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REMARKS ON PROCEEDINGS BEFORE THE
INTERNATIONAL COURT OF JUSTICE



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The ICJ ⁽¹⁾ is the most ancient existing international court of justice and the only one with general competence (based on consent). But the context in which it is evolving is constantly changing thus creating a major problem for the Court and a situation to which it is having great difficulty adapting.

In his speech delivered to the General Assembly on 7 November 2004, President Shi declared that the Court “has demonstrated its ability to deal with a varied and demanding caseload. It has clearly shown that it can react urgently and efficiently to meet the needs of States, as in the case concerning *Avena and Other Mexican Nationals (Mexico v. The United States of America)* and to respond to requests from the General Assembly for an advisory opinion” ⁽²⁾.

It is certainly worth congratulating the Court that it was able to render its judgment in the case *Avena and Other Mexican Nationals*, between Mexico and the United States on the functioning of the American criminal justice system (which could have had grave consequences for the lives of the nationals in question) within a very short period of time:

- The Mexican application was submitted on 9 January 2003,
- Provisional Measures were ordered on 5 February 2003, and

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⁽¹⁾ For a thorough examination of the numerous problems linked to proceedings before the I.C.J., and a sometimes critical review formulated by those counsel who have appeared the most often before the Court, see BOWETT et al., *The International Court of Justice: Process and Procedure*, London, 1997. Unfortunately, eight years later, these problems and criticisms are, more than ever, still present.

⁽²⁾ General Assembly, Official Records, Fifty-ninth session, 49th plenary meeting, 4 November 2004, A/59/PV.49.

— The judgment on the merits was rendered on 31 March 2004, in other words less than 15 months after the application had been filed.

It is interesting to note that this period of time would have been even shorter if the Parties had kept to the deadlines which had been initially imposed. However, the Court, upon a request by the Parties, extended the deadlines by Order of 22 May 2003 and, even if this is simply anecdotal, Mexico missed by three days the latest extension of the deadline by the Court, which decided in the absence of any objection by the United States that the submission was timely filed on 25 June 2003 ⁽³⁾.

Likewise, the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was rendered within a more than acceptable time period given the delicate legal and political nature of the request formulated by General Assembly Resolution ES-10/14 of 8 December 2003 and the large number of participants in this case as, other than Palestine, 44 States and four international organizations submitted written statements while twelve States and two international organizations participated in the oral pleading phase ⁽⁴⁾. In these circumstances, seven months to render an opinion does not seem excessive, even if the General Assembly had requested the Court to “urgently render an advisory opinion on the (...) question” ⁽⁵⁾ and even if the Court should, in accordance with Article 103 of its Rules take “all necessary steps to accelerate the procedure” ⁽⁶⁾. It took no less than nine-

⁽³⁾ See *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, in *ICJ Reports 2004*, 18, para. 6 (Nonetheless, Mexico had submitted to the Court within the deadline two electronic copies of its Memorial and annexes.)

⁽⁴⁾ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, in *ICJ Reports 2004*, 142, para. 9 and 143-144, para. 12.

⁽⁵⁾ See A/ES-10/14 of 8 December 2003, para. 21 of the preamble, reproduced in *ICJ Reports 2004*, 139-140, para. 1.

⁽⁶⁾ In the case concerning *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the General Assembly had requested the Court to “take into account the time constraint” (See Resolution A/42/210 B, 17 December 1987). The Court, referring expressly to Article 103 of its rules considered as a result that it “should take all necessary steps to accelerate the procedure” (See Order of 9 March 1988, in *ICJ Reports 1988*, 5); the advisory opinion was rendered in eight months. See also GUYOMAR, *Commentaire du Règlement*

teen months for the Court to render the advisory opinion of 8 July 1996 “urgently” requested by the General Assembly on the *Legality of the Threat or Use of Nuclear Weapons* ⁽⁷⁾ and no less than twenty-six months for the Court to rule on the very similar request that had been formulated without reference to the urgency of the response by the W.H.O. ⁽⁸⁾. The improvement is noticeable and congratulations are in order.

But these glimmers of hope cannot help to cover up the trouble spots, which are rather worrisome, which still remain and which, unfortunately, in other cases are highlighted. Admittedly, there are two cases, that are amongst the worse:

The Judgment of 10 October 2002 in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria* was rendered more than eight years and six months after the filing of the application. It is true that Nigeria had the ingenuity to multiply the procedural steps to the point of creating a veritable lesson for law students ⁽⁹⁾ and more than a year went by between the filing of a Rejoinder by Nigeria and the opening of the oral pleadings ⁽¹⁰⁾.

de la Cour internationale de Justice, Paris, 1983, 667-668; ROSENNE, *The Law and Practice of the International Court, 1920-1996*, vol. 3 (*Procedure*), The Hague/Boston/London, 1996, 1718-1719.

⁽⁷⁾ *ICJ Reports 1996*, 226.

⁽⁸⁾ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, in *ICJ Reports 1996*, 66. Generally, the General Assembly tends to indicate that its requests are “urgent”, the Court takes into account the circumstances to determine the degree of urgency.

⁽⁹⁾ Nigeria introduced preliminary objections which resulted in a Judgment of the Court on 11 June 1998 (*ICJ Reports 1998*, 275), then requested the interpretation of this first judgment under Article 60 of the Court’s Statute; the request for interpretation was declared inadmissible by the Court in its judgment of 25 March 1999 (*ICJ Reports 1999*, 31). Thereafter, Nigeria introduced counter-claims in its counter-memorial of 31 May 1999 in accordance with Article 80 of the Court’s Rules that were declared admissible by Order of 30 June 1999 (*ICJ Reports 1999*, 983).

