statute, whether expressly or impliedly. The Statute did not expressly grant power to the Court to confer by Rules a

right on the parties to have their views taken into account in the selection of serving judges to be members of an *ad hoc* chamber. Nor was any such power granted by the Statute impliedly: however generous may be the principle regulating the ascertainment of the extent of the Court's implied powers, such powers encounter an ultimate limit when they collide with the intrinsic nature of the Court itself. For the reasons given, the selection, whenever necessary, of serving judges to sit in any particular case is an integral part of the inalienable judicial power confided to the Court by the world community. The Court cannot, directly or indirectly, convey away that power in whole or in part, or share it with others, without destroying its essential character as a court of justice. A Rule of Court which purports to do so is contrary to the Statute. In the words of Judge Fitzmaurice, dissenting:

> "The Court has no power to make Rules that conflict with its Statute: hence any rule that did so conflict would be *pro tanto* invalid, and the Statute would prevail." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 310.)

Judge Mbaye spoke to similar effect in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene* (*I.C.J. Reports 1984*, p. 44). And a Rule of Court which is *ultra vires* the Statute is also *ultra vires* the Charter, first, because Article 92 of the Charter expressly declares that the Statute "forms an integral part of the present Charter", and, second, because the same Article of the Charter expressly requires the Court to "function in accordance with the annexed Statute". In the result, as Judge Lauterpacht said in his dissenting opinion in the *Interhandel* case:

> "the Court, as shown by its practice and as indicated by compelling legal principle, cannot act otherwise than in accordance with its Statute, of which it is the guardian" (*I.C.J. Reports 1959*, p. 104. See, also by him, in *Certain Norwegian Loans, I.C.J. Reports 1957*, p. 45.)

The foregoing considerations suggest that the requirement in Article 17, paragraph 2, of the Rules of Court 1978 for the President to ascertain the views of the parties regarding the "composition" of an *ad hoc* chamber should be construed harmoniously with the Statute, and that, when so construed, it is restricted to ascertainment of the views of the parties as to the "number" of members of the chamber. Failing that construction — a construction which does not correspond either with the general understanding of the provision or with the actual practice under it — it would seem that Article 17, paragraph 2, of the Rules is *pro tanto ultra vires* the Statute. For, as was observed by Judge Hackworth in his dissenting opin-

ion in the case of the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*:

> "The duty of a court when faced with apparent incompatibility between a legislative enactment and the constitution (the Charter) is to try to reconcile the two. If this cannot be done the constitution must prevail." (*I.C.J. Reports 1954*, p. 83.)

PART IV. JUDICIAL TENURE

The far-reaching implications of the new system now bring me to the question of judicial tenure, a matter alluded to in the letter from the Agent for Nicaragua to the Registrar of 1 February 1990. The question concerns an associated amendment as a result of which Article 17, paragraph 4, of the Rules of Court reads:

> "Members of a Chamber formed under this Article who have been replaced, in accordance with Article 13 of the Statute following the expiration of their terms of office, shall continue to sit in all phases of the case, whatever the stage it has then reached."

This applies even though no pleadings have been filed; it is enough that a bare application originating the proceedings has been. *A fortiori*, it is not necessary that the oral proceedings or any collegiate study of the case should have commenced. So, as happened in the *Gulf of Maine* case (*I.C.J. Reports 1982*, p. 3), a judge may be elected to a chamber just weeks before he is due to be replaced, with the result that it is the timing of the election and not the state of work that really dictates the need for an extension. By contrast, Article 13, paragraph 3, of the Statute, referred to in that rule, itself provides that Members of the Court replaced at an election "shall finish any cases which they may have begun". Adverting to this, Article 33 of the Rules stipulates that, save as provided in Article 17 above, Members of the Court who have been replaced in accordance with Article 13, paragraph 3, of the Statute shall continue to sit "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". Leaving aside arguments relating to the restrictive reference to "any phase", under this provision there can be no extension unless the oral proceedings had commenced before the normal date of retirement.

It is thus obvious that an outgoing judge elected as a member of an *ad hoc* chamber before the expiry of his normal term can continue to sit in circumstances in which an outgoing judge not so elected cannot. Can a Rule of Court competently create such a discrepancy?

