THE INTERNATIONAL COURT OF JUSTICE: A PRACTICAL PERSPECTIVE

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I. INTRODUCTION

IN looking at the role and influence of the International Court as it advances on towards and beyond the millenium, one is struck by the variety of perspectives from which one may view that institution. These include those adopted by the Court itself, academic theorists, practitioners both private and governmental, states more generally, international organisations and individuals. Each of these manifests its own methodology, needs and interests. Academics, for example, are keen to examine the intellectual basis and consistency of decisions and to infer, analyse and criticise the existence and nature of rules and institutions. Practitioners seek to equip themselves with the knowledge and tools necessary in order to enable their clients to win before the Court. States cautiously seek to uphold the dispute resolution role of the Court in general terms without losing any cases or putting themselves in a position where this is a possibility. International organisations and individuals look at the Court with keen and hopeful eyes.

The intention is to try to look at the nature and role of the Court from a practical perspective, that is from the point of view of a potential client and in the light of certain operational factors. The focus will essentially be upon contentious disputes. It is not intended to deal with matters that may require major constitutional changes, such as the question of *locus standi* before the Court of individuals and international organisations,[1] or the suggestion that states and national courts should be able to ask the Court

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1. See e.g. Sztucki, "International Organisations as Parties to Contentious Proceedings before the International Court of Justice?" in *The International Court of Justice: Its Future Role After Fifty Years* (eds. Muller, Raic and Thuránszky), 1997, p.141; Szasz, "Granting International Organisations *Ius Standi* in the International Court of Justice", *ibid.*, p.169; Seidl-Hohenveldern, "Access of International Organisations to the International Court of Justice", *ibid.*, p.189 and Janis, "Individuals and the International Court", *ibid.*, p.205. See also Bowett, Crawford, Sinclair and Watts, "The International Court of Justice: Efficiency of Procedures and Working Methods", 45 *I.C.L.Q.*, 1996, Supplement, p.S24. Similarly, the question as to whether the Court should continue to act to hear appeals from certain Appeal Tribunals of international organisations will not be examined, see e.g. Jennings, "The International Court of Justice After Fifty Years", 89 *A.J.I.L.*, 1995, p.493.

for advisory opinions.[2] Nor will the proposal to permit the United Nations Secretary-General to ask for advisory opinions from the Court be addressed.[3]

Essentially practitioners and their client states seek to settle disputes in the most advantageous manner. They want to win. That is the point of the exercise. No state will go to court, if it can be avoided, if the chances are that it will lose. That is obvious, but too simple. The advantage of third party judicial settlement is that the ultimate responsibility for the decision lies elsewhere than with the states concerned. It thus constitutes an important mechanism to enable a state to come to terms with a losing position in a manner that often entails less political cost than a negotiating strategy producing the same result. Internal political forces are more often inclined to accept losing if the decision has been imposed from elsewhere than if the state concerned had simply conceded from the start. This is especially the case where the result has been arrived at by an unquestionably independent and objective process based on clear norms and processes. At the least, there will be some international benefit to be derived from proceeding to judicial settlement and accepting the consequences. It could be argued that the circumstances of the *Taba* case support this view. The Israeli public accepted with little demur the fact that the Taba stretch of the Sinai coast passed to Egypt after the arbitration decision. It is to be questioned whether the same internal political situation would have obtained if Taba had simply been transferred to Egypt as part of bilateral negotiations.[4] Again, would Libya have so readily withdrawn from the Aouzou Strip without the decision of the International Court on title?[5]

But practitioners, and even states, have an interest in judicial settlement that goes beyond seeking to win (or lose in politically acceptable circumstances). There is a clear international community interest in supporting and sustaining the International Court of Justice. This operates upon sev-

2. See e.g. Schwebel, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts", 28 *Va.J.I.L.*, 1988, p.495 and Rosenne, "Preliminary Rulings by the International Court at the Instance of National Courts: A Reply", 29 *Va.J.I.L.*, 1989, p.40.

3. See e.g. Higgins, "A Comment on the Current Health of Advisory Opinions" in *Fifty Years of the International Court of Justice* (eds. Lowe and Fitzmaurice), 1996, p.567 and Schwebel, "Authorising the Secretary-General of the United Nations to Request Advisory Opinion", 78 *A.J.I.L.*, 1984, p.4. See also the UN Secretary-General, *Agenda for Peace*, 1992, para.38. Although this idea is politically contentious, it may be suggested that there is nothing to prevent the Secretary-General from convening a Judicial Advisory Council, composed of a representative selection of judges from the International Court on a rotating basis, to advise him on pertinent matters.

4. See 80 *I.L.R.*, p.244. See also Bowett, "The Taba Award of 29 September 1988", 23 *Israel Law Review*, 1989, p.429; Lagergren, "The Taba Tribunal 1986–89". 1 *African Journal of International and Comparative Law*, 1989, p.525 and Weil, "Some Observations on the Arbitral Award in the Taba Case", 23 *Israel Law Review*, 1989, p.1.

5. See *infra*, p.836.

eral levels. First, both practitioners and states often look beyond the current case to the next one or to other inter-state dispute situations which may need to be addressed. The success of the resort to the Court may enable other conflicts to be resolved in a similar fashion. The efficacy of the mechanism may prove helpful in relations with other states in other circumstances. Secondly, the elucidation of principles in one case before the Court may prove helpful in bilateral or multilateral negotiations in other situations. States negotiating maritime boundaries, for example, eagerly scour the decisions of earlier cases in an attempt to discover the current internationally acceptable relevant principles. Although the decisions of the International Court bind only the parties in the instant case and for that case,[6] it would be naïve to believe that such decisions are devoid of impact upon other states in similar situations. Thirdly, legal principles expounded on or referred to by the Court in an *obiter dicta* sense may in the appropriate circumstances constitute stepping stones to the development of further norms or the application of existing norms in other areas. Fourthly, new norms may arise as a result of views expressed by the Court, provided the necessary requirements are in place. Finally, many practitioners and states feel a generalised obligation to further the success of the Court as an organ of the international community from a perception or feeling of responsibility to that community. Judges, international practitioners, both private and governmental, and academics are bound together in this sense.

Although the focus is inevitably upon the International Court for present purposes, the existence of other courts should not be ignored.[7] Leaving aside the specialist courts associated with human rights[8] and economic law[9] and certain other particular issues,[10] one must in particular

6. Art. 59 of the Statute of the International Court of Justice.

7. See as to arbitration e.g. Wetter, *The International Arbitral Process Public and Private*, 5 vols., 1979; Simpson and Fox, *International Arbitration*, 1959; Caflisch, "L'Avenir de l'Arbitrage Interétatique", *A.F.D.I.*, 1979, p.9; Merrills, *International Dispute Settlement*, 2nd ed., 1991, Chapter 5; Schwebel, *International Arbitration: Three Salient Problems*, 1987; Stuyt, *Survey of International Arbitrations (1794–1984)*, 1990; Coussirat-Coustère and Eisemann, *Repertory of International Arbitral Jurisprudence*, 4 vols., 1989–91; Gray and Kingsbury, "Developments in Dispute Settlement: International Arbitration since 1945", 63 *B.Y.I.L.*, 1992, p.97; Sohn, "International Arbitration Today", 108 *H.R.*, 1976, p.1; *International Arbitration* (ed. F. Soons), 1990, and Fox, "States and the Undertaking to Arbitrate", 37 *I.C.L.Q.*, 1988, p.1. See also Shaw, *International Law*, 4th ed., 1997, p.737 *et seq.*

8. See e.g. the European Court of Human Rights and the Inter-American Court of Human Rights. Note also the proposed international criminal court, see e.g. Crawford, "The ILC's Draft Statute for an International Criminal Court", 88 *A.J.I.L.*, 1994, p.140 and Shaw, *International Law*, *op. cit.*, p.187 *et seq.*

9. See e.g. the EC Court of Justice, the Benelux Court of Justice created in 1965; the Court of Justice of the Cartagena Agreement created in 1976 for members of the Andean Group.

10. See e.g. the European Nuclear Energy Tribunal created in 1957 and the European Tribunal on State Immunity, created in 1972.

note the establishment of the International Tribunal on the Law of the Sea. Much of its potential work may come from the type of situations that might generate work for the International Court. Whatever view one takes of the question of proliferation of international courts,[11] the reality is that there are now two international courts having potential jurisdiction over law of the sea issues and litigators are likely to consider a variety of issues before deciding which one to opt for. Leaving aside obvious jurisdictional considerations, practitioners will no doubt consider matters such as experience and established authority, institutional mystique, and procedural points. Speed, fluency of procedure and implementation may be high considerations, while availability and enforceability of interim measures may also be relevant in the circumstances.

The rise of the Chambers phenomenon is a factor that is also likely to be in the mind of potential litigators seeking the appropriate forum.[12] The institution of the Chambers system by the International Court[13] was clearly an attempt to increase the flexibility to the parties that could be offered within the context of the institution. While the composition of the Chamber is a question for the Court, the parties will be consulted and are likely to have a significant influence.[14] On the whole, the additional flexibility may well prove advantageous in attracting clients not wishing their case, for whatever reason, to be heard by the full Court. There are some institutional disadvantages, of course, for the Court, in that certain judges may well be side-lined, whether for personal or national reasons, while there is a potential problem with regard to consistency of judgments. In addition, on a more strategic level, it would be a cause for some concern if

11. See e.g. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", 90 *A.J.I.L.*, 1996, p.69 and Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", 46 *I.C.L.Q.*, 1997, p.37. See also Oda, "The International Court of Justice from the Bench", 244 *H.R.*, 1993 VII, p.9, 139 *et seq.*; Guillaume, "The Future of International Judicial Institutions". 44 *I.C.L.Q.*, 1995, p.848, cf. Rosenne, "Establishing the International Tribunal for the Law of the Sea", 89 A.J.I.L. 1995, p.806.

12. See e.g. Mosler, "The *Ad Hoc* Chambers of the International Court of Justice" in *International Law at a Time of Perplexity* (ed. Dinstein), 1989, p.449 and McWhinney, *Judicial Settlement of International Disputes*, 1991, p.78 *et seq.* See also Jiménez de Aréchaga, "The Amendment to the Rules of Procedure of the International Court of Justice", 67 *A.J.I.L.*, 1973, p.1; Oda, "Further Thoughts on the Chambers Procedure of the International Court of Justice", 82 *A.J.I.L.*, 1988, p.556; Schwebel, "Chambers of the International Court of Justice formed for Particular Cases", *ibid.*, p.739; Valencia-Ospina, "The Use of Chambers of the International Court of Justice" in *Fifty Years of the International Court of Justice*, *op. cit.*, p.503 and Franck, *Fairness in International Law and Institutions*, 1995, p.326 *et seq.* As to the precedential value of decisions of Chambers, see Shahabuddeen, *Precedent in the World Court*, 1996, p.171 *et seq.*

13. See Art. 26 of the Statute and Articles 15–8 and 90–3 of the Rules of Court.

14. See e.g. the *Gulf of Maine* case, I.C.J. Reports, 1982, p.3 and I.C.J. Reports, 1984, p.246. See also Merrills, *International Dispute Settlement*, *op. cit.*, p.126, Singh. *Role and Record*, p.110 and Brauer, "International Conflict Resolution: The I.C.J. Chambers and the Gulf of Maine Dispute", 23 *Va.J.I.L.*, 1982–3, p.463.

a situation were to arise that a significant amount of work was being transacted by the world Court, with all the authority that this implies, by means of Chambers, whose composition was clearly not broadly based. The Court established a Chamber of Summary Procedure for the speedy despatch of business by five judges, but it has not been called upon.[15] A seven-member Chamber for Environmental Matters was created in 1993, but this also remains unused.[16] The particular problem with subject-specific Chambers is that by agreeing to send a case to such a Chamber, the essential characterisation of that case has been made. In many cases, it is indeed this very characterisation which is at issue.[17] Thus, such Chambers cannot deal with situations where the essential nature of the dispute constitutes the core of the conflict between the parties, and in practice are unlikely to be greatly used.