⁽¹⁰⁾ See the Court’s Order of 30 June 1999 by which it fixed 4 January 2001 as the date for filing of the Nigerian Reply (*ICJ Reports 1999*, 983). The date of the opening of the oral proceedings on the merits had been fixed by the Court at 18 February 2002 (Press Release 2002/1, 28 January 2002). In the *Diallo* case, the written pleadings of the Parties on preliminary objections have been closed since 7 July 2003 (Order of the Court of 7 November 2002, *ICJ Reports 2002*, 608); at the beginning of the month of December 2005, the date for the oral hearings had still not been fixed; it is true that in this case, the claimant State has not demonstrated a great deal of rapidity (cf. Order of 25 November 1999 and 8 September 2000 accepting the requests for extension of

Another example, which is mentioned with great regret, borders on the scandalous: Bosnia Herzegovina formulated on 20 March 1993 an application against Serbia and Montenegro (at the time still Yugoslavia) with regard to the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. To this day (i.e., more than twelve years later) the case has still not been decided (even if President Shi announced recently to the Parties that the Court envisages opening oral hearings in February 2006⁽¹¹⁾ — which means that it will have taken over thirteen years as of the filing of the application for the hearings on the merits to begin.

Here again, the Court is not solely responsible for this deplorable situation as it was ex-Yugoslavia (under its successive names) that raised preliminary objections⁽¹²⁾, introduced a “true-false” withdrawal of the claimant State⁽¹³⁾ and requested the revision of the judgment on preliminary objections⁽¹⁴⁾. In any event, the request for revision was rejected on 3 February 2003⁽¹⁵⁾ and more than three years went by between this date and the beginning of the oral proceedings.

Additionally, to give one final, recent example of the slow pace of the Court, in the case concerning *Certain Property (Liechtenstein v. Germany)*, the deliberations lasted more than seven months⁽¹⁶⁾, which is excessive, in itself, however the Court had to “let” the *Wall* opinion have priority.

deadlines fixed for the filing of the Memorial of the Republic of Guinea, *ICJ Reports 1999*, 1042-1043 and *ICJ Reports 2000*, 146-147).

⁽¹¹⁾ See Press Release 2004/37, December 2004, indicating that the public hearings on the merits will begin on 27 February 2006, i.e., six years after the filing of the rejoinder, a delay that even certain difficulties in procedure owing to the attitude of the Parties certainly cannot justify.

⁽¹²⁾ Order of 8 April 1993, *ICJ Reports 1993*, 3; Order of 13 September 1993, *ibid.*, 325.

⁽¹³⁾ A Co-Agent surreptitiously named by the Serbian member of the Tripartite Presidency of Bosnia-Herzegovina notified the Registry, without consulting with the Agent, of the “withdrawal” of this country.

⁽¹⁴⁾ See Application of 24 April 2001, published on the Court’s website (www.icj-cij.org); Press Release 2001/12, 24 April 2001.

⁽¹⁵⁾ *ICJ Reports 2003*.

⁽¹⁶⁾ The oral proceedings had been closed and deliberations began on 18 June 2004 (Press Release 2004/21, 18 June 2004); the Court’s Judgment on preliminary objections was delivered on 10 February 2005 (available on www.icj-cij.org).

If this kind of deviation is raised with the Judges of the I.C.J., inevitably the explanation will be based on two reasons:

- i) the Parties are essentially responsible for the situation;
- ii) the Court’s docket would be dramatically overcrowded.

On the first point, as mentioned above, there is certainly reason in stating that the Parties — or at least certain Parties — have the ingenuity to unnecessarily prolong the proceedings by multiplying, well beyond what is reasonable, the incidental procedures and the procedural steps in the simple sense of the term⁽¹⁷⁾. Without wishing to instigate a “war of juridical civilisations” I must say that I have the impression that well-known Anglo-Saxon counsel (and particularly British) are more particularly fond of these procedural games — perhaps because they are always barristers at law (even if most of them are professors) whereas “latin” or “continental” counsel are university types who are more inclined toward intellectual jousts (in fact, sometimes too inclined) rather than procedural chicaneries. It must also be recognized that sometimes counsel push their clients (i.e., States) to request excessive procedural time limits.

No matter how difficult the case is, six months, (for each Party) for the first round of written pleadings and four for the second should be sufficient, and, in any event, it never seems justified to surpass nine months for the first round and six for the second, which in the case of alternative pleadings, already means a total of 20 to 36 months, a time limit which is already considerable and that may be extended if there is a third round. I had the opportunity recently to be associated with ICSID and European Court of Justice cases where the time limits are infinitely shorter; and nonetheless the Parties can adapt and justice is just as effectively rendered — or at least with regard to the written proceedings it is; as with regard to the oral phase, the situation is slightly more complicated.

Therefore, the Parties and their counsel, have a certain responsibility with regard to this current, troublesome situation. But the

⁽¹⁷⁾ In its Judgment of 5 February 1970 in the *Barcelona Traction* case, the Court referred to “the unusual length of the present proceedings, which has been due to the very long time-limits requested by the Parties for the preparation of their written pleadings and in addition to their repeated requests for an extension of these limits” (*ICJ Reports 1970*, 30-31, para. 27).