It seems elementary that the right to continue to sit notwithstanding replacement is a substantive matter concerning the constitution of the Court and is accordingly controlled by the Statute itself. The Statute visualized only one case of extension and that was where, as provided in Article 13, paragraph 3, the judge had "begun" a case. A judge is not normally regarded as having "begun" a case until he has commenced the oral proceedings[1]. In the case of the International Court of Justice, a possibly wider formula has been given by Rosenne, as follows:

> "the point of time to which the verb 'begin' or its derivatives refers in provisions such as Article 13, paragraph 3, of the Statute and Articles 13, paragraph 2, and 27, paragraph 5, of the [1972] Rules of Court is the moment when the Court commences its collective deliberations, technically called the 'hearing'. Even when grammatically the verb describes action by an individual judge, juridically its implication is a general and collective study of the case by the judges together in person, and not the personal study of the file by a judge individually, to all of whom, of course, the *dossier* is formally transmitted by the Registrar under Article 48 of the Rules." (S. Rosenne, "The Composition of the Court", in Leo Gross (ed.), *The Future of the International Court of Justice*, 1976, Vol. 1, pp. 397-398.)

Different judges do, of course, begin to study a case file at different times. Hence, as Rosenne explains, even the wider view proposed by him would be restricted to a collegiate exercise. By contrast, Article 17, paragraph 4, of the existing Rules extends the right to sit whether or not any collegiate exercise has commenced.

The attempt made to vary the position as laid down by the Statute was not surprisingly based on the parallel attempt made to grant to the parties practical control over the selection of Members of the Court to be members of an *ad hoc* chamber. Judge Jiménez de Aréchaga put it this way:

> "The consideration that dictated a different solution for *ad hoc* Chambers is that in this type of Chamber continued participation in the case should not depend on remaining a Member of the Court itself. Otherwise, a Chamber set up at the request of, and taking into account the wishes of the parties might lose some of its members

[1] Consider, for example, the general understanding reflected in the statements made by M. Raested, in League of Nations, *Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes of the Session Held at Geneva, March 11th-19th, 1929*, p. 42. And see *R.* v. *Craske*, ex parte *Metropolitan Police Commissioner* [1957] 2 Q.B. 591, and *Sookoo* v. *Attorney General of Trinidad and Tobago* (1985) 33 W.I.R. 338, at p. 360 j, and, on appeal, [1986] 1 A.C. 63, P.C.

merely by the passage of time." (Jiménez de Aréchaga, *loc. cit.*, p. 4.)

In effect, so the argument seemed to run, since a judge owed his membership of such a chamber to the wishes of the parties, those wishes ought not to be frustrated by the expiry of his regular term. With much respect, this does not seem to be a safe mode of proceeding. Even if there is room for argument as to what is meant by the reference to "cases which they may have begun" in the governing provisions of Article 13, paragraph 3, of the Statute, it is not admissible to assign to that phrase one meaning in relation to cases heard before the full Court and another in relation to cases heard before a chamber. The form assumed by the Court in hearing a case has nothing to do with the question whether a case has been "begun" by a judge or not. The Court being in legal theory the same whether sitting *en banc* or in chamber, the question whether a judge has "begun" a case must be answered in the same way regardless of whether it is being heard before the one or the other. Whatever may be the meaning of the word "begun" as it appears in the Court's constituent text, that meaning can only be one and singular in relation to all judges. Different meanings may be given to the same word appearing in different places of an instrument or indeed in different places in the same provision of an instrument, but hardly to one and the same word appearing in a particular place in a particular provision, and certainly not where the meanings would be contradictory, as in this case[1].