II. THE PLURALIST CONTEXT

ANY state engaged in a dispute with another state will, or should, have a clear view of what the dispute is about and the conditions required for its resolution. In particular, views will be formed as to how to achieve the desired result in terms both of general strategic considerations and in the light of tactical methods. Within this general framework, recourse to the International Court might be examined. It is important to realise that, although existing and operating as a discrete and distinct mechanism, the Court finds its place within the larger picture of the peaceful resolution of disputes. As the Court itself noted in the *Iranian Hostages* case,[18] "legal disputes between sovereign states by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the states concerned". Thus co-ordinate or parallel consideration of the same factual situation by different legal and political organs is the rule rather than the exception.[19] Judicial settlement and the consequential application of international legal rules is merely one way in which states may settle problems. Other possibilities exist, either alone or in tandem.

15. Article 29 of the Statute. See also International Court of Justice, *Yearbook 1993–4*, 1994, p.17.

16. *Ibid.*, p.18.

17. E.g. the *Gabcikovo–Nagymaros* case between Hungary and Slovakia, where one of the fundamental matters in issue is whether the case is essentially an environmental law or treaty law one.

18. I.C.J. Reports, 1980, pp.7, 20.

19. See e.g. the *Aegean Sea Continental Shelf* case, I.C.J. Reports, 1978, pp.3, 12; The *Iranian Hostages* case, I.C.J. Reports, 1980, pp.7, 21–2; the *Burkina Faso/Mali* case, I.C.J. Reports, 1986, p.10 and the *Nicaragua* case, I.C.J. Reports, 1986, pp.392, 433–5. See also Shaw, "The Security Council and the I.C.J." in *The International Court of Justice*, at p.236 *et seq.*; Rosenne, *The World Court*, 5th ed., 1995, p.37 and *ibid.*, *The Law and Practice of the International Court*, 2nd ed., 1985, p.87.

Therefore any state in dispute will undoubtedly contemplate the various possibilities laid out by the international community and seek the most advantageous offering or combination. As is well known, the range of possibilities available to states for the peaceful resolution of disputes includes negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and resort to regional agencies or arrangements or to the United Nations.[20] There is no inherent hierarchy with respect to the methods specified and no specific method required in any given situation. States have a free choice as to the mechanisms adopted for settling their disputes.[21] This approach is also taken in a number of regional instruments.[22] Any issue likely to come before the International Court is therefore likely to form part of a wider context in which the involvement of the Court assumes a vital, but not necessarily exclusive component. In addition, the parties to a dispute have the duty to continue to seek a settlement by other peaceful means agreed by them, in the event of the failure of one particular method. Should the means elaborated fail to resolve a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, the parties under Article 37(1) of the Charter, "shall refer it to the Security Council". It is within this larger framework that the role of the Court is to be truly located.[23]

Thus, states in contemplating the resolution of a dispute, will invariably consider all the relevant circumstances and may resort to the Court as a part of a broader strategy. Of course, not every dispute may be amenable to settlement by judicial means,[24] but judicial mechanisms may play an important part as one approach among others in dispute settlement.[25] Any

20. See Art.33(1) UN Charter and the 1970 Declaration on Principles of International Law, General Assembly Resolution 2625 (XXV).

21. See Art.33(1) of the UN Charter and sections I(3) and (10) of the Manila Declaration on the Peaceful Settlement of International Disputes, General Assembly Resolution 37/590.

22. See e.g. the American Treaty on Pacific Settlement (the Pact of Bogotá) 1948 of the Organisation of American States, the European Convention for the Peaceful Settlement of Disputes 1957 and the Helsinki Final Act of the Conference on Security and Co-operation in Europe 1975.

23. A good example of the practical application of a range of methods, including the Court, to the task of peacefully settling a dangerous conflict is afforded by the Libya–Chad boundary dispute. Bilateral negotiations were succeeded by an agreed reference to the Court, while the Court's decision was implemented by a bilateral agreement monitored by UN observers. See the Framework Agreement on the Peaceful Settlement of the Territorial Dispute on 31 August 1989; Reports of the UN Secretary-General. S/1994/512, 27 April 1994, 33 *I.L.M.*, 1994, p.786 and S/1994/672, 100 *I.L.R.*, p.111 *et seq.*, and Security Council Resolutions 910 (1994), 915 (1994) and 926 (1994). See generally 100 *I.L.R.*, p.102 *et seq.*; the *Libya/Chad* case, I.C.J. Reports, 1994, p.6, and Ricciardi, "Title to the Aozou Strip: A Legal and Historical Analysis", 17 *Yale Journal of International Law*, 1992, p.301.

24. See e.g. Rosenne, *World Court, op. cit.*, p.7 and Jennings, "The Proper Work and Purposes of the International Court of Justice" in *The International Court of Justice, op. cit.*, pp.33, 37.

25. See e.g. Judge Lachs, in his Separate Opinion in the *Aegean Sea Continental Shelf* case, I.C.J. Reports, 1978, pp.3, 52 and in the *Iranian Hostages* case. I.C.J. Reports, 1980, pp.3, 49.

practical perspective on the Court must take this point on board and the Court is generally sensitive to this pluralistic context. In the *Fisheries Jurisdiction* case,[26] the Court explicitly declared that it ought not to "refuse to adjudicate merely because the parties, while maintaining their legal positions, have entered into an agreement one of the objects of which was to prevent the continuation of incidents". Moreover, it was emphasised that if the interim agreement between the parties in question was held to prevent it rendering judgment, the effect would be to discourage the making of such interim arrangements and "this would run contrary to the purpose enshrined in the provisions of the United Nations Charter relating to the pacific settlement of disputes".[27] More generally, the Court has clearly held that the fact that negotiations are taking place at the same time as legal proceedings was not a bar to the exercise by the Court of its judicial function.[28] On the contrary, the Court has noted that "pending a decision on the merits, any negotiation between the parties with a view to achieving a direct and friendly settlement is to be welcomed".[29] Indeed, cases may well be withdrawn from the Court as a result of a settlement reached during negotiations taking place at the same time as legal proceedings.[30] Judicial settlement may hasten the final resolution of the dispute as a whole[31] as may simply having the matter before the Court.[32] The latter point does indeed raise the issue as to whether the Court should itself seek to become more active in achieving a final settlement between the litigating parties. One notes, for example, that Protocol XI to the European Convention on Human Rights will allow the reconstituted European Court of Human Rights to "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter".[33] However, it is felt that this constitutionally proactive approach would run

See also Anand, "The Role of International Adjudication" in *The Future of the International Court of Justice* (ed. Gross), vol.I, 1976, p.1.

26. I.C.J. Reports, 1974, pp.3, 19.

27. *ibid.*, p.20.

28. See the *Aegean Sea Continental Shelf* case, I.C.J. Reports, 1978, pp.3, 12 and the *Nicaragua* case, I.C.J. Reports, 1986, pp.392, 440.

29. The *Great Belt* case, I.C.J. Reports, 1991, pp.12, 20. See also the *Free Zones* case, P.C.I.J., Series A, No.22, p.13 and the *Burkina Faso/Mali* case, I.C.J. Reports, 1986, pp.554, 577.

30. See e.g. the *Great Belt* case, I.C.J. Reports, 1992, p.348 and the *Iranian Airbus* case, I.C.J. Reports, 1996, p.9. In the latter case, the parties had asked for the postponement *sine die* of the opening of scheduled oral hearings because of ongoing negotiations to settle the dispute, *ibid.*, p.10.

31. See e.g. Judge Lachs in the *Iranian Hostages* case, I.C.J. Reports, 1980, pp.3, 49.

32. See e.g. the second application by Guinea-Bissau against Senegal concerning maritime delimitation introduced on 12 March 1991 and discontinued in 1995 as a result of an agreement between the parties, see I.C.J. Reports, 1991, pp.53, 75; I.C.J. Reports, 1995, p.423 and Report of the International Court of Justice 1995–6, A/51/4, para.35 *et seq.*

33. Article 38(1)b of the Protocol, which at the date of writing is not yet in force. See also Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 1995, Chapter 26.

counter to the established philosophy of the Court and might unnecessarily complicate any negotiations that are taking place either bilaterally or through the United Nations at the same time.[34] The Court itself in reaching a decision may assist in the process of obtaining a settlement, either directly by providing the basis for such resolution or by encouraging negotiations between the parties.[35] Indeed, the Court may also call for the terms of an existing relevant agreement to be observed[36] or for compliance with a particular dispute settlement mechanism.[37]

It is within this pluralistic context, that one must view the essential role of the Court. States seeking to resolve a dispute will examine recourse to the Court as part of the totality of methods available in the light of the full situation, with regard to which the legal dispute may only constitute a part. Of course, states going to the Court may do so for reasons that are less clearly aimed at the settlement of a dispute upon which they are engaged. This is particularly the case with regard to the situation of third party interventions. A state will intervene in contentious cases either where it considers that it has an interest of a legal nature which may be affected by the decision in the case in question[38] or where it is a party to a multilateral treaty and the construction of that agreement in is question.[39] However, the situation is more flexible in the case of advisory opinions. Article 66 of the Court's Statute provides that all states entitled to appear before the Court should be notified of the request for the advisory opinion "by means of a special and direct communication" as are international organisations considered by the Court (or the President if the Court is not in session) as "likely to be able to furnish information on the question".[40] Written and/or oral statements may then be made. This opens the possibility for such states and international organisations to act so as to, for example, maintain legal rights, apply or resist political pressure or influence the future

34. This, of course, is rather a different scenario from the situation where a party might seek subtly to send out hints to the Court as to what it might ultimately be prepared to find politically acceptable in the forthcoming judgment.

35. See e.g. Judge Broms's Separate Opinion in the *Great Belt* case, I.C.J. Reports, 1991, pp.12, 39.

36. See e.g. the Court's Order of 15 March 1996 in *Cameroon v Nigeria*, I.C.J. Reports, 1996, pp.13, 24.

37. *Ibid.*, p.25. The Court here called upon the parties to lend every assistance to the fact-finding mission which the UN Secretary-General had proposed to send to the Bakassi Peninsula.

38. Article 62 of the Statute of the Court. In which case, it is the Court that will decide upon the request.

39. Article 63 of the Statute. In this situation, states have the right to intervene.

40. Note that under Art.34(3) of the Statute of the Court, where the construction of the constituent instrument of a public international organisation or of an international convention adopted thereunder is in question, the Registrar is to inform the organisation concerned and communicate to it copies of all the written proceedings.

development of the law.[41] Accordingly, the Court is able to act in a rather more strategic community way than is often possible in bilateral contentious disputes.

