likely to change soon. The Soviets' new assessment of the international situation focuses on significant factors of international relations. The new thinking carries the USSR further in the direction first taken by its adoption of peaceful coexistence in the 1950s. It represents another step in the accommodation between the Soviet revolution and Western capitalism.

JOHN QUIGLEY*

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

August 1, 1988

Judge Schwebel's article (81 AJIL 831 (1987)) directs attention to an interesting new aspect of the internal organization and practice of the Court that is, evidently, gaining in strength and developing its own constitutional customs and conventions in ways not necessarily anticipated by the drafters of the Court's Statute and of the successive revisions of the Rules of Court, but compatible, nevertheless, with the letter or the spirit of those Rules.

The Statute envisages—apart from the special Chamber of five judges to "hear and determine cases by summary procedure" allowed under Article 29—the creation of special Chambers "composed of three or more judges as the Court may determine, for dealing with particular categories of cases," here indicating, specifically, "labour cases and cases relating to transit and communications" (Article 26(1)). Judge Lachs, in reviewing the historical origins of the institution of special Chambers, going back to the old Permanent Court and to the Treaty of Versailles and, particularly, its Articles 336 and 376, and the provisions of the Peace Treaties dealing with questions of navigation, transit and communications, has made the case for *functional* specialization within the Court through the Chamber system, as a means of mobilizing specialist expertise.[1] One such functionally specialized panel suggested by Judge Lachs would have been devoted to the protection of the environment, particularly as to pollution of rivers and lakes on borders between states, and another to the law of the sea. If the statutory provision for special Chambers had been picked up, earlier, by the Court, and used in its original, functionally specialized intent, this might have headed off the current tendency, in recourse to the judicial process as a means of international third-party dispute settlement, to create international tribunals parallel to the International Court of Justice, specialized by subject matter, like the one provided by the Third United Nations Conference on the Law of the Sea in its Final Act. Judge Lachs seems right, in this regard, to signal the problems for the organic unity of international law posed by any such separate and autonomous, and potentially competing, international tribunals.[2]

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[1] Lachs, *The Revised Procedure of the International Court of Justice*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 21, 42 (Kalshoven, Kuyper & Lammers eds. 1980).

[2] *Id.* at 44.

The public debate surrounding the first special Chamber created by the Court, for the *Gulf of Maine* case,[3] has concerned the degree of deference to be accorded by the Court to the preferences of the parties as to the choice of the "three or more judges," from among the regular 15-member plenum of the Court, to make up the panel. The Court's Statute, by itself, appears conclusive: it is the "number of judges to constitute such a chamber" that the plenum of the Court is to determine "with the approval of the parties" (Article 26(2)). It is the Rules of Court that, *ex hypothesi*, could not overcome the language of the Statute; in their 1972 version and, again, in the 1978 revised version, the Rules introduce a new element of ambiguity. Article 26(1) of the 1972 Rules required the President of the Court to consult with the parties regarding the "composition of the Chamber"—this in addition to the requirement in Article 26(2) of the same Rules, which repeated the provision of Article 26(2) of the Statute as to the Court's determining the "number" of judges with the approval of the parties. Article 17(2) of the present, 1978, revised Rules of Court states the requirement under the previous Article 26(2) a little more strongly, perhaps, with its stipulation that "[w]hen the parties have agreed, the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly."

It is known—from the Institut de Droit International reunion in Dijon in August 1981—that the special Chamber originally proposed would not have been limited in its membership to Western Europe and North America, but would have been broadly representative in terms of both the principal legal systems of the world and the main political-geographic regions, and that its members would also have had a high degree of functional (law of the sea) specialization. In addition, it would *not* have included judges of the same nationalities as the two parties—a principle that carries extra weight if the Chamber is to be limited to five judges, and that seems only partly explained, in its application in the specific *Gulf of Maine* context, by U.S. Judge Richard Baxter's recusing of himself. After President Waldock's sudden death in the late summer of 1981, it was left to the then Acting President, Judge Elias, to conclude the arrangements for the panel for *Gulf of Maine*, for presentation for approval by the plenum of the Court. The task was further complicated, not merely by the fact that President Waldock would himself have presided over the special Chamber, but also by the sudden death of the distinguished Danish jurist, Professor Sørensen (not a member of the International Court), who had already agreed to serve on the Chamber.

The debate within the Court itself over the constitution of this Chamber —reflected not merely in the dissenting opinions of Judges Morozov and El-Khani, cited in Judge Schwebel's article, but also in Judge Oda's declaration accompanying the Court's Order[4]—seems to have assisted in the long-range dialectical development of the Court's own thinking: first, as to how much, if at all, to defer to the wishes of the parties on the choice of judges; and, second, as to how far it is an imperative of the constitution and practice of the Court today for it to be seen as broadly representative, in legal-sys-

[3] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Constitution of Chamber, 1982 ICJ REP. 3 (Order of Jan. 20).