The resulting situation has an important bearing on the question whether an *ad hoc* chamber formed under the new arrangements may be regarded as a legitimate manifestation of the Court. The problem of what to do with judicial business remaining unfinished at a prescribed retirement date arises in many jurisdictions. There are several ways of dealing with it, other than to order a rehearing. As it has been aptly put in one jurisdiction where the question arose and had to be answered, two solutions are theoretically possible:

"One of these [is] to allow the termination to take effect and merely permit the holder of the office, now a former judge, to sit as a judge

[1] Cf. the interesting but doubtful cases of *Forth* v. *Chapman*, 1 P. Wms. 663, involving different interpretations of the same expression by different court systems, and *Bones* v. *Booth* (1778) 2 W. Bl. 1226, involving a difference between penal and non-penal application of a given expression. Both were mentioned in *Maxwell on the Interpretation of Statutes*, 6th ed., pp. 558-560, but have disappeared from more recent editions. The case of a single generic expression comprehending several species is of course a different one.

> for the purpose of completing the incomplete matters . . . The other [is] to postpone the vacating of the office of the judge for a period to be determined as necessary for the completion of the pending court matters and permit a judge to continue to hold his office with his powers undiminished." (*Sookoo* v. *Attorney General of Trinidad and Tobago* (1985) 33 W.I.R. 338, Trinidad and Tobago Court of Appeal, at p. 361, *per* Warner J.A., and, on appeal, [1986] 1 A.C. 63, P.C., at p. 71.)

It seems clear that it was the first of these two theoretical solutions which was employed in Article 13, paragraph 3, of the Statute, with the result that a judge who, "though replaced", is functioning by virtue of this provision, exercises the functions but does not hold the office of a judge. He cannot hold the office any longer because he has been "replaced" as one of the fifteen judges of the Court by another person who has been duly admitted to fill the same office. Now, if the Rules under consideration are valid, the entire oral proceedings of a case before an *ad hoc* chamber may take place before persons none of whom held the office of a Member of the Court at any time during that hearing. So, once again, is this the kind of chamber that the framers of the Statute had in mind when they accepted in Article 27 that a "judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court"?

PART V. POWER OF COURT TO REVERSE ITS PREVIOUS DECISIONS

I come now to the question whether, if the foregoing is right, what, if anything, can be done to correct the position. In the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Constitution of Chamber*, the Order of Court recited that the parties had been duly consulted "as to the composition of the proposed Chamber of the Court in accordance with Article 26, paragraph 2, of the Statute and Article 17, paragraph 2, of the Rules of Court" (*I.C.J. Reports 1982*, p. 4). With occasional variations, similar affirmations were later made in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali), Constitution of Chamber* (*I.C.J. Reports 1985*, p. 7); the case concerning *Elettronica Sicula S.p.A. (ELSI), Constitution of Chamber* (*I.C.J. Reports 1987*, p. 4); the case concerning *Elettronica Sicula S.p.A. (ELSI), Composition of Chamber* (*I.C.J. Reports 1988*, pp. 158-159); and the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (*I.C.J. Reports 1987*, p. 12). The Court has therefore taken a position, even though not reasoned, on the question whether the existing practice is in accordance with the Statute. But does this preclude the matter from being re-opened?

Before a practice is held to be inconsistent with a controlling provision of the Statute or of the Rules of Court, to which it must yield if in conflict,

the meaning of the provision must first be established. What is evidenced by the cases referred to is not a simple accidentally developed practice, but a practice resting on decisions of the Court which manifest its interpretation of the applicable provisions of those instruments. To what extent would it be proper for the Court at this stage to reverse its previous decisions as to the meaning of those provisions? This seems to be the question here, as I believe it similarly was in the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)* (*I.C.J. Reports 1989*, p. 145). The answer may, I think, be derived from the position put forward by Sir Hersch Lauterpacht as follows:

> "Subject to the overriding principle of *res judicata*, the Court is free at any time to reconsider the substance of the law as embodied in a previous decision ... it will not do so lightly and without good reason. But it may do so, and it has done so." (Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 19. See also *ibid.*, p. 20.)

That the Court should not act lightly and without good reason suggests to my mind that the mere fact that the Court in a later case may be disposed to see the law differently from the way in which it saw it in an earlier case may not always suffice to warrant a reversal of its previous holding on the same point. But I do not think the Court will be acting lightly and without good reason if it were to reverse a previous decision on the law on the ground that it was clearly erroneous as well as productive of grave consequences for the judicial integrity of the Court of which the Court itself is the avowed guardian. In this case, expectations based on the continuance of the system sanctioned by the previous decisions of the Court cannot outweigh the gravity of the consequences of those decisions for the essential nature and structure of the Court. I believe that the applicable criteria are satisfied in this case to the point of unmistakably requiring the Court to reverse its previous decisions and to redirect the law along its proper course. Reasonable development of the law, even if sometimes bold, is natural and legitimate; mere expansiveness is another matter.