Court also has its share of the responsibility, which is far from being negligible. The Court's responsibility is tied to objective factors that might constitute "excuses" but also "subjective" factors, or a poorly adapted organization, which is far less excusable.

First of all, the objective factors. The Judges repeat this at every opportunity; President Shi repeated it before the General Assembly⁽¹⁸⁾: the Court's docket is fuller than it has even been since 1945 and even since 1920: after peaking at 25 in 2003, today 22 cases are entered in the General List⁽¹⁹⁾. However:

— Even taking these figures at face value this is all relative: there are presently more than 800 cases before the European Court of Justice, without taking into account those cases (almost 1200) that are before the Tribunal of First Instance⁽²⁰⁾. The dockets of the Courts of Strasbourg and San José de Costa Rica are infinitely more crowded⁽²¹⁾. The docket of the Hague Court is also largely surpassed by that of the Dispute Settlement Body of the W.T.O.⁽²²⁾.

— These figures are reasonably and possibly artificially inflated. It must not be forgotten that out of the twenty-one cases stipulated to be pending, eight would have presented the same is-

⁽¹⁸⁾ See *supra*, note 2.

⁽¹⁹⁾ On the date that this article was last edited (1 December 2005), the number of cases entered in the General List had been reduced to twelve because of the eight Judgments rendered in the cases concerning the *Legality of Use of Force* (*Serbia and Montenegro v. Germany*), (*Serbia and Montenegro v. Belgium*), (*Serbia and Montenegro v. Canada*), (*Serbia and Montenegro v. France*), (*Serbia and Montenegro v. Italy*), (*Serbia and Montenegro v. Netherlands*), (*Serbia and Montenegro v. Portugal*), and (*Serbia and Montenegro v. United Kingdom*) and the Judgments delivered in the *Certain Property* (*Liechtenstein v. Germany*) and *Frontier Dispute* (*Benin/Niger*) cases whereas only one new application has been filed (*Dispute regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), Application of 27 September 2005, available on www.icj-cij.org).

⁽²⁰⁾ See the judicial statistics of the European Court of Justice and the Tribunal of First Instance for the judicial year 2004, published on the Luxembourg Court's website (curia.eu.int).

⁽²¹⁾ See the annual report for 2004 for the Main Chamber and the sections of the European Court of Human Rights published on the Court's website: www.echr.coe.int and, for the Inter-American Court, the Annual Report of the Inter-American Court of Human Rights, 2004, Doc. OEA/SER.L/V/III.65. Doc. I (www.corteidh.org.cr).

⁽²²⁾ See Addendum to Annual Report (2004) of the D.S.B., Doc. WT/DSB/37/Add.1, 3 December 2004.

sues, at least on the merits (*Legality of Use of Force*), which reduces the figure to fourteen. Out of these fourteen cases, certain cases are "dormant" and will probably not be or never be revived. I have in mind, principally, the *Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*) case in which a first Judgment was rendered in 1997 on the principle of responsibility and for which it is difficult to see now (but I could be wrong) that the Parties will decide to request a Judgment on the quantum of damages. If, at the end of this year or at the beginning of next year, the Court accepts the preliminary objections raised by the NATO member States in the eight cases on the *Legality of Use of Force* and those raised by Germany in the *Certain Property* case, there will remain only twelve cases in the General List⁽²³⁾. Relatively speaking, this is a lot compared to the past; however, this does not represent an excessively overcrowded docket for the Court.

Other factors can be grafted onto these statistical, objective elements and there is above all one, which is perhaps not the most important but that is irritating, and that I sometimes hesitate to mention but at the same time believe should not be ignored. My impression is — and this is of course a personal impression — that as an institution at least, the Judges do not handle enough work or are not sufficiently dedicated to their functions.

When one "gravitates" around the Court — as I have had the honour and pleasure to be able to do now for at least the last 20 years — it is readily apparent. The Judges participate very unequally in the drafting of judgments; and certain Judges are very (too) tied up with certain outside occupations, for example, arbitrations, an eminently respectable activity that, in principle, does not appear to be incompatible with the exercise of their judiciary functions, but risks interfering with those functions and sometimes complicates the fixing of hearing dates or deliberations.

This being the case, what has just been stated (that many others think and say in private but rarely risk expressing publicly) covers up other elements that might explain the (real) risk of the

⁽²³⁾ This has happened since this article was first drafted: by eight similar judgments, rendered on 15 December 2004, the Court declared it did not have jurisdiction to hear the applications filed by Serbia-Montenegro and, on 10 February 2005, the Court accepted one of the preliminary objections on jurisdiction raised by Germany to the application filed by Liechtenstein. See note 20 *supra*.

“excesses” of the Court. These other elements are even more worrisome as certain of these elements can be only partially remedied.

First of all, there is the language factor. This involves two main aspects. The first aspect is “personal” and varies according to the individual situation of each Judge; the second aspect is “collective”. It is difficult to have one compensate for the other.

It is well known that according to the terms of Article 39, para. 1 of the Statute, “the official languages of the Court shall be French and English.” This is a source of frustration, and of constraint, but at the same time a source of enrichment.

It is a source of frustration as, even if the bilingualism of the Court is for historical reasons, it might be asked why not Spanish or the language of Prof. Anzilotti (and of many other eminent international jurists) or German or Arabic or Chinese or Russian or Japanese? But also why not Czech or Slovak — apparently the two languages are different — or Gallic? The questions themselves carry their own responses: Why not other languages? Because that would not be reasonable and if we open Pandora’s box, it would be impossible to set objective limits.

