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Mohammed Bedjaoui

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# THE "MANUFACTURE" OF JUDGMENTS AT THE INTERNATIONAL COURT OF JUSTICE†

Mohammed Bedjaoui††

## INTRODUCTION

The functions of a Judge at the International Court of Justice may be summed up in four verbs: to read, to listen, to deliberate and to decide. It is, you see, not too complicated a profession and yet it may be simplified still more by casting some light upon the most mysterious of the four verbs: deliberate. The reservation of this word to just one of the four functions should not however mislead the reader into considering that there is anything less than deliberate in the others. On the contrary, conscious care attends every stage in the impressively lengthy period of gestation through which any judgment (or advisory opinion) of the Court must pass, and the deliberation properly so-called comes only towards the end. Hence, before describing the various phases of that deliberation, I shall have to perform a lengthy prelude on the theme of the adversary procedure. Some idea has to be given of the mass of materials which, in the course of the proceedings, accumulate in the depot known as the case file, pending their transfer into the processing plant, i.e. the deliberation. These materials derive from various sources and ar-

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† The author wishes warmly to thank Mr. B. Noble, Deputy Registrar of the International Court of Justice, for his precious assistance in the preparation of this article.

EDITOR'S NOTE: At the request of the author, the text of this article remains unedited. With great deference to the esteemed author, we respect and preserve the delicate shades of meaning entrusted to translation by Mr. Noble.

†† Member of the International Court of Justice, 1982-present; President of the Chamber formed to deal with the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. Doctor of Law. Diploma of the Institute of Political Studies, University of Grenoble, France. Minister of Justice and Keeper of the Seals (1964-1970). Algerian Ambassador to France (1970-1979). Permanent delegate of Algeria to Unesco (1971-1979). Ambassador and Permanent Representative of Algeria to the United Nations in New York (1979-1982). Member of the International Law Commission (1965-1982).

rive by stages.

## I. THE FIRST STAGE: INSTITUTING THE PROCEEDING

The first stage consists in the institution of the contentious proceedings,<sup>1</sup> whether through an application by one state against another state or states, or through the filing of a "special agreement"<sup>2</sup> concluded between two or more states for the purpose of seising the Court of a dispute between them. The equivalent document in an advisory case, namely the letter by which certain organs of the United Nations or international organizations (mostly specialized agencies) may seek the opinion of the Court on legal questions, is known as a "request." However, in order to avoid overloading this article, the advisory procedure will here be left on one side save for the following two remarks: First, with a few exceptions (notably the *Namibia*<sup>3</sup> case of 1970-71 and the *Western Sahara*<sup>4</sup> case of 1974-75), advisory proceedings do not feature as great a volume of documentation as contentious cases; second, whatever differences between contentious and advisory procedure exist during the written and oral presentation of the contentions to be examined, the deliberation itself follows a similar pattern.

The meaning of the term "special agreement" in contentious proceedings may require a word of comment. Known as a "compromis" in French, a special agreement is a treaty concluded between the states concerned and as such must, in accordance with the Charter of the United Nations, be registered with the Secretary-General in order to qualify for invocation before the Court.<sup>5</sup> Under such a treaty the states concerned agree to

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<sup>1</sup> CONTENTIOUS PROCEEDING, "A judicial proceeding not merely *ex parte* in its character, but comprising attack and defense as between opposing parties. . ." BLACK'S LAW DICTIONARY 319 (6th Ed. 1990).

<sup>2</sup> See *infra* p. 3.

<sup>3</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16.

<sup>4</sup> Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (1974-75).

<sup>5</sup> U.N. CHARTER, Art. 102. This article specifically provides:

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.
2. No party to any such treaty or international agreement which has not been

submit a legal dispute to the Court. Such a special agreement bears a close resemblance to the sort of *compromis* which provides a basis for arbitration,<sup>6</sup> but there is an important difference in that the parties, unless they explicitly state otherwise, pledge their acceptance of a settlement entirely based upon the rules of international law whose sources are listed in Article 38 of the Statute of the Court:<sup>7</sup> conventional or customary law, general principles of law and, where necessary, case-law and learned authority. In theory, signatories may number more than two, and in this respect one may instance the *North Sea Continental Shelf*<sup>8</sup> cases, referred to the Court under a tripartite protocol between Denmark, the Federal Republic of Germany and the Netherlands which, in effect, unified two similar special agreements concluded between the Federal Republic of Germany and each of its respective North Sea neighbours.

By the way, ever since those celebrated cases the institution of proceedings by special agreement has become the most frequent method of submitting cases to the Court.<sup>9</sup> This welcome

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registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

*Id.*

<sup>6</sup> LEGAL SETTLEMENT: *Compromis*

A preliminary agreement by the parties to a dispute which establishes the terms under which the dispute will be arbitrated. The *compromis* specifies the jurisdictional limits of the arbitral tribunal by (1) defining the subject of the dispute; (2) setting forth the principles that are to guide the tribunal; and (3) establishing the rules of procedure to be followed in deciding the case.

J.C. PLANO & R. OLTON, *THE INTERNATIONAL RELATIONS DICTIONARY* 297 (4th ed. 1988).