PART VI. CONCLUSION AS TO THE VALIDITY OF THE EXISTING ARRANGEMENTS RELATING TO *AD HOC* CHAMBERS

The issue, summarized, is this: The fundamental character of the Court remains what it was conceived to be by the founders of the Permanent Court. That character was deliberately judicial and was not materially altered by the introduction in 1945 of the institution of the *ad hoc* chamber. Up to 1972, the determination of which particular Members of the Court should sit on a chamber was exclusively a matter for the Court itself. Was it legally competent for the Court, by an exercise of its subordinate and

limited rule-making power, to bargain away a substantial, if not decisive, part of this faculty of choice to potential litigants in exchange for the prospect of greater use of *ad hoc* chambers? Was the fundamental judicial character of the Court consistent with giving the parties a share in the exercise of its power to select its regular personnel to sit in a particular case? Even in cases of negative selection by exclusion for cause, though something in the nature of a right of recusation in fact exists, the Statute cautiously refrained from explicitly conferring such a right on the parties (see *Procès-Verbaux*, 1920, *op. cit.*, p. 472, *per* Lord Phillimore; *P.C.I.J., Series D, No. 2*, p. 72, *per* Lord Finlay; Stauffenberg, *op. cit.*, p. 76; Hudson, *The Permanent Court of International Justice*, 1943, pp. 173 and 370; Louis Favoreu, "Récusation et administration de la preuve devant la Cour internationale de Justice", *Annuaire français de droit international*, 1965, Vol. XI, pp. 236 ff.; and Geneviève Guyomar, *Commentaire du Règlement de la Cour internationale de Justice: Interprétation et pratique*, Paris, 1983, pp. 195-197). Did it authorize the Court by Rules of Court to give them a right of positive selection? I do not think so.

The question then is which shall prevail — the practical utility of a privately selected chamber claiming to be a legitimate manifestation of the Court, or the grand original design of the Court as a court of justice serving an integrated world and seen by that world to be serving it as such a court? While it cannot be inadmissible today to recall the great vision which animated yesterday's creators of a judicial edifice of whose integrity the Court is the proud guardian, defenders of the new system may well call in aid Judge Lauterpacht's statement reading:

> "A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization." (*Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, I.C.J. Reports 1955*, p. 106.)

Even so attractively designed an invitation to constitutional creativity may not however settle doubts as to whether the law-making powers of the Court can ever properly extend to enable it by an act of levitation to shift the ground on which it has been standing. It was Judge Lauterpacht himself who noted "the principle that an organ cannot act except in accordance with its constituent instrument" (*Certain Norwegian Loans, I.C.J. Reports 1957*, p. 45). If this principle has indeed been breached in this case, to sustain the new arrangements relating to *ad hoc* chambers would not only violate the Court's own declaration that its duty is "to interpret . . ., not to revise" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, I.C.J. Reports 1950*, p. 229); it would go beyond that to bring into play the more ominous words used by the Permanent

Court of International Justice when it took the position that to uphold a certain interpretation "would be, not to construe but to destroy ..." (*Serbian Loans, P.C.I.J., Series A, No. 20/21*, p. 32). It seems to me that what would be destroyed here would be a concept of fundamental importance to the institutional integrity of the Court as it was conceived to be. This is the problem lying at the root of this whole case, as brought to a head by the present procedural difficulties.

In sum then, I agree with Nicaragua that to

> "consider that a challenge to the formation of the Chamber ... should be aired before the same Chamber would certainly be a complete surrender of the sovereign will of the intervening party to the will of the original parties as reflected in the formation of the Chamber" (letter to the Registrar from the Agent for Nicaragua of 1 February 1990).