This being said, quite apart from the legitimate frustration felt by certain States and numerous jurists who have to confront this historical basis, the bilingualism of the I.C.J. is also a source of very heavy constraints.

First of all, for States, which if they are not French or English speaking must call upon jurists speaking one of the two languages — who are for the most part foreigners — even if, theoretically, use of another language is possible⁽²⁴⁾. However, this is costly because translations are the responsibility of the party that has chosen to use a language other than one of the official languages⁽²⁵⁾ and it is undoubtedly one of the reasons why States do not take the risk of using another language.

Secondly, for the Judges this is also a problem because the system strongly favours those whose native language or habitual working language is French or English. The Japanese Judge, Judge Oda who has been on the Court for twenty-seven years, has told me many times that to work in English takes him three to four times

⁽²⁴⁾ See Article 39, para. 3 of the Statute.

⁽²⁵⁾ See Articles 51, para. 2, and 70, para. 2 of the Rules of Court.

longer that it takes a Judge whose native language is English and to read in French takes him ten to twenty times longer than it takes a French-speaking Judge; the recent system of legal assistants might serve to improve the situation and permit them to prepare notes for Judges on particular issues but there is no reason to believe that the system was conceived with this goal in mind; their essential mission is to “carry out research and establish legal texts for the Court and the Registry”, and they are organized into “pools” “as part of the legal department”⁽²⁶⁾ and they are not assigned to a particular Judge.

Last, but not least, the bilingualism constitutes a heavy burden for the Court itself, or at least for the Registry which must take charge of the translation of the entirety of the written pleadings of the Parties which contain almost always hundreds and sometimes thousands of pages.

In this regard, apart from efforts to improve the procedure — which will be treated below — one cannot help but approve of, at least basically — Practice Direction IV which provides:

“Where one of the parties has a full or partial translation of its own pleadings or of those of the other party in the other official language of the Court, these translations should as a matter of course be passed to the Registry of the Court. The same applies to the annexes. These translations will be examined by the Registry and communicated to the other party. The latter will also be informed of the manner in which they were prepared”.

This means, in fact, that even if the Parties attempt to assist the Registry in this regard, they can only do so partially, i.e., if a condition of bilingualism already exists⁽²⁷⁾. The ultimate step that most States can take is to furnish the Registry, unofficially, the original version of chapters written by Counsel in the other official language, and in turn translated by them, but this practice is relatively

⁽²⁶⁾ See COUVREUR, *L’organisation et les moyens des juridictions internationales face au contentieux international*, in *La juridictionnalisation du droit international*, Colloque de la S.F.D.I. de Lille, Paris, 2003, 477, my translation.

⁽²⁷⁾ For example, it would appear that Canada usually submits to the Court its written pleadings in the two official languages. On the other hand, in its *Land and Maritime Boundary* case with Nigeria, Cameroon filed its official written pleadings exclusively in French.

rare and could prove to be problematic because, in general, the initial texts are reworked when the written pleadings are compiled and discussed by counsel.

However, there exists a solution to these problems — or at least a partial solution as certain inequalities between Judges and between Parties would remain; this would be to switch to a single language. After all, the deliberations of the European Court of Justice take place in French, which creates huge advantages: the Judges exchange their ideas directly without having them be subjected to interpretation, and this tradition has not been questioned despite the successive increases and multiplication of community languages — even if the proceedings themselves before the Court of Luxembourg can be held in practically all of the languages of the Europe Union. This being true, I am not enough of a dreamer or sufficiently chauvinistic to think that if a single language system, even a partial one, were to be introduced to the I.C.J., it would lean heavily toward being French ⁽²⁸⁾.

Nonetheless, despite how attractive the one language — English — as the privileged language, solution — might seem — I am, quite sincerely and in trying to ignore my “Frenchness”, not a believer. Basically because the existing bilingualism is not just a source of frustration and constraint, it is also a source of enrichment and, in order to explain this, it is necessary to move a bit backwards in time.

International law has resulted essentially from the meeting of two legal traditions: Roman law, of Latin origin, undoubtedly practiced in the majority of countries in the world and whose influence was certainly predominant when the foundations of modern international law were established and developed in the 17th and 18th centuries, and, on the other hand, the common law in which the methods of reasoning are very different. Furthermore, as provided in Article 9 of the Statute of the I.C.J. the Court’s Judges are chosen in assuring “in the body as a whole the representation [...] of the principle legal systems of the world”.

⁽²⁸⁾ In 1929, the Assembly of the League of Nations adopted a resolution indicating that the Judges of the P.C.I.J. had to be able to work in one of the two languages and have a [working] knowledge of the other. See VON STAUFFENBERG, *Statut et règlement de la Cour permanente de Justice internationale: Éléments d’interprétation*, Berlin, 1934, 288, this directive was not adopted by the I.C.J., which is regrettable.

Of course one can address a French Judge, or a Brazilian Judge or a Madagascan Judge in English, but language, nonetheless, is not a neutral transmitter and the possibility to address the Court in a language that constitutes a natural vehicle for the common law, and in another language, that is related to the creation of Roman law is a source of mutual enhancement and enrichment. I have been able to and continue to verify each day in the thirty cases before the Court in which I have been or am presently serving as counsel that even within teams of advocates, the diversity of legal systems to which we belong may complicate the orchestration of the legal strategy that will eventually be followed, but it guarantees the full gambit of argumentation and undoubtedly allows for an approach that is sufficiently diversified on the legal issues at stake so that each of the Judges on the Court may find his way in the legal reasoning expressed on behalf of the State that is being represented. It must not be forgotten that the full Court, which is the standard judicial body, includes fifteen permanent Judges (and, often, one or two *ad hoc* Judges) who have also been nourished by either Roman law or the common law and who, because of this, might have difficulties entering into a logic that in certain instances, might be very foreign to them ⁽²⁹⁾.