[4] *Id.* at 10.

temic and political-geographical terms, both in its decision making and in its opinion writing in support of decision. If the *Gulf of Maine* panel, as finally constituted, may be viewed by many as having been narrowly Eurocentrist in character and composition since limited, in its five judges, to Western European and North American jurists, every special Chamber constituted by the Court thereafter has been determinedly eclectic in legal-systemic terms, and immune, in consequence, from any political reproaches of "Eurocentrism" (i.e., Western Europe and, by extension, North America). Moreover, in the aftermath of *Gulf of Maine*, even where, as with the *Guinée/Guinée-Bissau* arbitration,[5] the parties have opted for a special arbitral tribunal rather than the International Court, and consequently have acted with absolutely no legal restrictions on their choice of members, they have restricted that choice to serving judges of the International Court of Justice and made sure that the membership represented various legal systems.

The preferred constitutional position would be for Article 26(2) of the Statute and Article 17(2) of the 1978 Rules to be interpreted as instituting a full consultation by the Court with the parties as part of the process of constituting special Chambers, and a pragmatic consensus between the Court and the parties that a broadly eclectic membership including respect for political-geographical representativeness is imperative. The *Gulf of Maine* experience, imperfect as it may have been, would thus be seen as part of a trial-and-error testing experience of which the present Court is the beneficiary.

Incidentally, the proposition advanced by Judge Schwebel in regard to the final Judgment in *Gulf of Maine*,[6] that it was not in fact (whatever the legal-cultural homogeneity of its members) narrowly Eurocentrist in its holding or in its supporting reasoning, should be augmented by a further one. The advantages of special panels or senates or chambers, specialist in terms of subject matter, within a larger tribunal, are sufficiently well-known and proven in the experience of continental European and European-influenced courts for the International Court's current experience with Chambers to continue to be useful and to be extended; and there is enough acquired experience, in continental European and European-influenced courts and also within the International Court itself, to guard against the political risks inherent in any system of selecting some judges, rather than others, from the full ranks of the Court.

It is, however, especially important in this regard that the opting for a special Chamber not be viewed as a convenient method by the states parties to a case of avoiding or bypassing the jurisdiction of the full Court, characterized as "political" for the purpose. Some public comments by the State Department in the aftermath of the earlier *Nicaragua* judgments[7] did seem

[5] Tribunal arbitral pour la délimitation de la frontière maritime Guinée/Guinée-Bissau (Award of Feb. 14, 1985).

[6] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12).

[7] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4).

to imply such justifications for recourse to Chambers.[8] In contrast, nothing in the Canadian Government's public statements—either of the Trudeau Government, which agreed to the Chamber in *Gulf of Maine*, or of the successor Mulroney Government—derogates from long-standing policies of support for the International Court of Justice in its normal full jurisdiction as a prime means of international dispute settlement.

EDWARD MCWHINNEY*

TO THE EDITOR IN CHIEF:

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Professor Barrie's arguments that the ASIL policy on divestment violates international law (82 AJIL 311 (1988)) are erroneous, for reasons going beyond Paul Szasz's excellent responding Comment (*id.* at 314). As the author of the underlying Note on the Society's divestment decision (81 AJIL 744 (1987)), and also as one who, like Professor Barrie, makes his daily bread teaching international law, I add a few words in reply.

In citing Chief Buthelezi's aphorism against burning down a house to rid it of a snake, Professor Barrie is too kind to both the snake and the house. An apter reference would have been to the historical necessity in many parts of East and southern Africa to burn down village huts and sometimes even whole villages to rid them of driver ants. This reflects the nature of apartheid to black, and increasingly to white, South Africans, not as a single creature but a deadly scourge of racism made pervasive by the Pretoria regime. All participants are obliged under the Convention on the Suppression and Punishment of the Crime of Apartheid (Annex to GA Resolution 3068 (XXVIII) of November 30, 1973) to help rid the international community of this crime, as apartheid is now defined by international law.

It was a recognition of "law," including obligations to desist from being either a joint tort feasor or an accessory to a crime, that helped produce the ASIL decision to desist from taking steps economically or symbolically to cooperate with or lend support to a governmental system that is both illegal and criminal under international law.

As Szasz well states, the principle of domestic jurisdiction is no longer a bar to the international scrutiny of human rights violations (82 AJIL at 317). Moreover, that principle's underpinning doctrine of sovereignty is no longer a bar to individual state action, provided that action is consonant with the United Nations Charter and other major global community policies, in response to massive human rights violations. This permissibility arguably extends to all participants under international law, including learned societies.

The illegality of apartheid and the obligation of states to act against it derive directly from the UN Charter. Thus, all General Assembly resolutions, such as those cited by both Barrie and Szasz, are governed, regarding

[8] *See, e.g.*, Statement of Department of State on U.S. Withdrawal from Nicaragua Proceedings, Jan. 18, 1985, *reprinted in part in* Contemporary Practice of the United States, 79 AJIL 438, 441 (1985).

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