But what are the true implications of the extent to which "the will of the original parties [is] reflected in the formation of the Chamber"? In my opinion, reached with reluctance but with conviction, the methods by which the members of the Chamber have been selected do not satisfy the criteria required to enable it to discharge the judicial mission of the International Court of Justice, considered as a court of justice, in relation to the Applicant; and the fundamental reason for this is that the Chamber has been constituted not in accordance with the Statute, but in accordance with an unauthorized arrangement under which the Court has been essaying to transform itself into the Permanent Court of Arbitration, or something akin to it. This represents a major flaw which the Court, as the avowed guardian of its own judicial integrity, cannot correctly overlook. The existing practice may well continue unabated. My views may make no difference. It was nevertheless my duty to state them.

PART VII. THE NICARAGUAN APPLICATION CONSIDERED ON THE ASSUMPTION OF THE LEGALITY OF THE EXISTING ARRANGEMENTS

Assuming that I am wrong in the foregoing, how should the Nicaraguan Application be determined? It seems to me that, even if the original constitution of the Chamber was valid in relation to the existing Parties, the capacity of the Chamber to act judicially, as it stands, in relation to Nicaragua would still be seriously in issue.

In its Application, as pointed out in the Order made by the Court, Nicaragua emphasized that its "request for permission to intervene... is a matter exclusively within the procedural mandate of the full Court". The word "exclusively" seems reasonably to convey that Nicaragua does *not*

wish its Application to be considered by the Chamber. Developing this, in his letter to the Registrar of 1 February 1990, the Agent for Nicaragua stated the following:

> "One of the main changes introduced in the 1972 Rules of Court was in relation to the composition of *ad hoc* Chambers. As former Registrar Hambro said, the changes in the Rules
>
> 'means that the parties are free to make known exactly which individual judges they desire on the Bench for that case'[1].
>
> In effect, Article 26, paragraph 1, of these Rules indicates that the President of the Court 'shall consult the agents of the parties regarding the composition of the Chamber'.
>
> The role of the parties in organizing the *ad hoc* Chamber is further emphasized by the fact of the continuation of a member of an *ad hoc* Chamber beyond his term of office.
>
> To consider that a challenge to the formation of the Chamber, made because of the extent of the competence *ratione materiae* with which it was anointed, should be aired before the same Chamber, would certainly be a complete surrender of the sovereign will of the intervening party, to the will of the original parties as reflected in the formation of the Chamber.
>
> . . . . . .
>
> This principle [of the equality of States] which demands respect of the sovereign equality of Nicaragua would be inevitably affected if it were decided that the only intervention possible was before the *ad hoc* Chamber. Hence, Nicaragua can only appear before the full Court if this principle is to be respected.

[1] Edvard Hambro, 'Will the Revised Rules of Court Lead to Greater Willingness on the Part of Prospective Clients?', in Leo Gross (ed.), *The Future of the International Court of Justice*, 1976, p. 368."

Clearly, Nicaragua's primary concern is with the extent to which the formation of the Chamber reflected the will of the existing Parties. It does not wish to go to the Chamber as it stands, whether for the purpose of seeking permission to intervene or for the purpose of seeking a reformation of the Chamber. The situation so presented may be considered, first, at the level of general principles, and then at the level of particular procedural rules.

Viewing the matter at the level of general principles, I think it is first necessary to consider the relationship between the full Court and a chamber of any kind. No doubt, unless a chamber is indicated by the context, a reference in the Statute to the "Court" is a reference to the full Court, and evidently there are differences between these two bodies, but these differ-