Furthermore, one cannot hide from the fact that the disappearance of French undoubtedly would bring with it, little by little, slowly but surely, the progressive eviction of counsel from Latin countries in favour of Anglo-Saxon counsel who already are very present at the invisible bar of the I.C.J. This, in turn, would certainly have an influence, perhaps indirectly but just as surely, on the jurisprudence of the Court and, thereafter, on the evolution of international law. It seems to be already sufficiently threatened, for other reasons, by American imperialism (that are not only legal) which does not need to be encouraged by such means, which, in any event, would not create a panacea to cure the stagnation that will perhaps eventually threaten the Court.

⁽²⁹⁾ See PELLET, *Conseil devant la Cour internationale de Justice - Quelques impressions*, in *Mélanges offerts à Hubert Thierry*, Paris, 1998, 351, also published and updated under the title *Remarques sur le ‘métier’ de Conseil devant la Cour internationale de Justice*, in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law*, New York, 1999, 442-443.

Another element that slows the proceedings and overcrowds the docket certainly arises from the Court's working methods:

- absence of Judges rapporteurs;
- the system of notes to be written by each Judge⁽³⁰⁾;
- the constitution of the Drafting Committee, composed, in principle, of three members, presided over by the President of the Court, if he shares the majority opinion of the Court⁽³¹⁾.

These are the heavy elements of procedure which the Court could rely on at a time when it rendered barely two judgments or advisory opinions per year, but which need to be seriously dusted off if the Court wants to ensure its — relatively-speaking — newly found success but also wants to maintain and strengthen it.

This method is furthermore only employed with caution. Additionally, the idea that, from now on, the system of notes has been abandoned in principle for preliminary objections must be applauded, and even, for certain cases on the merits where no crucial problem is at stake⁽³²⁾. But these minor reforms are certainly insufficient to “revitalize” the Court in the way that is really required.

Another solution, favoured by many individuals, would be to multiply the instances of and make more common recourse to Chambers of the Court in application of Article 26 of the Statute. But, first of all, States have to want to do this; presently they are not demonstrating a lot of enthusiasm in this regard; currently, a single case (*Frontier Dispute (Benin/Niger)*) has been submitted to a five-judge Chamber⁽³³⁾. And even though the Court created within its structure a special Chamber for environmental matters, this Chamber has never been seized of a dispute (it is true that few environmental cases have been brought before the Court) and the Chamber of summary procedure per Article 29 of the Statute is a

⁽³⁰⁾ See BEDJAOUI, *La 'fabrication' des arrêts de la Cour internationale de Justice*, in *Le Droit international au service de la paix, de la justice et du développement*, Mélanges Michel Virally, Paris, 1991, 97-98.

⁽³¹⁾ See Article 6 of the Resolution concerning the Internal Judicial Practice of the Court, 12 April 1976, available on www.icj-cij.org.

⁽³²⁾ See Guillaume's presentation in S.F.D.I. colloque de Paris, *Le droit international et le temps*, Paris, 2001, 269.

⁽³³⁾ The Chamber rendered its Judgment in this case on 12 July 2005.

sleeping beauty that no prince charming has had the idea to wake up since the creation of the present Court⁽³⁴⁾.

Admittedly, this reticence on the part of States is understandable even if recent precedents have shown that cases submitted to Chambers can be settled more quickly than those submitted to the full Court⁽³⁵⁾.

First of all, the procedure, that includes certain aspects that are judicial and certain aspects that are arbitral⁽³⁶⁾, is a bit of a hybrid; the Parties are not supposed to be in a position to choose the members of a chamber but they may do so anyway⁽³⁷⁾ and, in reality, this does not occur without a certain difficulty⁽³⁸⁾.

Additionally, this falsifies a bit the rules of the game, within a

⁽³⁴⁾ Since the time of the P.C.I.J. only two Judgments have been rendered by the summary procedure chamber: 12 September 1924, *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)*, Judgment No. 3, 1924, P.C.I.J. Series A, No. 3 and 26 March 1925, *Interpretation of Judgment No. 3, Judgment No. 4, 1925, P.C.I.J., Series A, No. 4*.

⁽³⁵⁾ The Judgment of 12 July 2005 in the *Frontier Dispute (Benin/Niger)* case was rendered a little more than three years after the notification of the Special Agreement and less than seven months after the filing of the last written pleading, nonetheless deliberations lasted four months. The Judgment revision requested by El Salvador in the case concerning *Land, Island and Maritime Dispute* was rendered fifteen months after the filing of the Request; indeed, it is true that the case was not very complicated; the Judgment on the merits of 11 September 1992 (which was particularly long given the diversity of the questions to be decided) was rendered six years after the notification of the Special Agreement.

⁽³⁶⁾ Cf., for example, Articles 26 and 28 of the Statute and Articles 17 and 92 of the Rules of Court. For interesting developments with regard to Chambers, see *Les formations restreintes des juridictions internationales*, in GUILLAUME, *La Cour internationale de Justice à l'aube du XXIème siècle - Le regard d'un Juge*, Paris, 2003, 57-84, notes, 58-63 and 77-78.