In applying to the Court, states will no doubt consider what may ultimately emerge from the process, in the sense of the remedies that they are able to obtain. In the broadest sense, of course, actually going to Court may constitute a form of remedy by setting the matter down before a high profile institution in a manner which may assist, stimulate or engage bilateral or multilateral negotiations or regional or global settlement mechanisms. The exercise of the Court's incidental jurisdiction is also itself a form of remedy, whether in the context of an application for indication of provisional measures[42] or third party applications to intervene. Beyond that, it is fair to say that there has been relatively little analysis of the full range of the remedial powers of the Court.[43] In the main, an applicant state will seek a declaratory judgment that the respondent has breached international law. Such declarations may extend to provision for future conduct as well as characterisation of past conduct. Examples might include desisting from particular illegal conduct, withdrawal of forces or the drawing of terrestrial or maritime boundaries. The Court may be asked to lay down the generally applicable principles of international law or simply resolve the dispute on a technical level. Requests for declaratory judgments may also be coupled with a request for reparation for losses suffered as a consequence of the illegal activities or damages for injury of various kinds, including non-material damage.[44] Such requests for damages may include not only direct injury to the state in question but also with regard to its citizens or their property. The Bosnian application to the Court in the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, for example,[45] includes a claim that the respondent state is under an obligation "to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by

41. See e.g. the *Legality of the Threat of Use of Nuclear Weapons* case, I.C.J. Reports, 1996.

42. See infra, p.860.

43. But see e.g. Gray, *Judicial Remedies in International Law*, 1990 and Brownlie, "Remedies in the International Court of Justice" in *Fifty Years of the International Court of Justice*, *op. cit.*, p.557.

44. See e.g. the *I'm Alone* case, 3 *R.I.A.A.*, 1935, p.1609 and the *Rainbow Warrior* case, 74 *I.L.R.*, pp.241, 274. In the latter case, the subsequent arbitration award provided that "an order for the payment of monetary compensation can be made in respect of the breach of international obligations involving ... serious moral and legal damage, even though there is no material damage", 82 *I.L.R.*, pp.499, 575.

45. I.C.J. Reports, 1993, pp.3, 7.

the foregoing violations of international law in a sum to be determined by the Court".

Reparation may conceivably extend to *restitutio in integrum*, but this has been rather unclear.[46] However, the Court in the *Great Belt* case,[47] faced with a Danish argument that Finland's claims could only be satisfied by damages since an order for restitution would be excessively onerous, declared that "in principle ... if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled".[48] A party may simply leave it open to the Court to apply whatever remedy it feels appropriate beyond a general claim for reparations for damage.[49]

It thus appears that applicants to the Court have a wide range of possibilities before them with regard to remedies since the Court itself has not as yet developed a clear pattern of applicable remedies.[50] Much remains to be done in this field.

Going to the Court represents one particular strategy for states, but one that possesses special characteristics, which themselves constitute a relevant factor in choosing that option. States in applying to the Court have a variety of expectations in mind. They expect an impartial tribunal composed of independent and appropriately qualified judges applying objective and verifiable rules of law in a reasonably predictable manner. They look for an authoritative decision, which is reasoned and enforceable, binding and final, consistent and coherent.

An interesting preliminary question is that of the appropriate time to approach the Court. The matter was raised in the *Nauru* case[51] where the Court took the view that international law did not lay down any specific time limits within which an application should be made and that it was therefore a matter for the Court to determine in the light of the circumstances of each case "whether the passage of time renders an application

46. See the *Chorzow Factory* case, *P.C.I.J.*, Series A, No.13, and the *Iranian Hostages* case, I.C.J. Reports, 1980, p.4 for possible authority for such a power. See also Gray, *op. cit.*, pp.95–6.

47. I.C.J. Reports. 1991, pp.12, 19.

48. This very point is likely to arise in connection with the *Gabcikovo-Nagymaros (Hungary/Slovakia)* case, see e.g. 32 *I.L.M.*, 1993, p.1247 *et seq.* and I.C.J., *Yearbook 1993–4*, p.204.

49. See e.g. the *Oil Platforms (Iran v US)* case, I.C.J., *Yearbook 1993–4*, p.190 *et seq.*

50. One should also note here the effect of Art.292 of the Convention on the Law of the Sea 1982, which provides that the question of the prompt release from detention of a vessel or its crew by another state party to the Convention "may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining state under Art.287 ..." which shall without delay deal with the matter. This would include the International Court of Justice by virtue of Art.287(1)b. It is unclear how the International Court may deal with such a situation.

51. I.C.J. Reports. 1992, pp.240, 253–4.

inadmissible". Even where in situations of delay the matter is declared admissible, the Court may have to ensure that the other party is not thereby prejudiced, particularly in terms of the establishment of facts and the determination of the contents of the applicable law.[52] In certain situations, timing may be all. In the *Northern Cameroons* case,[53] for instance, the Court emphasised that it could only pronounce judgment "in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties",[54] while in the *Nuclear Tests* case,[55] it was noted, perhaps in more controversial circumstances, that "the dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognisance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means." In addition, one can only point to the impact upon the Order of the Court of 14 April 1992 in the *Lockerbie* case of Security Council Resolution 748 (1992), adopted three days after the conclusion of oral hearings.[56] This resolution, adopted under Chapter VII of the UN Charter, imposed binding sanctions upon Libya for failing to comply by the due date with the request to extradite the alleged bombers. However, the initial pleading before the Court was upon the basis of Resolution 731 (1992), which called for the extradition, but which did not constitute a binding decision. The Court in its Order refused to speculate upon the position prior to the adoption of the second resolution,[57] but one wonders what view the Court might have adopted, had this resolution not appeared before the date of the Order of the Court. Timing was, perhaps, all.[58]

Timing will, however, often be critical in applications for indications of provisional measures in view of the necessity for urgency and one would expect that states considering such applications would seek to time their applications accordingly. To apply too early might lead to rejection on the basis that the requisite urgency had not been demonstrated,[59] to apply later might indeed adversely impact upon the rights sought to be protected.

52. *Ibid.*, at p.255.
53. I.C.J. Reports, 1963, pp.15, 33–4.
54. It appears sufficient if the dispute becomes manifest at the time of the application or indeed during proceedings before the Court itself, see the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, I.C.J. Reports, 1996, para.28. Cf. the Separate Opinion of Judge Torres Bernárdez in the *El Salvador/Honduras* case, I.C.J. Reports, 1992, pp.351, 659.
55. I.C.J. Reports, 1974, pp.253, 271.
56. I.C.J. Reports, 1992, pp.3, 13.
57. *Ibid.*, p. 15.
58. Note that it has been argued that the timing of the judgment of the Court itself may have political repercussions, see McWhinney, *op. cit.*, pp.137–9.
59. Compare the *Great Belt* case, I.C.J. Reports, 1991, pp.12, 17, where there was held to be no such urgency, and the *Cameroons v Nigeria*, I.C.J. Reports, 1996, pp.13, 22, where there was held to be such urgency.

Timing may also be crucial with regard to third party interventions.[60] Applications to intervene under Article 62 of the Statute[61] are to be made "as soon as possible and not later than the closure of the written proceedings".[62] However, this may be too late for an intervenor who seeks to intervene as a party.[63] A party may have the right to appoint an *ad hoc* judge and to file pleadings, but the existing parties would have the right to reply to these. Under Articles 85(1) and 86(1) of the Rules of Court,[64] such a state has the right to see the initial memorials and annexed documents only after permission has been given by the Court for the intervention.[65] This is a likely cause of delay and frustration. It is to be envisaged that third party applications to intervene may well increase as a result partly of the successful application by Nicaragua in the *El Salvador/Honduras* case[66] and partly because of the increasing complexity of cases, not least in the maritime field, that may come before the Court. Accordingly, some thought may need to be given as to whether the Court's current Rules allow sufficiently for multi-party cases, not least with regard to timing issues.

III. AN AUTHORITATIVE DECISION BASED ON LAW

STATES, and their advisers, contemplating an application to the International Court appreciate that what distinguishes the Court from other organs is the fact that they will obtain an authoritative decision based on law. It also raises the issue of the nature of the exercise of the judicial function by the Court. This will include the competence to determine whether a dispute is a legal dispute in the sense of being capable of resol-

60. See generally Torres Bernárdez, "L'Intervention dans la Procédure de la Cour Internationale de Justice", 256 *H.R.*, 1995, p.193; Rosenne, *Intervention in the International Court of Justice*, 1993; Ruda, "Intervention Before the International Court of Justice" in *Fifty Years of the International Court of Justice*, *op. cit.*, p.487; Chinkin, "Third Party Intervention Before the International Court of Justice", 80 *A.J.I.L.*, 1986, p.495; Elias, *The International Court of Justice and Some Contemporary Problems*, 1983, Chapter 4, and Rosenne, *Law and Practice*, *op. cit.* vol.I, pp.430–34. See also Rules 81–86 of the Court, 1978, and Jessup, "Intervention in the International Court", 75 *A.J.I.L.*, 1981, p.903.

61. This provides that where a state considers that it has an interest of a legal nature which may be affected by the decision in the case in question, it may submit a request to the Court to be permitted to intervene. It is for the Court itself to decide upon the request. Note that under Art.63 where the construction of a convention to which states other than those concerned in the case are parties is in question, the registrar of the Court shall notify all such states forthwith. Every state so notified has the right to intervene in the proceedings. See here the *SS Wimbledon* case, P.C.I.J., Series A, No.1 (1923); the *Haya de la Torre* case, I.C.J. Reports, 1951, pp.71, 76–7; and the *Nicaragua* case, I.C.J. Reports, 1984, pp.215–6.

62. See also Art.81 of the Rules of Court.

63. See Bowett et al, *loc. cit.*, p.S23.

64. Concerning interventions under Arts.62 and 63 of the Statute respectively.

65. Although under Art.53 of the Rules, the Court may furnish copies of the pleadings and documents to a state "entitled to appear before it which has asked to be furnished with such copies".

66. I.C.J. Reports, 1990, p.92.

ution by the application of international law.[67] The Court has emphasised that the assessment of the possible conduct of states in relation to international legal obligations is an "essentially judicial task".[68]

A. Authoritative

The authoritativeness of the decision will essentially be founded upon the constitutional function, perceived role and reputation of the Court. In formal terms, a decision of the Court will be binding upon the parties to the case in question and in respect only of that case,[69] but the reality is that the impact of any decision will range far and wide. It will constitute a precedent in the widest sense, relied upon and cited in subsequent litigation (or indeed in other fora altogether) as an authoritative statement of law.[70] This will be done in the knowledge that the Court itself will with only the greatest hesitation depart from previous decisions.[71] Such judgments may change perceptions and confer authority upon one particular approach to a legal problem so that that approach becomes accepted as the dominant view. One may take here the *Anglo-Norwegian Fisheries* case,[72] or the *Corfu Channel* case[73] or the *Nicaragua* case.[74] When one considers the importance of advisory opinions where no binding element as such exists, the impact of the work of the Court becomes even more evident. Simply to mention by way of example the *Reparation* case[75] or the *Reservations to the*

67. *Nicaragua* v. *Honduras*, I.C.J. Reports, 1988, pp.16, 91. See also the *Certain Expenses* case, I.C.J. Reports, 1962, pp.151, 155 and the *Tadic (jurisdiction)* case before the Appeals Chamber of the Yugoslav War Crimes Tribunal, IT–94–1–AR72, p.11. See also Higgins, "Policy Considerations and the International Judicial Process", 17 *I.C.L.Q.*, 1968, pp.58, 74.

68. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, I.C.J. Reports, 1996, pp.66, 73–4.

69. Art.59 of the Statute of the Court. Art.60 states that such decision will be final and without appeal. Note that by virtue of Art.38(1)c judicial decisions are deemed to be "subsidiary means for the determination of rules of law".

70. Note that Judge Azevedo in his Dissenting Opinion in the *Asylum* case, I.C.J. Reports, 1950, p.332, referred to the "quasi-legislative value" of such decisions See also Judge Tanaka in his Separate Opinion in the *Barcelona Traction* case I.C.J. Reports, 1964, p.67, who referring to the *Aerial Incident* case, I.C.J. Reports 1951, p.145, emphasised its "tremendous influence upon the subsequent course of the Court's jurisprudence and the attitude of parties vis-à-vis the jurisdiction issues relative to this Court". See also Shahabuddeen, *op. cit.*, p.209 *et seq.*

71. See e.g. the care taken in the *Temple* case, I.C.J. Reports, 1961, pp.17, 27–8, and *Barcelona Traction* cases, I.C.J. Reports, 1964, pp.6, 29–30, to distinguish the *Aerial Incident* case, I.C.J. Reports, 1959, p.127.

72. I.C.J. Reports, 1951, p.116. See the view expressed by Fitzmaurice that following this case, "neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight baselines", "Some Problems Regarding the Formal Sources of Law" in *Symbolae Verzijl*, 1958, pp.153, 170.

73. I.C.J. Reports, 1949, p.4.

74. I.C.J. Reports, 1986, p.14.

75. I.C.J. Reports, 1949, p.174.

Genocide Convention case[76] will make this point abundantly clear. Thus, the formal role of the Court is the starting point only for a consideration of the authoritativeness of any given judgment.

The International Court rests essentially upon two streams of legitimacy. It is "the principal judicial organ of the United Nations".[77] As such it functions in accord with the terms of its Statute, which "forms an integral part of the present Charter".[78] A series of provisions deal with the position of the Court in relation to other organs and functions of the UN.[79] In addition to its role as the principal judicial organ of the UN, the Court also possesses a more general function. It constitutes, as Judge Lachs in the *Lockerbie* case has noted,[80] "the guardian of legality for the international community as a whole, both within and without the United Nations" and thus possesses both a particular responsibility with regard to the United Nations and a general responsibility towards the international community as a whole. Any state, whether or not a member of the UN, may, if the requisite jurisdictional requirements have been met, ask the Court to settle a dispute between it and another state. In the process of reaching a decision or concluding an advisory opinion, the Court may have resort to the full range of sources of international law and is not restricted to the provisions of the UN Charter itself.

One of the strengths of the Court, perhaps the prerequisite to its successful functioning as an authoritative world court, lies in the combination of its individual and representative character,[81] the latter being what Jennings has called the "ecumenical quality".[82] The compositional issue is an important part of the recognised authority of the Court.[83] As is well known, Article 2 of the Statute refers to "a body of independent judges" of

76. I.C.J. Reports, 1951, p.15.

77. Art.92 of the UN Charter and Art.1 of the Statute.

78. Art.92 of the UN Charter.

79. In particular, under Art.36(3) it is expressly provided that the Security Council should take into consideration that "legal disputes should as a general rule be referred by the parties to the International Court of Justice" and under Art.94(2) the Council may, after application by a party to a judgment of the Court, make recommendations or decide upon measures to be taken to give effect to the particular judgment in question. Under Art.96 the Court may be asked to give an advisory opinion on any legal question by the General Assembly or the Security Council or by other organs of the UN and specialised agencies on legal questions arising within the scope of their activities. The Court submits an annual report to the General Assembly pursuant to Art.15(2). See e.g. Shaw, "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function" in *The International Court of Justice*, *op. cit.* pp.219, 236 *et seq.*

80. I.C.J. Reports, 1992, pp.3, 26.

81. See e.g. Shahabuddeen, "The World Court at the Turn of the Century" in *The International Court of Justice*, *op. cit.*, pp.3, 9.

82. "The Internal Judicial Practice of the International Court of Justice", *B.Y.I.L.*, 1988, pp.31, 35. See also Jennings, "The Collegiate Responsibility and Authority of the International Court of Justice" in *International Law at a Time of Perplexity* (ed. Dinstein), 1989, p.343.

83. See also Rosenne, "The Composition of the Court" in *The Future of the International*

high moral and legal quality,[84] while Article 9 provides that "in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world should be assured". Little more needs to be said of the individual quality of judges, other than that perceived impartiality is indispensable. Judges who have played a part in a case brought before the Court cannot participate in the subsequent decision. While the central core of Article 17(2) of the Statute is clear,[85] there are areas of uncertainty. Judge Zafrullah Khan, for example, was controversially persuaded to recuse himself from the *South West Africa* case[86] on the basis of having participated in UN General Assembly debates on the general questions involved.[87] The Court in the *Namibia* case[88] on the other hand took the view that the participation by members (prior to their election to the Court) in UN organs in their former capacity as government representatives did not attract the application of Article 17(2), even when in the case of one member this included playing a part in the drafting of a Security Council resolution which referred to a General Assembly resolution that lay at the heart of the case in question.[89] It is to be noted that Article 17(2) refers to recusation within a specific context, that is the "case" with regard to which the Court is to reach a decision. This may pose a particular problem where the general factual background of a case has been the subject of discussion in international organisations, but where

Court of Justice, *op. cit.*, p.377 and Abi-Saab, "The International Court as a World Court" in *Fifty Years of the International Court of Justice*, *op. cit.*, p.3.

84. As to independence, see e.g. Judge Shahabuddeen's Dissenting Opinion in the *El Salvador/Honduras (Intervention)* case, I.C.J. Reports, 1990, pp.3, 45; Judge Zoricic, *Conditions for Admission to the UN* case, I.C.J. Reports, 1947–8, p.95 and Judge Winiarski, *Judgments of the Administrative Tribunal of the ILO* case, I.C.J. Reports, 1956, p.104.

85. "No member may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity". Note that any doubt on this point is to be settled by the decision of the Court, Art.17(3). Note also that under Art.24(1) of the Statute, if for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, the President should be informed, while under Art.24(2) "if the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly". Where the President and the member concerned disagree, the matter shall be settled by the decision of the Court (Art.24(3)).

86. I.C.J. Reports, 1966, p.6.

87. See e.g. McWhinney, *op. cit.*, p.92. See also the cases of Judge Sir Benegal Rau, who recused himself in the *Anglo-Iranian Oil* case on the basis that he had represented India on the Security Council when it had dealt with the UK complaint against Iran for failure to comply with the interim measures indicated by the Court, see Franck, *op. cit.*, p.323 and I.C.J. *Yearbook 1951–2*, pp.89–90, and Judge Bedjaoui, who recused himself from the *Guinea-Bissau v Senegal* case, I.C.J. Reports, 1991, p.53, on the grounds of having been one of the arbitrators in the award that was the subject of the case before the Court.

88. I.C.J. Reports, 1971, pp.16, 18–9.

89. But note the criticisms of this by Judges Petrén, Onyeama, Fitzmaurice and Gros, I.C.J. Reports, 1971, pp.16, 130, 138, 309 and 324.

the case itself before the Court is focussed upon very specific allegations.[90] It may very well be that involvement by members of the Court prior to their election in the former situation should not impel them to recuse themselves from participating in the case itself. It is a matter of fine judgment. There is, of course, a matter of important general interest here. While judges must avoid any hint of partiality or prejudice, and this is a point of fundamental importance for the credibility of the Court, there is also a community interest in sustaining the Court as an institution composed of a wide range of talented and experienced jurists. The loss of such expertise in particular cases needs to be avoided where possible. It is a fact that the Court has been, and is, composed of many judges who have given their views on issues as national legal advisers, representatives at the UN, members of expert bodies, or as academics. Where such issues subsequently give rise to or form the background to specific litigation between particular parties, there is a difficult and sensitive choice often to be made and the greatest care must be shown by the members of the Court. Such members in deciding whether to recuse themselves, or indeed the President in exercising his powers under Article 24(2), need to consider two principles in particular. These are the necessity of avoiding any situation that may give rise to fears of bias however unjustified in practice, and the need to maintain the basis of the Court as composed of a balanced team of experienced and authoritative members.

Although it is true that the political nature of the election process[91] has sometimes given rise to concern about the independence of judges, examination and empirical research has shown such concerns to be highly exaggerated.[92] More than that, one needs to point to the vital significance of the collegiality of the Court. This crucial, if rather indefinable, characteristic, permeates the Court and those in professional contact with it. It is a combination of solemn ritual, mutual trust, integrity and professional respect. It conditions the approach of the members of the Court so that they are bound and guided by understood intellectual and moral guidelines in the conduct of their work. The ritual, language and procedures of the law perform an important function in enhancing the separation of the judges from

90. Note that Judges Higgins and Fleischauer recused themselves from the preliminary objections phase of the *Genocide Convention* case between Bosnia and Yugoslavia. President Bedjaoui at the start of oral hearings put the matter as follows: "Deux membres de la Cour, M. Fleischhauer et Mme Higgins, m'ont fait savoir qu'ayant antérieurement connu, en leur qualife, respectivement, de conseiller juridique des Nations Unies et de membre du Comité des droits de l'homme des Nations Unies, de certaines questions susceptibles d'être pertinentes aux fins de la présente affaire, ils estimaient ne pas pouvoir participer à celle-ci, conformément aux dispositions applicables du Statut de la Cour", CR96/5, 29 April 1996, p.6.

91. See Arts.4 to 10 of the Statute of the Court.

92. See e.g. Brown Weiss, "Judicial Independence and Impartiality: A Preliminary Inquiry" in *The International Court of Justice at a Crossroads* (ed. Damrosch), 1987, p.123; Franck, *op. cit.*, p.319 *et seq.* and McWhinney, *op. cit.*, p.91 *et seq.*

pressures upon them that may tend to affect their consideration of matters before them. Anything which tends to diminish this collegiality is to be avoided. In this context, while one must support the need for additional research assistance to be given to members of the Court,[93] the provision of law clerks in the very active sense that this is understood and operates in the US would need very careful thought. The dangers of law clerks negotiating with each other on behalf of "their" judges and thus determining the essential evolution of a decision must be apparent, both for itself and for the distance that it inevitably creates between judges.[94]

As far as professional advisers are concerned, they form part of the outer circle of this collegiality in that there is undoubtedly a shared sense of community with regard to the work of the Court in its widest sense. In many ways, it is akin to the more formal duty of an advocate to the court found in domestic systems.

B. Decision

The role of any court is essentially on the basis of the relevant law to decide the case before it. That is what the parties want. The International Court's function, as stated in Article 38 of the Statute, is "to decide in accordance with international law such disputes as are submitted to it"[95] and Judge Weeramantry has referred to the "compelling obligation" to decide.[96]

Undoubtedly part of the authoritativeness of the decision of the Court in any particular instance relates to the very nature and content of the decision itself. But what is "the decision"? Lawyers, and practitioners in particular, need to know what the court in question has actually decided from the point of view of binding law. Decisions in this sense are important for that is what will be cited before the court in subsequent litigation as crucial and unavoidable propositions. Other propositions not falling within this precedential equation will be of interest but far less influential. The distinction is therefore important. Of course, the "decision" is something different from the *dispositif*,[97] but how does one identify it from the range of propositions put forward by the Court in any given case? This is

93. See e.g. the Report of the International Court for 1995–6, A/51/4, para.193.

94. See e.g. the description provided in Woodward and Armstrong, *The Brethren: Inside the Supreme Court*, 1979. See also Richman and Reynolds, "Do Not Let the Law Clerks Take Over", *The Lawyer*, 20 May 1997, p.14, who criticise in particular the risks in this system of over-delegation to and lack of supervision of law clerks in the US system.

