The Composition of the International Court of Justice

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1 Introduction

The title of my contribution to the Collection of Studies in Honour of my dear friend and colleague Tullio Treves represents the continuation of my discussion relative to the Statute of the International Court of Justice (hereinafter the Statute) which I published in the Essays in Honour of Edward McWhinney.[1] Namely, in that article I analyzed some provisions of the Statute which in my view require amendments in order to promote the role of the International Court of Justice (hereinafter ICJ or the Court).

In the present text, I will mainly discuss some other provisions of the ICJ Statute and some provisions of the Charter of the United Nations (hereinafter the Charter) dealing with the peaceful settlement of disputes. Naturally, also relevant are the additional documents to the Statute, primarily the Rules of the Court and the Practice Directions.[2]

In discussing that topic, one has to start with the Charter, which often mentions the peaceful settlement of disputes and establishes the ICJ as the principal judicial organ of the United Nations (Chapter XIV).

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[1] Vukas 2009, pp. 277–283.
[2] All these documents can be found in the ICJ publication Charter of the United Nations, Statute and Rules of the Court and Other Documents, No. 6, 2007.

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The reason for now dealing with the ICJ is the fact that in the last decade I have been chosen as judge *ad hoc* in two cases before the Court, and that in that period of time I have reconsidered my impressions concerning the rules and the work of the Court.[3] The work with the Members of the Court has clarified some doubts I had concerning the role of judges *ad hoc*, but also indicated some questions/problems concerning their role.

2 The UN Charter and the Peaceful Settlement of Disputes

The Charter contains various provisions dealing with the goal/principle of the United Nations to promote the peaceful settlement of disputes which may arise among its members.

Already among the "Purposes and Principles" of the United Nations (Chapter I of the Charter), the governments of the States establishing the United Nations stressed the importance of the peaceful settlement of international disputes. Therefore, in Article 1.1, the authors of the Charter stressed their decision to avoid any breach of the peace and "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". In accordance with that purpose, Article 2.3 of the Charter states the following as one of the Principles in accordance with which the United Nations and its Members shall act in the pursuit of the Principles stated in Article 1:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Taking into account the fact that the Purposes and Principles somehow represent the Preamble to the Charter, one should not try to give a precise/clear interpretation to every word of its first two articles. The majority of the terms used in these introductory articles have received a clear interpretation in the following articles of the Charter and in the Statute of the ICJ. Thus, for example, the list of "peaceful means" has been provided in Article 33.1 of the Charter: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements (…) Moreover, the Charter established the International Court of Justice as one of the principal organs of the Organization (Article 7), and all the Members of the UN are *ipso facto* parties to the Statute of the ICJ (Article 93.1).

[3] ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro); Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece).

3 Members of the International Court of Justice

Chapter XIV of the Charter, which deals with the ICJ, does not contain any provision referring directly to the composition of the Court. However, there is a sentence in Article 92 of the Charter which states that the Court shall function in accordance with its Statute which is annexed to the Charter.

Chapter I of the Statute deals with the "Organization of the Court", which means that it deals primarily with the judges, the Members of the Court. First of all, the Statute contains rules requiring that the Members of the ICJ have a high moral character and professional competence (Article 2). Many articles contain rules on the election and status of the Members of the Court (Articles 3–33). The judges are finally elected by the General Assembly and the Security Council, but no two of them may be nationals of the same State (Article 3.1 of the Statute).

There is no indication of the right of any State to have an advantage in the election of its nationals as Members of the Court. It is only stated that "in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Article 9 of the Statute). Taking into account that rule and the number of States which are Members of the United Nations, one could expect that nationals of each State would have long intervals between two elections to the Court. These consequences of the rules contained in the Statute are the reality of the practice of electing members of the ICJ, with the exception of five States. Although such a rule does not exist in the Statute, nationals of the five permanent members of the Security Council are always members of the rather small body of fifteen judges of the ICJ! Therefore, whatever the "moral character" and the professional competence of the candidates proposed by China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America, they will spend at least nine years in the Court. Is it correct that for the various roles these States had in World War II and in the international regime they wanted to establish after the drafting/adoption of the UN Charter in 1945, their nationals permanently represent one-third of the International Court of Justice?

On the other hand, even the best experts in international law—members of the Institute of International Law coming from other countries—will not very often become Members of the ICJ. Thus, for example, after the end of the mandate of Judge Milovan Zoričić in 1958, none of the excellent experts from the former Yugoslavia became a Member of the ICJ during the next 33 years of Yugoslavia's existence and during the 20 years of the States established after the dissolution of that Federation.