⁽³⁷⁾ See the dissenting opinions of Judges Morozov and El-Khani to the Order of 20 January 1982 concerning the constitution of an *ad hoc* Chamber in case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)* in which the two Judges harshly criticize the attitude of the Parties who imposed not only the number of Judges sitting in the Chamber but the composition of the Chamber (*ICJ Reports 1982*, 11 and 12-13). The Declaration of Judge Oda (*ibid.*, p. 10) in a much less direct way seems to suggest the same criticism. See also ZOLLER, *La première constitution d'une chambre spéciale par la Cour internationale de Justice: Observations sur l'Ordonnance du 20 janvier 1982*, in *Revue générale de droit international public*, 1982, 305-324.

⁽³⁸⁾ See for questions linked to the resignation of a Judge, MÜLLER, *Procedural Developments at the International Court of Justice*, in *The Law and Practice of International Courts and Tribunals*, 2005, 142 (Note 6).

Chamber of five Judges, of which two are *ad hoc* or nationals, the weight of their individual characteristics is greater than in a Court of fifteen permanent Judges and the Parties' lawyers tend to address themselves individually to each Judge, which does not appear to be very healthy. Perhaps this would be less often the case if Chambers of seven Judges were constituted. Unfortunately, this has never been tried.

Finally, the constitution of chambers does not seem very helpful for lightening the Court's load: the President of the Court generally wants to be a member (and preside over them) and, in any event, the work of the chambers cannot help but collide with the calendar of the full Court and its work in which the Judges sitting in a chamber must also participate; furthermore, a chamber disposes of the same means, linguistically and logistically, etc. as does the full Court and the Registry's workload is by no means lightened.

In fact, recourse to chambers could only have real advantages in terms of lightening the full Court's work load if several chambers could function at the same time and if the Registry had at its disposal the human and financial means for this.

From what I have learned, this type of situation is very far away. The creation of 12 new positions for translators in 2000, and 5 positions for legal assistants in 2002⁽³⁹⁾ is probably not sufficient to handle the extra work entailed to maintain the current flow of cases. Moreover, the pressure of UN budgetary procedures makes it more difficult to adapt the financial and manpower capabilities of the Registry to the unpredictable evolutions of the docket of the Court.

This is exactly what the Court has been doing by working on modifications of its Rules, which since 1978, have addressed only minor problems, but which have been very much welcome, just the same⁽⁴⁰⁾ and, in particular, by adopting the Practice Directions, "di-

⁽³⁹⁾ See COUVREUR, *L'organisation et les moyens des juridictions internationales face au contentieux international*, cit., 477.

⁽⁴⁰⁾ Therefore, on 12 January 2001, with effect as of 1 February 2001, the Court modified Articles 79 and 80 of its Rules concerning, respectively, preliminary objections and counter-claims. These amendments were carried out in order to "reduce the length of proceedings, the multiplication of which has increased the number of contentious matters, to clarify the rules in force or to adapt them so that they better reflect the practice developed by the Court" (See Press Release 2001/1, 12 January 2001). See also, PRAGER, *The 2001 Amendments of the Rules of Procedure of the International Court of Justice*, in *The Law and Practice of International Courts and Tribunals*,

rected towards accelerating the Court's work"⁽⁴¹⁾. Twelve directions of this type have been adopted since 2001, the last three having been adopted on 30 July 2004. Hereafter follow a few brief comments on the Practice Directions; with regard to their form and their content⁽⁴²⁾.

With regard to their substance, the Practice Directions are divided into two broad categories:

— two of them relate to counsel, advocates and *ad hoc* Judges⁽⁴³⁾;

— most of the others concern procedure, properly speaking; they are aimed at rationalizing, accelerating and simplifying but they do so, nonetheless, in a rather limited manner.

These Practice Directions should come closer to the modifications made to Article 79 of the Rules⁽⁴⁴⁾ that also aimed to avoid

2001, 155-197. The amendments to the Preamble and to Article 52 of the Rules, adopted on 14 April 2005 (See Press Release 2005/9 of the same date), have had a minimum effect on the contentious or advisory procedure of the Court. The amendment to the Preamble was necessary following the adoption of a new practice by the Court regarding the publication and notification of amendments to its Rules. The elimination of paragraph 3 to Article 52 of the Rules likewise was simply a question of form owing to the fact, that since 1972, the memorials submitted by Parties no longer need to be printed and in practice, the printing and reproduction these days is mainly taken care of by the Parties themselves. See also MÜLLER, *Procedural Developments at the International Court of Justice*, in *The Law and Practice of International Courts and Tribunals*, 2005, 351-354. Recently, the Court amended Article 42 of its Rules in order to put in place a notification procedure for international organizations who are parties to an international agreement, the interpretation of which is at issue in a case pending before the Court. See, with regard to this amendment, MÜLLER, *Procedural Developments at the International Court of Justice*, in *The Law and Practice of International Courts and Tribunals*, 2005, 507-509. For a more general view on the Court's efforts of adaptation, see COUVREUR, *supra*, note 26, 473-478.

⁽⁴¹⁾ See Note containing important information for Parties for new cases.