95. See also Art.94(1) of the United Nations Charter. As to the question whether an indication of provisional measures constitutes a decision of the Court, see e.g. Judge Weeramantry's Separate Opinion in the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, I.C.J. Reports, 1993, pp.325, 383 and Rosenne, *Law and Practice*, *op. cit.*, p.125.

96. Dissenting Opinion, *East Timor* case, I.C.J. Reports, 1995, pp.90, 159.

97. See Art.95 of the Rules of the Court. *Dispositif* is translated as "the operative provisions of the judgment", *ibid.*

an important problem in practice, if only because it could well determine how subsequent cases are argued.

There is some opposition to the notion that the common law concepts of *ratio decidendi* and *obiter dicta* have a place in international law. Lauterpacht was unsympathetic to the view that one could apply to the work of the Court "the supposedly rigid delimitation between *obiter dicta* and *ratio decidendi* applicable to a legal system based on the strict doctrine of precedent",[98] although this was in the context of an approach that called for "a full measure of exhaustiveness of judicial pronouncements of international tribunals".[99] Rosenne has also criticised "the finely drawn distinction" as being not in contemplation with regard to Article 95(1) of the Rules of Court requiring a judgment to set out "the reasons in point of law".[100] Both these seminal authors would, however, distinguish the relevant legal reasons for the decision in question from propositions made which are not necessary for the decision. It is also the case that considerable numbers of judges have in their own separate and dissenting opinions referred to statements made *obiter dicta*,[101] Counsel in putting an argument before the Court are often impelled to determine precisely the identity and legal character of propositions being maintained as support for their views and thus need themselves to distinguish the "decision" in the widest sense of previous judgments, while the Court from time to time is itself required to address an argument that a particular proposition constitutes the *ratio decidendi* of an earlier case.[102] Thus in practice, both counsel and Court may need to address the core issue as to what elements in a previous judgment may be deemed to be of precedential value, that is part of the essential reasoning leading up to, and including, the *dispositif* itself. Judge Shahabuddeen has indeed in his leading study of precedent in the Court concluded that "it is difficult to deny the existence of a distinction in the jurisprudence of the Court between *ratio decidendi* and *obiter dicta*".[103] Having said that, of course, the question as to the precise precedential weight to be accorded to propositions put that do not constitute the *ratio decidendi* of a judgment, is another matter entirely and one to be judged on a case by case basis in the light of existing international law.

The issue of the reasoning preceding the formal *dispositif* raises a further question. It is obvious that the process leading up to the decision of the Court needs to be reasoned, that is part of the judicial process itself,

98. *The Development of International Law By the International Court*, 1958, p.61.
99. *Ibid.*, at p.37.
100. *The Law and Practice of the International Court, op. cit.*, p.614.
101. See Shahabuddeen, *Precedent*, p.154 *et seq.* See also generally Jennings, "The Judiciary, International and National, and the Development of International Law", 45 *I.C.L.Q.*, 1996, pp.1, 6 *et seq.*
102. See the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Tunisia/Libya case*, I.C.J. Reports, 1985, pp.191, 208.
103. *Op. cit.*, p.157.

but how reasoned? In particular, should the Court adopt a cautious or a charismatic approach? As an example, perhaps, of the former, Jennings has praised "the economy of decision" of the Court in the *Libya/Chad* case,[104] whereby the Court focusses upon those issues considered decisive in the case and ignores the rest. This, it is maintained, is part of a "traditional legal reasoning generally practised by courts of law".[105] Adjudication, it is noted, is "a technical, intellectual, artificial method".[106] This may very well be what Lauterpacht termed "the tendency to compression" in the technique of judicial pronouncement, to be contrasted with the tendency to insist upon "a detailed examination and elaboration of the issues involved".[107] Lauterpacht himself clearly favoured the latter, noting that "there are compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals".[108] The Court itself emphasised in the *Libya/Malta* case[109] that "it must be open to the Court, and indeed its duty to give the fullest decision it may in the circumstances of each case", while Judge Ranjeva in his Declaration in the *Jan Mayen* case[110] emphasised that "the authority of a decision of the Court cannot but be reinforced whenever, in stating the reasons for its judgment, it reveals the factors which shed light on the operative provisions, i.e. criteria, methods, rules of law, etc.".[111]

One practical reason adduced by Lauterpacht for adopting this broader charismatic approach is that "governments as a rule reconcile themselves to the fact that their case has not been successful—provided the defeat is accompanied by the conviction that their argument was considered in all its relevant aspects".[112] This is a powerful argument, particularly when allied to the issue of the authoritativeness of the Court and its decisions, for the more a decision is supported by a process of reasoned progression, the more impartial and judicial it appears. Beyond this, there is the question of the overarching function of the International Court within the international community. As Franck has succinctly written, "the International Court of Justice stands at the apex of international legal develop-

104. I.C.J. Reports, 1994, p.6.
105. "Proper Work". *loc. cit.*, p.35. See also Abi-Saab, "The International Court as a World Court" in *Fifty Years of the International Court of Justice*, *op. cit.*, pp.3, 8.
106. *Ibid.*, at p.36.
107. *Op. cit.*, p.62. See also Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol.II, 1986, pp.647–8.
108. *Ibid.*, at p.37.
109. Application for Permission to Intervene, I.C.J. Reports, 1984, p.25.
110. I.C.J. Reports, 1993, pp.37, 87.
111. Note also the criticism made by Judge Oda in his Separate Opinion in the *Jan Mayen* case, I.C.J. Reports, 1993, pp.37, 91 and 115, of the lack of reasoning put forward by the Court concerning its views, for example, on drawing a single line, the relevance of "equitable access" to fishing resources or the adjustment of the median line as a point of departure.
112. *Ibid.*, at p.39.

ment".[113] This implies a responsibility perhaps that goes beyond a narrow interpretation of its functions with regard to each particular dispute situation and would suggest that an overly minimalist approach might not rest easily with a broader perception of the role of the Court. One is reminded here of Judge Lachs's Separate Opinion in the interim measures phase of the *Aegean Sea Continental Shelf* case,[114] that "in going further than it has, the Court, with all the weight of its judicial office, could have made its own constructive, albeit indirect, contribution, helping to pave the way to the friendly resolution of a dangerous dispute".

Perhaps in between the minimalist cautious and the maximalist charismatic approaches, lies the question of the relationship between the decision and the arguments and submissions of the parties themselves. The Court noted in the *Asylum* case[115] that "one must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions". This has often been interpreted negatively, to preclude the Court from venturing outside of the guidelines provided by the parties themselves, particularly in relation to remedies not asked for.[116] It is essentially concerned with the quantum of consent within the jurisdictional framework. However, the positive injunction cannot be overlooked. Judge Lauterpacht stated in the *Norwegian Loans* case,[117] that "in my opinion a party to proceedings before the Court is entitled to expect that its judgment shall give as accurate a picture as possible of the basic aspects of the legal position of that party". While a state cannot expect in all reality for each and every one of its observations to be commented upon by the Court in its judgment, it should be able to expect that its principal lines of argument would be addressed. Reasons of polity as well as those of judicial integrity would appear to suggest this.

The conventional wisdom is that the decision of the Court is constrained by the submissions of the parties to the instant case. It was noted in the *Chorzow Factory* case that "though it can construe the submissions of the parties, it cannot substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced".[118] The point was essentially repeated in the *Nuclear Tests* case.[119] This principle, of immense practical importance for the drafting of submissions is a

113. *Fairness op. cit.*, 1995, p.318.
114. I.C.J. Reports, 1976, pp.3, 20.
115. I.C.J. Reports, 1950, pp.395, 402.
116. See e.g. Fitzmaurice, *op. cit.*, p.524 *et seq.* and Rosenne, 1965, pp.326–7. See also the *Corfu Channel* (assessment of compensation) case, I.C.J. Reports, 1949, p.249, where the Court declared itself unable to award more compensation than that claimed by the UK government.
117. I.C.J. Reports, 1957, pp.36.
118. P.C.I.J. Series A, No.17, p.7.
119. I.C.J. Reports, 1974, pp.253, 262–3.

matter over which much care is taken, has two aspects. First, the parties are entitled to expect that their principal submissions will be addressed and dealt with in reasoned conclusions and secondly, that the parties are entitled to expect that the Court will not reach a decision on the basis of issues not referred to in their submissions and with regard to which they have not had the opportunity to put their views. Each of these propositions has been challenged in recent cases.

One may turn first to the judgment of the Court in the *East Timor* case.[120] Portugal's final submissions[121] were somewhat lengthy, carefully composed and sophisticated. The first submission called upon the Court to declare that the rights of the people of East Timor to self-determination, territorial integrity, national unity and permanent sovereignty over natural resources and that the duties and rights of Portugal as administering power were opposable to Australia, which was bound to respect them. The second submission asked the Court to declare that Australia by reason of the actions it had taken[122] had breached these rights of the people of East Timor and the powers of Portugal and in addition had contravened Security Council Resolutions 384 and 389.[123] Australia simply called upon the Court to declare that it lacked jurisdiction or that the application was inadmissible or alternatively that Australia had not breached international law in the circumstances.[124] The case, of course, was complicated by Indonesia's absence.

Portugal sought to argue that there were a series of "givens", arising by virtue of UN resolutions which imposed an obligation upon states not to recognise any authority on the part of Indonesia over East Timor and as far as that territory was concerned, to deal only with Portugal.[125] The Court, however, interpreted the situation as meaning that any such approach would amount to a determination that Indonesia's entry into and continued presence in East Timor were unlawful and that, as a consequence, Indonesia did not possess any treaty-making power in matters relating to the continental shelf resources of the territory. Thus, Indonesia's rights and obligations would constitute the very subject-matter of a judgment made in the absence of the consent of that state, so that the *Monetary Gold*[126] principle applied thus foreclosing jurisdiction.[127]

120. I.C.J. Reports, 1995, p.90. See also Bekker, 90 *A.J.I.L.*, 1996, p.94; Chinkin, 45 *I.C.L.Q.*, 1996, p.712 and Scobbie and Drew, "Self-Determination Undermined: The Case of East Timor", 9 *Leiden Journal of International Law*, 1996, p.185.
121. *Ibid.*, at pp.94–5.
122. I.e. the negotiation, conclusion and implementation of the Agreement of 11 December 1989 with Indonesia and consequential activities, *id.* p.94.
123. Submissions 3, 4 and 5 dealt with certain consequential issues.
124. *Ibid.*, at p.95.
125. *Ibid.*, at p.103.
126. I.C.J. Reports, 1954, p.32.
127. I.C.J. Reports. 1995, p.104.