Another question which could be discussed concerning the composition of the International Court of Justice is the number of its members. According to Article 3, para 1, of its Statute, the ICJ consists of fifteen members. In some specific cases it can reach the number of seventeen members: these are cases when both parties are entitled to choose a judge *ad hoc* as the Court does not include on its Bench a judge of their nationality (see infra para 11).

In discussing the question of the number of the members of the Court it is difficult not to recall that the number of fifteen judges was decided upon when the United Nations only had 50 Member States, while the number of Members of the World Organization today is almost 200 States.

The creation of new States, having mostly a colonial history and various political regimes, has made it very difficult to satisfy the requirement of the Statute that in the ICJ "the representation of the main forms of civilization and of the principal legal systems of the world should be assured" (Article 9).

However, a considerable enlargement of the composition of the ICJ would inevitably affect its work. Therefore, suggestions have been made for a slight increase in the number of Members of the Court.[4] Thus the Institute of International Law concluded in 1954 that an increase in the number of the Members of the Court which would make the deliberations of the ICJ more difficult should be avoided. If the new circumstances would make an increase necessary, the number of judges should not be greater than eighteen.[5]

In discussing the number of judges of the ICJ, one should mention the establishment of the International Tribunal for the Law of the Sea (ITLOS). Although created by the 1982 United Nations Conference on the Law of the Sea as a tribunal open to all parties to the Convention, it is composed of only 21 members (Article 2, para 1, of Annex VI to the Law of the Sea Convention). It is impossible to compare the work of the ICJ and ITLOS, as the Law of the Sea Tribunal commenced its work only in 1996 and it has not heard many cases.

The question of composition should also be analyzed by taking into account the possibility of more often forming chambers, and limiting, or totally excluding the meetings of the plenary of the ICJ. However, I have the feeling that the opinions of the plenary of the ICJ have more effect on the development of international law than the judgments of the small chambers.

4 Judges *Ad Hoc*

Due to the interests of the population of their State, but even more often because of their own interests, State leaders have always been reluctant to make use of arbitration or judicial settlement to resolve their disputes. For that reason, notwithstanding the creation of the International Court of Justice, even the members of the United Nations are free to decide (in various ways) whether they will refer their disputes to the ICJ.

Such a limited competence of the ICJ has not evolved since the establishment of the Permanent Court of International Justice, notwithstanding the fact that the members of the Court are nationals of the Member States of the United Nations.

[4] Rosenne 1995, p. 61.

[5] Institut de droit international 1957, pp. 157–158.

Because of the limited number of the Members of the ICJ (see above, Sect. 3), the Statute of the Court provides a system which is intended to make all the parties to a case referred to the Court equal. Namely, the parties to a case whose nationals are not members of the Bench are entitled to "choose a person to sit as judge" in that case (Article 31.2 of the Statute). This is the institution of the so-called judges *ad hoc*. Although States mostly choose judges *ad hoc* having their nationality, this is not their duty, and there have been many judges *ad hoc* (including the author of this text) not having the nationality of the party entitled to choose a judge *ad hoc*.

Judges *ad hoc* must fulfill the same moral and professional conditions as the Members of the ICJ and "They shall take part in the decision on terms of complete equality with their colleagues" (Article 31.6 of the Statute). This is true in respect of the decisions which are relevant for the substance of the case, but they do not participate in every procedural decision concerning the case. Thus, for example, they are not invited to join the Bench in adopting the order determining the time limits for the filing of the written pleadings.[6]

Notwithstanding the equality of the judges *ad hoc* with their colleagues in the process of the decision of the Court, there are some differences between the two kinds of judges.

The Members of the Court discuss every case in the context of the practice of the Court in dealing with previous cases. Although the judges *ad hoc* may also be familiar with the previous practice of the ICJ, they are not supposed to participate in their specific case as lawyers being able to contribute to the general practice of the Court. They are supposed to follow the general practice/procedure of the Court and—if necessary—to contribute to the Court by some specific information concerning the case in which they are nominated as judges *ad hoc*.[7]

5 Final Remark

I will now end my comments on the International Court of Justice for the Essays in Honour of my dear colleague and friend since our participation in the Third United Nations Conference on the Law of the Sea, Professor Tullio Treves. However, I intend to discuss some additional remarks concerning the rules of the Court and its practice in Essays in Honour of some of my other colleagues. The first topic I would like to deal with is the question of the official languages of the Court—only French and English!?

[6] See e.g. ICJ: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro), Order (4 February 2010).

[7] Rosenne 1995, pp. 73–75.

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