⁽⁴²⁾ See also the following articles: ROSENNE, *International Court of Justice: Practice Directions on Judges ad hoc; Agents, Counsel and Advocates; and Submission of New Documents*, in *The Law and Practice of International Courts and Tribunals*, 2002, 223-246; WATTS, *New Practice Directions of the International Court*, in *The Law and Practice of International Courts and Tribunals*, 2002, 247-256; PRAGER, *Procedural Developments at the International Court of Justice*, in *The Law and Practice of International Courts and Tribunals*, 2002, 425-426; MÜLLER, *Procedural Developments at the International Court of Justice*, in *The Law and Practice of International Courts and Tribunals*, 2004, 577-578.

⁽⁴³⁾ Practice Directions VII and VIII.

⁽⁴⁴⁾ See *supra* note 40.

excessive procedural delays with regard to preliminary objections — essentially by obliging Parties to raise preliminary objections at the latest during the three months following the filing of the Memorial (and no longer no later than the filing of a counter-memorial) (para. 1) and by allowing the Court to decide separately and *proprio motu* on questions of jurisdiction and admissibility even if the claimant does not request the Court to do so (new paras. 2 and 3). The Practice Directions are drafted in this tone as well.

Before commenting on the content of these directions, the issue as to their legal nature arises. In reality, there is no reason why these cannot simply be regarded as a “Rules Set 2” in coordination with the Statute and Rules properly speaking. In fact it is not unusual for international tribunals to have a statute and several sets of rules — Rules and Regulations for example — their name is not important. Nonetheless, in the case of the Court, the situation is not so clear.

First of all, the legal nature of the Practice Directions is uncertain as is evident by their name. Are these procedural rules properly speaking? Are they recommendations? Are they something in between the two? Are they simple guidelines?

Secondly, in any event, they must conform to the Statute, on the one hand, and on the other, they must conform to the Rules of Court. And it is far from certain that they actually do. Practice Direction I, for example, is certainly justified with regard to its basis; without a doubt the filing of simultaneous pleadings is not recommended. However, if the Parties do not agree on another procedure, the filing of simultaneous memorials and counter-memorials remains the standard (Article 46, para. 2 of the Rules). Therefore, how is one to understand Practice Direction I by virtue of which “The Court would expect future special agreements to contain provisions as to the number and order of pleadings [...]”? Clearly, the Court cannot, hopefully, establish a directive, although it has no legal effect, which advises the Parties in a manner, perhaps not in letter, but at least in spirit, that is contradictory to the Rules in force. Furthermore, in the Special Agreement in the *Frontier Dispute (Benin/Niger)* case signed several months after the adoption of Practice Direction I, the Parties opted for simultaneous pleadings⁽⁴⁵⁾ without either the Court or the Chamber constituted for the case having protested.

⁽⁴⁵⁾ Article 3 of the Special Agreement signed on 15 June 2001 in Cotonou, re-

However, the Court has demonstrated its greater concern for the Parties to respect Practice Directions VII and VIII concerning the choice and nomination of *ad hoc* Judges and agents, counsel and advocates, a measure which, to a certain degree, should be considered worthy of criticism⁽⁴⁶⁾.

It is certainly necessary to avoid having one person sit as Judge *ad hoc* who at the same time is pleading before the Court in another case. It is desirable that a former Judge not be allowed to participate as counsel until after a reasonable period of “widowhood” (*viduité*). On the other hand, it is completely illogical that former counsel cannot be designated as a Judge *ad hoc* as soon as they are no longer counsel. It can be hoped that one day a Party will have the courage to overlook this abusive requirement and name an individual who does not fulfil the conditions listed in Practice Instruction VII as Judge *ad hoc*. In my opinion, legally, the Court, cannot object to the nomination for *ad hoc* Judge of an individual who has served during the last few years as counsel in another case if that other case has ended. Furthermore, given the terms included in Practice Direction VII: “The Court considers”, the parties “should refrain [...]”. These are simply expectations and, legally speaking, expectations can be overlooked.

With regard to the other Practice Directions, for the most part, these are generally reasonable and useful. They are aimed at rationalizing and accelerating proceedings before the Court.

Practice Direction II which requests the Parties to include at the conclusion of the written pleadings a “short summary of its reasoning” is of little interest for the acceleration of proceedings and appears to be questionable even with regards to what inspired it. After all, the Judges should read the entirety of the Parties’ written pleadings.

Practice Direction III is more fundamental and can even be considered not to have been drafted in strong enough terms⁽⁴⁷⁾. It

produced in the Judgment of the Chamber of the Court of 12 July 2005, para. 2 available on www.icj-cij.org.

⁽⁴⁶⁾ See also ROSENNE, *International Court of Justice: Practice Directions on Judges ad hoc; Agents, Counsel and Advocates; and Submission of New Documents*, in *The Law and Practice of International Courts and Tribunals*, 2002, 223-238.

⁽⁴⁷⁾ “The Court has noticed an excessive tendency towards the proliferation and protraction of annexes to written pleadings. It strongly urges Parties to append to their pleadings only strictly selected documents”.

might be useful for reinforcing the efforts of certain counsel (not all unfortunately) who attempt to convince their clients to adopt a more reasonable approach when it comes to annexes.

Practice Direction V usefully completes the amendment to Article 79 of the Rules of Court, which targets imposing stricter time limits for the filing of preliminary objections.

Practice Direction IX is overflowing with good intentions but it does not add much to the provisions of the Rules.

Practice Directions X and XII constitute a welcome return to order⁽⁴⁸⁾ but constitute something that is difficult to make the Parties respect.