ences are those between related and not mutually alien entities. In principle, the same Court is acting whether it acts through the full Court or through a duly established chamber. The first chamber judgment, given in 1924, began with the carefully chosen words, "The Court, sitting as a Chamber of Summary Procedure . . .", and ended with a dispositif beginning significantly with the words, "For these reasons the Court decides . . ." (*Treaty of Neuilly, P.C.I.J., Series A, No. 3*, pp. 4 and 9 respectively). By Article 1 of the relevant Special Agreement, the case had been correspondingly submitted by the parties "to the Permanent Court of International Justice, in its Chamber for summary procedure . . ." (*P.C.I.J., Series C, No. 6*, p. 9). In effect, the functions of a chamber are as much the functions of the "Court" as are those of the full body. Thus, however desirable it may be for a chamber to be left to discharge its actual functions as autonomously as possible, the relationship between it and the full Court is not one between strangers. Nicaragua has drawn attention to significant instances of action taken by the full Court in relation to a chamber even after the latter has been established. The full Court, having set up a chamber, cannot interfere in its actual work; but I think it retains a continuing responsibility to ensure that the composition of the chamber is such as to enable it to function with a sufficient degree of procedural rectitude in order to qualify it as a convincing manifestation of the Court as a court of justice. If I mistake not, something of this view is implicit in the reference in the Court's Order to its "power to form a chamber to deal with a particular case, and consequently to regulate matters concerning its composition".

Under the system as it has so far worked, an *ad hoc* chamber, being composed of judges whose selection has been substantially influenced, if not determined, by the original parties (a proposition which cannot credibly be controverted), cannot function as a normal court of justice either in relation to an application for permission to intervene or, if the application is granted, in relation to the applicant as an intervening party to the case on the merits. 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.

It may well be that the original parties and the applicant (if successful) may never agree on matters essential to the reformation of the chamber, such as the number of members. In that event, the proceedings are halted; but, unfortunate as this may be, it is, in my opinion, a lesser thing than that the proceedings should be conducted at variance with fundamental norms applicable to a court of justice, as distinguished from an arbitral tribunal.

I accept as elementary that in principle it is the tribunal with compe-

tence over the merits which should also determine incidental proceedings, including applications for permission to intervene. But another elementary rule is that in applying a rule — especially an elementary rule — it is important to take account of the particular circumstances. Subject to this, I think I can agree with the submission of Honduras that —

> "the correct principle is . . . that any Court or Tribunal, with competence over the merits of the case, must (within the limits of its Statute) be free to decide upon the procedures appropriate to the case, and such decision has to be taken in the light of the actual issues of substance raised in the case, not as an abstract matter" (letter to the Registrar from the Agent for Honduras of 15 January 1990).

That, no doubt, represents the norm. However, the present case represents anything but the norm. Having regard to the methods by which the Chamber was formed, it is difficult to appreciate how the Applicant can with any show of justice be left with no option but to go to that body. I see no convincing answer to Nicaragua's submission that to require it to submit to such a forum would involve "a complete surrender" of its will "to the will of the original parties as reflected in the formation of the Chamber" and a resulting breach of the principle of equality of States. In this respect, the position here seems materially and qualitatively different from that in the case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment* (*I.C.J. Reports 1981*, p. 6) in which it was held that a State applying to the full Court for permission to intervene had no right to appoint an *ad hoc* judge to that Court for the purpose of hearing the application, even though the Court included *ad hoc* judges appointed by the existing parties in the ordinary way. In my opinion, such is the distance between the circumstances of that case and those of the present case (in which the selection of all the members of a five-member chamber was substantially, if not decisively, influenced or determined by the existing Parties) as to leave no juridically defensible alternative to the Application in this case having of necessity to be heard by the full Court.

The Court has cited the *Haya de la Torre* principle to the effect that "every intervention is incidental to the proceedings in a case" (*I.C.J. Reports 1951*, p. 76). In that case (decided under Article 63 of the Statute), the question was whether the purported intervention "actually relate[d] to the subject-matter of the pending proceedings" *(ibid.)*. That is not the question here. While I accept that the principle would ordinarily mean that an application for permission to intervene under Article 62 of the Statute should be made to the tribunal dealing with the merits of the matter, this presupposes that the tribunal is one which can act judicially in relation to the application. That case was not concerned with the kind of issues arising here as to what should be done to give real effect to the

applicant's right to apply where the tribunal, which should ordinarily act, does not satisfy the generally recognized criteria applicable to a court of justice in so far as the applicant at any rate is concerned. In particular, that case did not involve the concomitant application of the principle of equality of States which would ineluctably be breached if Nicaragua's only remedy was to go before a chamber composed of members selected as mentioned above. It is difficult to justify this course by reference to the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, without a considerable and unpersuasive extension of the latter.