Despite considerable attention having been devoted to this issue by the parties, the essence of the decision by the Court on this crucial, if complex point, rests it would seem upon simple denial of the Portuguese case, unaccompanied by reasoned conclusions. Somewhat confusingly, the rejection of the Portuguese "givens" went hand in hand with the Court's declaration that the right of peoples to self-determination had been recognised both by the UN Charter and in the jurisprudence of the Court and possessed an *erga omnes* character,[128] and the rather coy acceptance by the Court that both the parties had recognised that East Timor remained a non-self-governing territory and that its people had the right to self-determination.[129] One wonders whether Portugal felt that the treatment by the Court of its final submissions was thoroughly satisfactory.

The rather disappointing approach of the Court here might be contrasted with that adopted in the *Qatar* v. *Bahrain* case concerning the relationship between the decision reached by the Court and the submissions made by the parties. The Court in its jurisdiction and admissibility decision of 1 July 1994,[130] inserted in its *dispositif* the provision that it "*decides* to afford the parties the opportunity to submit to the Court the whole of the dispute" (emphasis in original) and then proceeded to fix time limits.[131] This direction did not accord with the submissions of either party. Qatar called for the Court to accept jurisdiction over the dispute referred to in the application filed by it on 8 July 1991,[132] while Bahrain contested the basis of the jurisdiction invoked by Qatar.[133] The difference between the dispute defined by Qatar and the "whole of the dispute" referred to by the Court was the claim by Bahrain to sovereignty over Zubarah. In other words, the decision of the Court was not to decide on the jurisdiction and admissibility issues but to call upon the parties to submit the whole of the dispute to it.[134] It could be supposed that the Court, which took the decision by 15 votes to 1, felt that rather than ignoring or contradicting the submissions of the parties, it was nudging their elbows to add one further disputed issue between the states to the rosta. This juris-

128. *Ibid.*, at p.102. See e.g. the *Namibia*, I.C.J. Reports, 1971, p.16 and *Western Sahara*, I.C.J. Reports, 1975, p.12, cases.

129. *Id.*, at p.103.

130. In an act termed one of "constructive diplomacy" by Eli Lauterpacht, see " 'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice" in *Fifty Years of the International Court of Justice*, *op. cit.*, pp.465, 473.

131. I.C.J. Reports, 1994, pp.112, 127.

132. This concerned disputes between the two parties with regard to sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah, and the delimitation of the maritime areas of the two states, *ibid.*, at p.114.

133. *Ibid.*

134. See also the *Qatar* v. *Bahrain* (jurisdiction and admissibility) judgment of 15 February 1995, I.C.J. Reports, 1995, p.6.

dictional activism stands in interesting relationship to the de-activist decision in the *East Timor* case.[135]

C. *Based on Law*

It is, of course, self-evident that decisions of the Court must be based on law. As Jennings put it, "litigating parties do not resort to judges because they are wise or statesmanlike—very often they are manifestly neither—but because they know the law".[136] The Court has noted that it is no part of the judicial function to make a choice not based on legal consideration, but only on considerations of practicability or of political expediency,[137] while it has emphasised that it is the Court itself which "must be the guardian of the Court's judicial integrity".[138] Although the Court is a court of justice,[139] that justice is one framed and constrained by law. The Court applies international law.[140] This law is temporally constrained, it is the law at the time of the decision in question.[141]

But what if the law is not comprehensive but contains gaps? The issue of *non-liquet* has generated considerable controversy and it was in order to close any such gap that the provision of "the general principles of law recognised by civilised nations" was inserted into Article 38 of the Statute of the Court as a source of law.[142] It is important to appreciate that while there may not always be an immediate and obvious rule applicable to every international situation, as Oppenheim has put it, "every international situation is capable of being determined *as a matter of law*".[143] The issue arose, perhaps rather unexpectedly, in the recent *Legality of the Threat or Use of Nuclear Weapons* case,[144] where the Court held that it could not "conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-

135. *Supra.*

136. "The Judiciary", *loc. cit.*, p.3.

137. See the *Haya de la Torre* case, I.C.J. Reports, 1951, pp.71, 79. See also the *Free Zones* case, P.C.I.J., Series A/B, No.46 at p.162.

138. See the *Northern Cameroons* case, I.C.J. Reports, 1963, pp.15, 29.

139. See e.g. Shahabuddeen, "The World Court at the Turn of the Century", *loc. cit.*, p.4.

140. See Art.38(1) of the Statute. Note that the parties may specifically request that the Court take into account particular factors. In the *Tunisia/Libya* case, I.C.J. Reports, 1982, pp.18, 21, the *compromis* specifically asked the Court to take into account "the recent trends admitted at the Third Conference on the Law of the Sea".

141. The *Fisheries Jurisdiction* cases, I.C.J. Reports, 1974, pp.3,19, 23–4.

142. See e.g. Hudson, *The Permanent Court of International Justice 1920–1942*, 1943, p.194; Stone, *Of Law and Nations*, 1974, Chapter III; Lauterpacht, "Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order", *Symbolae Verzijl*, 1958, p.196, and Thirlway, "The Law and Procedure of the International Court of Justice", *B.Y.I.L.*, 1988, p.76. See also the *North Sea Continental Shelf* cases, I.C.J. Reports, 1969, p.46, and the *Nicaragua* case, I.C.J. Reports, 1986, p.135.

143. *Oppenheim's International Law* (eds. Jennings and Watts), 1992, p.13.

144. I.C.J. Reports 1996, paras.36–40: 35 *I.L.M.*, 1996, pp.809, 830 and 831.

defence, in which the very survival of the state would be at stake".[145] This very issue was the subject of a strong rebuttal by Judge Higgins in her Dissenting Opinion.[146]

D. Without Undue Delay

As the Court has itself emphasised,[147] "it is in the interest of the authority and proper functioning of international justice for cases to be decided without unwarranted delay". Justice must not only be done and be seen to be done,[148] it must be done expeditiously. Justice delayed is justice denied and unwarranted delay impacts upon the credibility of any legal system. There are many issues connected with the problem in question. The Court will itself set time limits for the production of the various stages of the written pleadings[149] in close consultation with the parties. Generous time limits are clearly inevitable due to the requirement of preparation of relevant material.[150] Such time limits may be extended by the parties themselves for various reasons. On occasions it is genuinely felt that more time is needed in order to prepare the pleadings thoroughly in view of difficulties of obtaining or analysing source materials. On other occasions, delays will be requested in order to permit negotiations to develop.[151] The Court, however, is rightly sensitive to criticisms made of it of undue delay where it is apparent that the fault lies elsewhere.[152]

The expectation that the Court will produce an authoritative reasoned decision based on law in a reasonably predicable manner without undue delay forms the basis of any consideration by potential litigants as to whether or not to make a formal application to the Court.

IV. SOME PROCEDURAL ISSUES

PROCEDURE is often one of the keys to success in litigation. Knowledge of it is certainly a crucial practical matter. The formalised system of procedure at the International Court is founded upon equality of states and sustains the concept of the equality of arms as between state litigants.[153] The Court has the power to regulate its own procedure,[154] but

145. Para.2E of the *dispositif*. See also para.97.
146. 35 *I.L.M.*, p.934 *et seq.*
147. In the *Barcelona Traction* case, I.C.J. Reports, 1970, pp.3, 31.
148. See e.g. Judge Lachs in his Separate Opinion in the *Nicaragua* case, I.C.J. Reports, 1986, pp.14, 171.
149. See further *infra*, p.855.
150. *Infra*, p.856.
151. See e.g. the *Iranian Airbus* case, I.C.J. Reports, 1996, p.9.
152. See e.g. the *Barcelona Traction* case, I.C.J. Reports, 1970, pp.3, 30–1.
153. Note Thirlway's view that procedure is "no more than a way of getting somewhere", "Procedural Law and the International Court of Justice" in *Fifty Years of the International Court of Justice*, *op. cit.*, p.389.
154. See e.g. Judge Weeramantry's Dissenting Opinion in the *Request for an Examination*

closely consults the parties to a case on such questions. The parties themselves may jointly propose modifications to many of the Rules of Court in contentious proceedings,[155] while alterations to the normal pattern of proceedings made by the Court may be acceptable upon the basis of the consent of the parties even where the proposed changes are not specifically authorised by the Rules.[156] It is indeed worth pointing out that the attitude of the Court in general terms to procedural questions of form is less stringent than is the case in domestic legal Systems.[157]

There are, however, some procedural issues of particular moment to litigating states. The first is with regard to the structure of pleadings. Written pleadings are governed by Articles 44 to 53 of the Rules of Court. These in effect allow the parties considerable latitude. While it is for the Court itself to determine the number, order and timing of filings of pleadings, this is done in consultation with the parties and the Court is ready to allow parties to extend time-limits or determine whether, for example, there should be further rounds of pleadings. As to the precise contents of such written pleadings, the Rules are vague. The memorial is to contain a statement of relevant facts, a statement of law and the submissions. The counter-memorial is to contain an admission or denial of the facts stated in the memorial, any additional facts if necessary, observations upon the statement of law in the memorial and a statement of law in answer thereto and the submissions.[158] The reply and rejoinder, if authorised by the Court, are not intended merely to repeat the contentions of the parties but should be directed at bringing out the issues still dividing them.[159] In practice, this admonition is often neglected.

Complaints have been made concerning the length of written pleadings and the time taken to file them, with suggestions for word limits.[160] However, it does need to be appreciated that for litigant states important political as well as legal factors are in play. The Court must be seen to be affording states every reasonable consideration in order to avoid a losing

of the Situation in Accordance with Paragraph 63 of the Nuclear Tests Case, I.C.J. Reports, 1995, pp.288, 320, where he noted that this power enabled it to devise a procedure *sui generis*.

155. See Art.101 of the Rules of Court.

156. An example of this was the additional application submitted by the Cameroon in the *Cameroon* v. *Nigeria* case on 6 June 1994 to the original application of 29 March 1994 which had the effect of extending the dispute before the Court. The Agent of Nigeria stated that he had no objection to the additional application being treated as an amendment to the original application, see e.g. I.C.J. Reports, 1994, p.105 and I.C.J. Reports, 1996, p.13. Neither the Statute nor the Rules of the Court provide for the amendment of applications, although Rule 47 does permit the joinder of two or more cases. See also E. Lauterpacht, "Partial Judgment", *loc. cit.*, pp.475–6.

157. See e.g. the *Mavrommatis Palestine Concessions* case, P.C.I.J., Series A, No.2, p.34 and the *Polish Upper Silesia* case, P.C.I.J., Series A, No.6, p.14.

158. Arts.49(1) and (2) of the Rules.

159. Art.49(3) of the Rules.

160. See e.g. Highet, "Increasing the Effectiveness of the Court", paper delivered to the I.C.J./UNITAR Colloquum, 16 April 1996.

party complaining that no sufficient opportunity was allowed for the full elucidation of its case. The range of primary research required, often amongst documents stored abroad as well as those found within the territory of the litigant state, coupled with the need to organise an international team of counsel and assistants and provide for the necessary logistical and translation support, means that the realistic possibility of curtailing either the time limits for filing or the length of written pleadings is marginal. Even with the best organised and most generously resourced teams in place, much time may be required. It is also believed that the scope for reducing the scale of annexed documents is not large. States, with their national and international advisers, often have a necessarily broad perception of the evidence that must be produced to prove their arguments and disprove those of their adversaries, while modern technological and library developments have meant that more relevant documents are likely to be available than hitherto may have been the case. It also needs to be realised that for many states their written pleadings may have an importance going beyond the immediate case before the Court. They may constitute, and be designed to constitute, a national statement for the record, an exposition of a particular position that will stand as an authoritative commentary for historical purposes. Nevertheless, it may be possible for annexed documents to be better organised for the assistance of the Court. It may be that states could distinguish between those documents that are necessary to prove a particular proposition (or disprove that of the other side) and those that simply add to the weight of existing evidence or merely assist in "setting the scene". Such an arrangement might well prove helpful to the Court as it seeks to digest the extensive materials provided and thus ultimately assist the parties in speeding up the process of consideration.