Practice Direction VI is, on the other hand, particularly important. From a legal point of view, this Practice Direction is not extremely important as it simply recalls the terms of Article 60, para. 1, of the Rules of Court, provision the “Court requires full compliance with” and for which it disposes of the means necessary to ensure compliance.

Nonetheless, the text demonstrates clearly the preoccupations of the Court with the subject of the length of oral pleadings. In this regard, it is worth commenting on the fact that hearings today are shorter than they were in the very recent past, when oral pleadings were excessively long⁽⁴⁹⁾, and the announced reduction is by no means worthy of criticism. Nevertheless, it is important not to vacillate from one extreme to the other. It is impossible to reduce beyond reason the time allotted to oral proceedings, and at least in the

⁽⁴⁸⁾ Practice Direction X: “Whenever a decision on a procedural issue needs to be made in a case and the President deems it necessary to call a meeting of the Agents to ascertain the views of the parties in this regard pursuant to Article 31 of the Rules of Court, Agents are expected to attend that meeting as early as possible”. Practice Direction XI: “The Court has noticed the increasing tendency of parties to request the indication of provisional measures. Parties should in their oral pleadings thereon limit themselves to what is relevant to the criteria for the indication of provisional measures as indicated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose”.

⁽⁴⁹⁾ The oral proceedings stretched out over six months in the *South West Africa* case (not taking into account the holiday break cf. *ICJ Reports 1966*, 9) over three months in the *Barcelona Traction (Second Phase)* case (cf. *ICJ Reports 1970*, 7, para. 7) and over two in the *Land, Island and Maritime Frontier Dispute* case (*ICJ Reports 1992*, 360).

context of proceedings relating to preliminary objections, the limits these days are approaching the unacceptable⁽⁵⁰⁾.

As indicated above⁽⁵¹⁾, the worries of the Court to limit hearings to what is reasonable is understandable. But under two conditions:

— the first is, of course, that each case has to be treated separately: four public sittings for the *Aerial Incident of 10 August 1999* case between India and Pakistan was no doubt sufficient (the Parties, upon the President’s invitation, did not even make use of the entirety of the time allotted)⁽⁵²⁾, three weeks, in the *Kasikili/Se-dudu island* case, was perhaps too long⁽⁵³⁾ but for others — and I believe this applies to cases that are currently pending, this would be entirely insufficient.

— The second would be to renounce inflicting on counsel the often impossible, or at least excessive, rhythm imposed on them, without multiplying the number of public sittings. It would be useful to include, between the different rounds of pleadings, preparatory sessions that are presently often reduced to the bare minimum: one day, or even a half-day, which does not leave enough time to seriously study the other side’s arguments and forces counsel to formulate arguments that are not sufficiently thought out, or to read texts that are prepared before having heard the pleadings to which they are supposed to respond⁽⁵⁴⁾.

“Procedurally speaking”⁽⁵⁵⁾, the International Court of Justice is not aging well. The Court is demonstrating a certain difficulty in

⁽⁵⁰⁾ See PELLET, *Le procès international et le temps - Le temps du Conseil*, in *Le droit international et le temps*, cit., 241-248; WATTS, *New Practice Directions of the International Court*, cit., 251-252.

⁽⁵¹⁾ PELLET, *supra*, nota 50, 245.

⁽⁵²⁾ Cf. Judgment of 21 June 2000, in *ICJ Reports 2000*, 16, para. 7.

⁽⁵³⁾ Cf. Judgment of 13 December 1999, in *ICJ Reports 1999*, 1051, para. 8.

⁽⁵⁴⁾ In this regard, the schedule fixed by the Court for the hearings to come in the case concerning the *Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* beginning on 27 February 2006, demonstrates a break from the earlier practice of the Court, as it includes long breaks between the different rounds of pleadings, which is very satisfying.

⁽⁵⁵⁾ For a very positive global check-up (from 10 years ago) with which the author shares the same views, see CONDORELLI, *La Cour internationale de Justice: 50 ans et (pour l’heure) pas une ride*, in *European Journal of International Law*, 1995, 388-400.

adapting to its success, a success that risks declining if the Court does not find the means to face the new influx of cases under which it seems to be submerged. In 2004, like in 2005, only one new case was entered in the General List. There is no doubt that the slow pace of proceedings, the resulting costs for the Parties, the diplomatic tensions that this engenders and the impatience of public opinion are not without effect on this new defection: Parties have the impression that the political, financial and human efforts involved in their consent to bring a case to the World Court are not compensated and they therefore turn toward other fora, which are perhaps less prestigious, but just as effective.

Without a doubt, the Court has demonstrated its ability to have the rapidity required in certain circumstances; but this is simply more discouraging for the States that have not been able to benefit from the same exceptions. They have the impression that the case that they have submitted to the Court has not been considered as urgent or important. Indeed, not all cases reflect the same degree of urgency; but, for the Parties, the cases they submit are always, or almost always, essential and represent situations where sovereignty is at stake a factor which the Judges perhaps are not always wary of.

One can forget about the importance (at least subjectively speaking) of what is at stake and consider that seizing the Court of a dispute will eventually become something banal; this would be the advent of an international community complying with the "rule of law" principle. However, this is not presently the case and any procedural weaknesses of the I.C.J do not detract from the strength of the role of Justice on the international plan. Indeed the Court remains not only a remarkable mechanism for the peaceful resolution of disputes, it is, without a doubt, one of the most effective and most flexible means for adapting international law to the evolutions of world society.