If, for the reasons given by me, the Chamber cannot entertain the Application, and if, for the reasons given by the Court, the Court cannot, it would follow that there is no effective right to apply for permission to intervene in a matter pending before an *ad hoc* chamber. But I see little justification for holding that the right conferred by Article 62 of the Statute to make such an application can be denied by simply bringing a case before such a chamber rather than before the full Court. A system which turns away a State as a stranger at the gate even if it can prove that "it has an interest of a legal nature which may be affected by the decision in the case" has little claim in modern times to speak in the name of a court of justice, whatever other style it may affect and whatever might have been the earlier position in international adjudication. However, if there is a right to apply for permission to intervene, it must be a real right capable of being asserted and vindicated by normal judicial process.

It is true that under Article 59 of the Statute the decision of the chamber is not binding on a non-party. That, however, does not diminish the import of the fact that Article 62, paragraph 1, of the same Statute gives a non-party a right in law to request permission to intervene if "it has an interest of a legal nature which may be affected by the decision in the case", whether the requested permission is ultimately granted or not being another matter (see Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. 2, p. 552; and Shigeru Oda, "Intervention in the International Court of Justice", in *Festschrift für Hermann Mosler*, 1983, pp. 645-647). A State does not have to exercise that right; but, if it elects to do so, it is entitled to have its application determined judicially by a court of justice. I fail to see how this can happen where the selection of the members of the deciding tribunal was influenced, if not in substance determined, by the existing parties.

Viewing the matter now at the level of the procedural rules, it is to be observed that, in the absence of any provision in the Statute or the Rules dealing specifically with applications for permission to intervene in a chamber case, and leaving aside general principles, the argument against Nicaragua is based largely on the circumstance that Article 90 of the Rules of Court applies in relation to chambers the provisions of Articles 81, 83, 84 and 85 of the Rules (see the second recital of the Order of Court). These

provisions lay down rules of procedure for carrying out the functions of the Court under Article 62, paragraph 1, of the Statute concerning the right to apply for permission to intervene.

Although the rule-making provisions of Article 30, paragraph 1, of the Statute speak only of the "Court" framing "rules for carrying out its functions", it being the case that the functions of a chamber are the functions of the Court, it was fully competent for the Court acting under that provision to make rules of procedure relating to chambers also. I will assume, without deciding, that the combined effect of Articles 81, 83, 84, 85 and 90 of the Rules of Court is to regulate proceedings relating to applications for permission to intervene in chamber matters on the basis that such applications are to be made to the chamber concerned. But, in thus providing for such applications to be made to the chamber concerned, the Rules contemplated a chamber so constituted as to be capable of functioning as a court of justice in relation to the applicant. For the reasons given, the Chamber in this case cannot be considered as a normal court of justice in relation to the Applicant. In my opinion, the Rules do not and cannot require such an applicant to submit to such a chamber.

To what forum should the Applicant then turn? On the safe assumption that Article 62 of the Statute gives the Applicant a real right to apply for permission to intervene, the common sense view would be that the Applicant must of necessity apply to the full Court. This common sense view accords with the legal situation. As has been noticed, the Rules of Court are made under Article 30, paragraph 1, of the Statute which authorizes the Court to "frame rules for carrying out its functions". It is the function of the International Court of Justice to administer justice, not injustice; and, correspondingly, judges who make Rules of Court are to be credited with the intention of enabling the Court to do justice, not injustice. Hence, a Rule of Court should not be construed or applied as being legally effectual to create injustice, such as that which I fear would be created by construing the existing Rules as requiring Nicaragua to submit its Application to the existing Chamber notwithstanding the methods by which it was constituted.

Since, in my view, the Rules do not effectively provide for the case, the competence to deal with an application for permission to intervene in such a case falls to be considered as remaining with the full Court in keeping with the wording of Article 62 of the Statute. Under paragraph 1 of this, the request for permission to intervene is to be made to the "Court". Under paragraph 2, the decision is made by the "Court". Article 3 of the Statute makes it clear that references to the "Court" are references to the full Court. The Court may of course act through a chamber in proper instances. But where, as here, the Court cannot properly act through a chamber, the Court must of necessity act by itself. The jurisdiction

belongs primarily to the Court and is retained by it to the extent that it has not, for any reason, become effectually exercisable by the chamber.