One controversial issue linking expense and time is that of translation costs. At the moment, the Registry of the Court is responsible for preparing translations of submitted pleadings and documents into the two official languages, as well as for the interpretation of oral hearings. This is time consuming and expensive, although a function which ought to be carried out by the Registry. In view of the serious financial situation faced by the Court,[161] it has been suggested that perhaps the parties to a case might be prepared to submit their written materials in both English and French, rather than in one only of the official languages,[162] There are clearly important cost implications here for litigating states. However, and in the absence of the provision of the necessary resources by the UN, it might be helpful to seek to establish an expectation or culture whereby

161. Note the concern of the Court expressed in its annual report to the General Assembly covering 1995/6, A/51/4, para.188 *et seq.*

162. See e.g. Highet, *loc. cit.*

parties should, if at all possible and bearing in mind that this might expedite the oral hearing of cases, provide written pleadings in both official languages. Many counsel, for example, have felt frustration where material they have drafted in one official language, is translated into the official language used by their client and is then re-translated back into the original language by the Registry of the Court in perhaps a slightly less felicitous form. A modest step might be to permit counsel to submit their original drafts to the Registry at the same time as the written pleadings in the other language are delivered. In addition, it might be possible to use the suggested distinction in the documentary annexes[163] between those deemed essential to a party's case and those that either simply constitute supporting evidence or merely set the scene. It is felt that in any event, the parties should assume responsibility for the translation of those documents that fall within the second category.

The question of oral pleadings is, however, rather different. Ignoring the determination of counsel to plead before the Court, one must think carefully about the length of oral pleadings.[164] The advantage of an oral proceeding is that it really does provide an opportunity for those representing the state in litigation to put over the essentials of its argument in an appealing and dramatic, if not melodramatic way. It is indeed true that a more emphatic and nuanced exposition of a state's case orally may bring out elements rather hidden in the dry language of the written pleadings. Oral statements can make a difference. However, there really does appear to be no necessity for a wholesale reiteration of material, both factual and legal, contained in the written pleadings. The view sometimes maintained that one cannot realistically expect a judge to have read the papers and that therefore one must conduct the case as if essentially there have been no written pleadings is a little condescending. Oral presentations are important and should take place in order to bring the essentials of the argument to life in a memorable way. They are not needed as talking memorials, counter-memorials, replies and rejoinders.[165] In essence, the provisions of Article 60(1) of the Rules need to be actually applied.

Cases are about law and facts. The Court is expected to know the law, elucidating the facts raises particular problems. The Court has wide powers with regard to evidential matters.[166] It has under Article 36 of the

163. *Supra* p.856.

164. See e.g. Bowett et al, *loc. cit.*, p.S7 *et seq.*

165. Note that Art.60(1) of the Rules of the Court provide that "the oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain". See also Jiménez de Aréchaga, *loc. cit.*, p.6.

166. See e.g. Alford, "Fact-Finding by the World Court", 4 *Vill. L.R.*, 1958, p.37; Schwebel, "Three Cases of Fact-Finding by the International Court of Justice" in *Justice in Inter-*

Statute the competence *inter alia* to determine the existence of any fact which if established would constitute a breach of an international obligation. It may make all arrangements with regard to the taking of evidence,[167] call upon the agents to produce any document or to supply any explanations as may be required,[168] or at any time establish an enquiry mechanism or obtain expert opinion.[169] The Court may indeed make on-site visits.[170] This impressive array, however, needs to be qualified. First, it has no power to compel production of evidence generally. Secondly, neither witnesses nor experts can be subpoenaed. Thirdly, there is no equivalent to proceedings for contempt of court.[171] Fourthly, the Court has been reluctant to utilise the powers it possesses. For example, use of experts has been comparatively rare[172] as has been recourse to witnesses.[173] Agents are rarely asked to produce documents or supply explanations and there have been only two on-site visits to date.[174] This has produced a situation where the parties feel able to present whatever evidence, primarily documents and maps, that they feel would be of assistance in a whole variety of complex circumstances. It has also meant that the Court has sought to evaluate claims primarily upon an assessment of the documentary evidence provided, utilising also legal techniques such as inferences and admissions against interest.[175] In addition, the Court has felt able to take judicial notice of facts which are public knowledge, primarily though media dissemination.[176] Evidence which has been illegally or improperly acquired may also be taken into account, although no doubt where this happens its probative value would be adjusted accordingly.[177] The Court has on the

national Law, *op. cit.*, p.125; Highet, "Evidence, the Court and the Nicaragua Case", 81 *A.J.I.L.*, 1987, p.1; *ibid.*, "Evidence and Proof of Facts" in *The International Court of Justice at a Crossroads*, *op. cit.*, p.355; *Fact-Finding Before International Tribunals*, ed. Lillich, 1991, and Sandifer, *Evidence Before International Tribunals*, rev. ed., 1975.

167. Art.48 of the Statute.

168. Art.49 of the Statute.

169. Art.50 of the Statute. By Art.43(5), the Court may hear witnesses and experts, as well as agents, counsel and advocates.

170. Art.44(2) of the Statute and Art.66 of the Rules of Court.

171. See Highet, "Evidence, the Court and the Nicaragua Case", *loc. cit.*, p.10.

172. But see the *Corfu Channel* case, I.C.J. Reports, 1949, p.4.

173. But see e.g. the *Corfu Channel* case, I.C.J. Reports, 1949, p.4; the *Tunisia/Libya* case, I.C.J. Reports, 1989, p.18; the *Libya/Malta* case, I.C.J. Reports, 1985, p.13, and the *Nicaragua* case, I.C.J. Reports, 1986, p.14.

174. First, in the *Diversion of the River Meuse* case, P.C.I.J., Series A/B, No.70, and secondly in the *Gabcikovo-Nagymaros* case, I.C.J. Communiqué No.97/3, 17 February 1997, by Order of the Court of 5 February 1997.

175. See e.g. the *Nicaragua* case, I.C.J. Reports, 1986, p.14. The difficulties of proving facts in this case were, of course, exacerbated by the absence of the respondent state during the proceedings on the merits.

176. *Ibid.*

177. See e.g. the *Corfu Channel* case, I.C.J. Reports, 1949, pp.4, 32–6. See also Thirlway, "Dilemma or Chimera?—Admissibility of Illegally Obtained Evidence in International Adjudication", 78 *A.J.I.L.*, 1984, p.622.

whole been prepared to be flexible with regard to evidential material. In the second provisional measures order in the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, for example,[178] the Court was prepared to admit a series of documents even though submitted on the eve and during the oral hearings despite being "difficult to reconcile with an orderly progress of the procedure before the Court, and with respect for the principle of equality of the parties".[179] The admission was actually achieved by virtue of recategorising the material as "observations", which under Article 74(3) of the Rules of Court can be presented before the closure of the oral hearings. This way of proceeding inevitably raises concerns with regard to procedural regularity. Ultimately, the question of production of evidence is one for the parties concerned. They bear the burden of proving their claims to the satisfaction of the Court[180] and in the current circumstances are likely to err on the side of over- rather than under-production of what is regarded as possibly relevant.[181]

Two further issues of practical moment merit brief consideration. Article 79 of the Rules of Court provides for preliminary objections to be made to the jurisdiction of the Court or the admissibility of the application "in writing within the time-limit fixed for the delivery of the counter-memorial". This allows for the respondent state to wait until almost the conclusion of the period allowed for production of the counter-memorial (usually in the order of nine months) before signalling objections to jurisdiction. If such objections are dismissed, the period allowed for production of the counter-memorial starts again. This can hardly be equitable. It allows not only for the introduction of unfortunate, albeit legitimate, delaying tactics, but also for the respondent state to have double the usual period for preparation of the counter-memorial. It could perhaps be suggested that if a party wishes to object to jurisdiction or admissibility, then this could be communicated to the Court in short form within two months of the receipt of the memorial. At that point, the Court could then fix time limits for the jurisdictional phase.

178. I.C.J. Reports, 1993, pp.325, 336–7.

179. Art.56 of the Rules provides that after the closure of written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or in the absence of consent where the Court, after hearing the parties, authorises production where it is felt that the documents are necessary.

180. See e.g. the *Nicaragua* case, I.C.J. Reports, 1984, pp.392, 437.

181. Of particular interest here is the view taken by the Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area in its Award of 14 February 1997. The Appendix to the Order lays down the Principles Applicable to the Admissibility of Evidence and notes *inter alia* that each party bears the burden of proving its own case and in particular facts alleged by it. The party having the burden of proof must not only bring evidence in support of its allegations, but must also convince the Tribunal of their truth. The Tribunal is not bound to adhere to strict judicial rules of evidence, the probative force of evidence being for the Tribunal to determine. Where proof of a fact presents extreme difficulty, the Tribunal may be satisfied with less conclusive, i.e. *prima facie* evidence. See 36 *I.L.M.*, 1997 pp.396, 402–3.

It may also be suggested that much tighter time limits would be apposite for the jurisdictional phase than for the merits phase. Clearly the wealth of documentary material usually necessary for the latter stage, which takes so much time to investigate, collate and analyse, is not a factor in jurisdictional problems and the Court should be prepared for speedy hearings on these questions.[182]

The other area which tends to raise important practical issues relates to the application for indication of provisional measures to preserve the rights of the parties under Article 41 of the Statute.[183] Two points only will be briefly noted. First, what is the impact of an application for such measures upon the conduct of the case in practice? Or, in other words, in what circumstances would it be practically advantageous for a party to apply for the indication of provisional measures? It is clear that the Court will not indicate provisional measures unless the provisions invoked by the applicant appear *prima facie* to afford a basis upon which the jurisdiction of the Court might be founded.[184] Often, it is deemed psychologically advantageous to obtain such provisional measures where jurisdiction has been challenged by the other side for the acceptance of a *prima facie* jurisdictional base might be seen as a step forward, not least in domestic political terms where because of the filing of preliminary objections, it is likely to be many years before the merits may be heard. On the other hand, if the application is refused, then consequential political problems may very well occur. Again, it is possible that the application for provisional

182. Note that under Art.54(2) of the Rules, the Court, in fixing the date for oral hearings, "shall have regard ... to any other special circumstances, including the urgency of a particular case". This would permit the Court to enable hearings on jurisdiction to have a certain priority.

183. See also articles 73–8 of the Rules of Court. See e.g. Oda, "Provisional Measures" in *Fifty Years of the International Court of Justice*, *op. cit.*, p.541; Oxman, "Jurisdiction and the Power to Indicate Provisional Measures" in *The International Court of Justice at the Crossroads*, *op. cit.*, p.323; Merrills, "Interim Measures of Protection and the Substantive Jurisdiction of the International Court", 36 *Cambridge Law Journal*, 1977, p.86; *ibid.*, "Interim Measures of Protection in the Recent Jurisdiction of the International Court of Justice", 44 *I.C.L.Q.*, 1995, p.90; Rosenne, *Law and Practice*, *op. cit.*, vol.I, pp.224–28; Gross, "The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures", 74 *A.J.I.L.*, 1980, p.395; Gray, *Judicial Remedies in International Law*, 1987, pp.69–74 and Mendelson, "Interim Measures of Protection in Cases of Contested Jurisdiction", 46 *B.Y.I.L.*, 1972–3, p.259.