I appreciate that, by reason of the Special Agreement, it may be said that the case is pending before the Chamber and not before the Court. But if, as I consider, the right to apply for permission to intervene is applicable in relation to a case pending before such a chamber, this must be so because "the case" is in legal theory pending before the "Court" within the meaning of Article 62 of the Statute.

It remains for me to refer to the following statement made in the Order of Court:

> "Whereas furthermore a State which has submitted a request for permission to intervene on which a decision has not yet been taken 'has yet to establish any status in relation to the case' (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 6, para. 8), and therefore a State requesting such permission must, for the purposes of the decision whether that request should be granted, take the procedural situation in the case as it finds it".

In my opinion, the question raised in the case referred to by the Court, as to whether an applicant to the full Court for permission to intervene has a right to appoint an *ad hoc* judge to that Court before it hears the application, was, as submitted above, not of the same order as the question raised in this case as to whether such an application may competently be heard by a chamber the selection of all of whose members was influenced, if not practically determined, by the existing parties. The issue arising in this case concerns the capacity of the Chamber to act judicially in relation to the hearing and determination of the Application, having regard to the methods by which the Chamber was constituted and to universally accepted judicial standards. The issue so raised is too vital, too weighty, and too substantial for me to bring myself to accept that it may be disposed of as a mere "procedural situation" within the Court's dictum that an applicant for permission to intervene "must ... take the procedural situation in the case as it finds it". It is on this fundamental issue, and the proper judicial approach to it, that I have the misfortune to disagree with the Court.

In sum, but with respect, I consider that the Court has misconceived Nicaragua's case. The essence of that case, as I understand it, is that the methods by which the Chamber has been formed entitle Nicaragua to take the view that the Chamber cannot exercise the judicial functions of the International Court of Justice in so far as Nicaragua is concerned. The Order of Court nowhere addresses this problem. The *Haya de la Torre* principle relied upon by the Court does not by itself suffice to provide a solution to that problem. A solution, if there is one, must, in the circumstances of this particular case, take account of the principle of equality of States, and there is no possibility of satisfying this principle without

appropriate action taken by the full Court within the framework of the very special relationship existing between itself and the Chamber.

For these reasons, I would uphold the contention of Nicaragua that the full Court has jurisdiction to entertain its Application. It is possible that the conclusion so reached is not altogether neat. But it often happens that the law has to balance the operation of one principle against that of another, and sometimes in peculiar circumstances. If the result of this process of mutual accommodation does not give perfect satisfaction in this case, the difficulty lies not in the conclusion but in the premise, namely, that the existing arrangements relating to *ad hoc* chambers are valid. In my opinion, they are not; and I fear that the problems inhering in the opposite view are not concluded with today's Order.

I end, as I began, by affirming my view that the *ad hoc* chamber system provided for by Article 26, paragraph 2, of the Statute is a valuable one. Though delays have not been unknown, the system should be capable of affording the benefit of simplicity without the risk of fractionalizing the functioning of the Court. In this latter respect, it seems to me that there is something of lasting worth in the stress which the Informal Inter-Allied Committee laid upon

> "the unity and cohesion of the Court as an institution, its central direction and the uniformity and continuity of its jurisprudence — everything, in fact, that is implied in the conception of a single Permanent Court of International Justice" ("Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, February 10, 1944", *American Journal of International Law, Supplement*, 1945, Vol. 39, p. 33).

I am not convinced that in the long term (for it is this which must provide the true institutional perspective) any risk to these values is necessarily negated by experience of the working of the new arrangements so far. In principle, some of the problems which exercised the mind of the Informal Inter-Allied Committee when considering the subject of regional chambers are inherent in the methods by which an *ad hoc* chamber is formed under the existing arrangements. But for those methods, I should have had no difficulty supporting the Order made by the Court today. It may be that those methods can be usefully reviewed. At the moment, however, I feel obliged respectfully to dissent.

(Signed) Mohamed SHAHABUDDEEN.