184. See the request by Guinea-Bissau for the indication of provisional measures in the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)* case, I.C.J. Reports, 1990, pp.64, 68. See also the *Great Belt* case, I.C.J. Reports, 1991, pp.12, 15, where jurisdiction was not at issue and *Cameroons* v. *Nigeria*, I.C.J. Reports, 1996, pp.13, 21, where it was. The Court in the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, I.C.J. Reports, 1993 pp.3, 12; noted that jurisdiction included both jurisdiction *rationae personae* and *ratione materiae*. Note that Jiminez de Aréchaga, a former President of the Court, has written that "interim measures will not be granted unless a majority of judges believes at the time that there will be jurisdiction over the merits", "International Law in the Past Third of a Century", 159 *H.R.*, 1978 I, pp.1, 161.

measures, although apparently delaying the ultimate merits stage because of the interposition of an additional phase of the case, may in fact have the opposite effect. In the *Great Belt* case,[185] the Court, in rejecting the necessity for interim measures, noted that in the normal course of events the merits stage would be completed before the physical obstruction of the East Channel, which would be not before the end of 1994. Judge Broms in his Separate Opinion[186] pointed out that "another thing changing the original situation was that later during the deliberations of the case the Court decided to make the final decision of the case expeditiously, probably during the spring of 1992 or at the latest in the fall of 1992". It would therefore appear that the application for provisional measures, although unsuccessful, in fact succeeded in causing an acceleration in the planned timetable. Another advantage in applying for an indication of provisional measures is that it may stimulate the furnishing of assurances from the other party with regard to a critical matter. The *Great Belt* case[187] provides an example of this. During the oral hearing on the application, Denmark gave assurances that no physical hindrance for the passage through the Great Belt would occur before the end of 1994.[188] By "placing on record"[189] such assurances, the Court concluded that the urgency requirement for the indication of provisional measures had not been met. Nevertheless, despite failing to obtain interim relief, Finland in fact achieved an important objective in terms of the assurances.[190] Of course, and upon an analogy with domestic procedures, it may well be open to the party against whom such interim relief is obtained to seek a cross-undertaking in damages whereby it would be compensated for losses suffered as a consequence of complying with provisional measures where it eventually succeeded on the merits.[191]

Less tactically, the applicant state may feel that the deterioration in the situation alleged is such that both it and the Court must be seen to do something or lose credibility. This is particularly so where it is envisaged that several years may elapse before the merits of the case are heard.[192] The Court has set a fairly high threshold for grant of provisional measures.

185. I.C.J. Reports, 1991, pp.12, 18.
186. *Ibid.*, pp.37, 38.
187. I.C.J. Reports, 1991, p.12.
188. *Ibid.*, p.18. See also CR91/11, p.11, 2 July 1991.
189. *Ibid.*
190. See also Merrills, *loc. cit.*, 1995, p.112.
191. This was sought by Denmark in the *Great Belt* case, I.C.J. Reports, 1991, pp.12, 15, but was not decided upon since Finland's application for the indication of provisional measures failed. See also Merrills, *loc. cit.*, 1995, p.117.
192. See also the two Orders of the Court in the *Genocide Convention (Bosnia* v. *Yugoslavia)* case, I.C.J. Reports, 1993, pp.3 and 325.

They must protect rights which are the subject of dispute in judicial proceedings,[193] and which are at risk of irreparable damage.[194] The Court has also stated that provisional measures are only justified if there is urgency.[195] Speed is essential and on the whole the Court does respond with adequate rapidity.

The second issue relates to the efficacy of such measures once granted. The record of compliance with provisional measures is not on the whole encouraging,[196] nevertheless, there may be a price for a state ignoring such measures. This will depend upon the Court being willing to refer clearly to the issue at the later stages of the case. For example, the Court was prepared to make some rather critical comments with regard to the attempted US rescue of its hostages in Iran in April 1980,[197] which followed the indication of provisional measures on 15 December 1979 calling for abstention from action which might aggravate tension.[198] Once a party has taken the tactical decision to apply for provisional measures and obtained them, it may consider returning to the Court if such measures have not been respected. However, a second order from the Court may be no more successful in achieving the desired result and may in any event prove logistically counter-productive in that consideration of the case may be meaningfully delayed by the application.[199] Nevertheless, the Court under Article 78 of its Rules has the authority to request information from the parties on any matter connected with the implementation of any provisional measures it has indicated, and it may be considered whether a formal follow-up mechanism under this provision might not be instituted in order to be seen to be acting in what has already been accepted as an urgent situation.

V. MANAGING CASES

ONE of the major current concerns with regard to the Court relates to the time taken for deliberation between the close of oral hearings and the announcement of the decision.[200] The process for deliberation is well

193. The *Aegean Sea Continental Shelf* case, I.C.J. Reports, 1976, pp.3, 9 and the *Iranian Hostages* case, I.C.J. Reports, 1979, pp.7, 19. See also the *Arbitral Award of 31 July 1989* case, I.C.J. Reports, 1990, pp.64, 69.

194. See e.g. Merrills, *loc. cit.*, 1995, p.106 *et seq.*

195. See the *Great Belt* case, I.C.J. Reports, 1991, pp.12, 17, cf. *Cameroons* v. *Nigeria*, I.C.J. Reports, 1996, pp.13, 22.

196. See e.g. the *Fisheries Jurisdiction* case, I.C.J. Reports, 1974, pp.3, 17.

197. I.C.J. Reports, 1980, pp.3, 43.

198. I.C.J. Reports, 1979, p.7.

199. Since under Art.74(1) of the Rules of the Court, a request for the indication of provisional measures has priority over all other cases.

200. See Bowett et al., *loc. cit.*, p.S19, where the six and a half month period between close of oral hearings and delivery of judgment in the *Libya/Chad* case is cited, a judgment which was not complex, relying on one critical ground and taking some 17 pages only of reasoning.

known.[201] The question, however, is what can be done to ensure the rapid completion of the deliberation stage leading to judgment without affecting in any way the authority and weight of that judgment. It is realised by all that such careful deliberation inevitably takes time. However, it may be possible to hasten parts of the process by administrative measures.[202] One measure which may be suggested concerns the management of cases from their inception to the implementation of the judgment. One could envisage the establishment of a system whereby a small two or three person Case Review Committee would be set up with regard to each case submitted to the Court upon the filing of the application.[203] This Review Committee would keep track of all relevant developments, reporting back to the full Court at regular intervals. The Committee could have a role with regard to oral pleadings. It would be helpful if each litigant state were to provide to the Committee (and to each other) a couple of months prior to the oral hearings,[204] a short, focussed written statement of the essentials of the case in order to highlight the fundamental issues as seen by that state. This would then allow the Committee to signal to the parties which points would be of particular assistance to the judges in oral exposition. Such a short statement to the parties, provided say a month prior to the oral hearings, would no doubt include the fundamental points put by each side, but would allow the parties to be able to identify issues that were felt to be of little importance and which could safely be left in the written arena. This manner of focussing upon the essential issues may very well assist in the reduction of the time spent on oral hearings.

201. In brief and simple terms, the following constitutes the usual methodology A meeting of the Court is held before oral arguments begin for an exchange of views on the written pleadings and to identify points on which explanations need to be solicited from the parties. After the close of oral hearings, a meeting is held to discuss the case at which the President will present an Outline of Issues, prepared by the Registry and approved by him. Judges will then prepare written notes on the case if they wish. After a period, a meeting will be held at which the judges will present their opinions orally in reverse order of seniority. A Drafting Committee will be established from amongst those representing the majority opinion. A preliminary draft will be circulated, which will be revised by the Committee in the light of any amendments and then discussed. Drafts of separate and dissenting opinions will also be circulated. An amended draft of the judgment will be discussed and the final versions of judgment and opinions prepared. See the 1976 Resolution on Practice, International Court of Justice, *Acts and Documents Concerning the Organisation of the Court*, 1989, p.165. See also e.g. Jennings, "Internal Judicial Practice", *loc. cit.*; Bedjaoui, "La 'Fabrication' des Arrêts de la Cour International Internationale de Justice" in *Mélanges Virally*, 1991, p.87; Oda, "The International Court of Justice Viewed from the Bench", 244 *H.R.*, 1993–VII, p.13 and Bowett et al., *loc. cit.*, p.S13 *et seq.*

202. Note the view of Judge Oda that in order for more cases to be dealt with by the Court, "reform of the deliberation procedure will become inevitable", *loc. cit.*, p.126.

203. This would operate under the overall direction of the President as per Art.12 of the Rules.

204. Which should themselves. be scheduled soon after the completion of the written proceedings. See, for example, the call by Bowett et al. for an indicative six months maximum between closure of pleadings and commencement of oral argument, *loc. cit.*, p.S8.

The moment that oral hearings are concluded, a report could be given by the Review Committee to the full Court detailing the key arguments put by each side and indicating the ways in which the matter could be dealt with by the Court. This report might indeed replace the "President's Outline of Issues" document prepared by the Registry and approved by the President.[205] The Committee may also take it upon itself to guide the careful process of preparation of notes, discussions and drafts that invariably and rightly follows. Nothing should be done to impact upon the development of the reasoning of the Court, but the Review Committee system for each case may allow for simultaneous consideration of several cases in on-going review meetings from application onwards, becoming more detailed and substantial as the case progresses. It is also conceivable that the Review Committee would be the appropriate forum to conduct any necessary follow-up activity with regard to provisional measures, reporting as necessary to the full Court. This method of managing cases would at least ensure an up-to-date and full knowledge of each case at each stage and should help reduce the time taken for deliberation.

VI. CONCLUSIONS

THE Court does not constitute an exclusive, self-contained world, but exists as part of a wide-ranging set of mechanisms and means for the resolution of inter-state disputes. States recognise this and act accordingly. What states seek specifically from the Court is an authoritative decision based on internationally accepted criteria within the bounds of reasonable professional predictability. This means that both the impartiality of the individual judge and the independence and collegiality of the Court as a whole are crucial components in the system. While the substantive law to be applied by the Court is coherent and comprehensive, it is true that there remains a need to elaborate in a more sophisticated fashion a systemic range of remedies that may be provided. It is also felt that community needs and expectations argue for a broader rather than a narrower approach from the Court with regard to its process of reasoning up to and including the *dispositif*. At the very least, the Court must address the major lines of argument from and submissions of the parties.

The relationship between the Court and states within the international system is not at all analogous to the relationship between superior courts and litigants within domestic legal orders. This situation bears certain consequences, including, for example, the need to allow states to develop their arguments as they see fit. Nevertheless, this does not preclude the need for the Court to improve the technical process of considering cases. It may be that the Court should proceed in the future in a rather more

205. See *supra* note 201.

proactive fashion in managing cases before it, showing always sensitivity and care. Areas where this may be of advantage would possibly include signalling what the Court feels is important and less important for oral elucidation and indicating to the parties where it is felt that further evidence may be required in order to demonstrate the point being asserted.

The International Court is important. How it works is therefore important. Its operational techniques may be just as significant to a potential litigant state as the content of the substantive rules, so that practical issues simply cannot be neglected or undervalued.