<sup>7</sup> Statute of the International Court of Justice, Art. 38 (1945); 59 Stat. 1055, 1066; T.S. 993 (1945). Article 38 specifically provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions in the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

*Id.*

<sup>8</sup> North Sea Continental Shelf Cases, (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 4.

<sup>9</sup> Article 36 delineates the jurisdiction of the Court and provides:

1. The jurisdiction of the Court comprises all cases which the parties refer to it

development has to a large extent made up for the disappointing performance of the "optional clause" system<sup>10</sup> that had been devised with a view to encouraging states to accept the Court's jurisdiction in advance in all cases where they were proceeded against, or in all those of a particular category or categories.

It is no secret that this system has not lived up to expectations and has given rise to many controversies as to the Court's jurisdiction, whereas no challenge can arise when a dispute is referred to the Court by special agreement.

The document instituting proceedings, whether an application, a special agreement or a request for advisory opinion, is normally a short one and, in the case of an application, is generally confined to an outline of the acts complained of and a request that they be condemned accompanied by calls for restitution or compensation. In such a case, the Court terms the plaintiff the Applicant and the defendant state the Respondent;

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and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Statute of the International Court of Justice, art. 36 (1945) 59 Stat. 1055, 1060; T.S. 993 (1945).

<sup>10</sup> The optional clause system was devised to encourage states to accept the Court's jurisdiction in advance in all cases where they were to proceed against, or in all cases of a particular category or categories.

but where the document is a special agreement and no plaintiff/defendant relationship arises, the states concerned are known simply as the parties to the case and tend to present the Court merely with a description of the problem or problems to be resolved; this description also serves the purpose of defining the scope of the jurisdiction conferred upon the Court. Whatever the type of document, it may have annexed to it a number of key texts, especially if the dispute bears mainly upon the interpretation of a treaty.

## II. THE SECOND STAGE: WRITTEN PROCEEDINGS

### A. *Preliminary Questions*

The second stage in the supply of materials is known as the written proceeding. I shall here set aside such possible incidents as requests for the indication of provisional measures, important though they may be, and, to avoid over-complication, will suppose that no such incidents arise. Nevertheless, when a case is instituted by a unilateral application, the respondent, as often as not, begins by contesting the jurisdiction of the Court. This it may do by filing an objection which is frequently accompanied by a challenge to the admissibility of the application.<sup>11</sup>

Faced with an objection to its jurisdiction, the Court, acting in accordance with Article 36, paragraph 6, of its Statute, opens a phase in which all treatment of the merits of the case is suspended<sup>12</sup> and the sole topic becomes the question of its jurisdiction<sup>13</sup> and, as the case may be, of the admissibility of the appli-

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<sup>11</sup> In proceedings brought by Nicaragua against Costa Rica in 1986, the Respondent admitted from the outset that the Court had jurisdiction. This fact deserves to be highlighted, given that it was the first time for 28 years that a respondent had testified to the Court, from the outset of proceedings, its devotion to the judicial settlement of disputes. The case was finally withdrawn by Nicaragua in 1987.

<sup>12</sup> Rules of the Court art. 79, para. 3 (1978). This rule provides as follows:

Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President, if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

*Id.*

<sup>13</sup> Statute of the International Court of Justice, art. 36, para. 6 (1947). Article 36, para. 6 of the Statute of the International Court of Justice provides that: [i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the

cation. This phase amounts in reality to a case within the case and goes through all the stages, whether written or oral, adversarial or deliberative, of proceedings on the merits, ending with a judgment on jurisdiction and, perhaps admissibility. If the Court at this stage finds in favour of the applicant, the proceedings on the merits are restarted.

Since proceedings on jurisdictional issues follow precisely the same lines as proceedings on the merits, an account of which is to be given below, all that needs to be remarked here is that such issues tend to result in a lesser bulk of materials presented, because it is basically an analysis of law which is involved, and only very rarely a dispute as to facts. Hence, the documentation is generally confined to the essential texts relating to the jurisdiction of the Court.<sup>14</sup> However, if a challenge to admissibility is grafted onto the jurisdictional issues, when it often happens that matters connected with the substance of the case are raised, the annexes may be rather more abundant.

#### B. *On the Merits*

The parenthesis devoted to preliminary questions may now be closed, and I shall pursue my account of the written proceedings on the merits.

The inception of a case by a unilateral application lends a systematically adversary character to the procedure as it takes its course. It thus begins with an attack, in which the applicant elaborates in a Memorial the allegations outlined in the application, and continues with a defence, in which the respondent devotes a Counter-Memorial to refuting the contentions of its opponent. If the Court so orders— as it will normally do if the parties so request— there will then follow a second round,<sup>15</sup> in which the applicant attempts in a Reply to tear the Counter-Memorial to shreds, and the respondent deploys a Rejoinder, to demolish the reply.<sup>16</sup> This is a useful if sometimes leisurely way

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decision of the Court.”

<sup>14</sup> This reduction in volume occurs primarily because at this stage only an analysis of law is involved; only very rarely is there a dispute as to facts.

<sup>15</sup> Rules of the Court, art. 44, para. 1 (1978). “[T]he court shall make the necessary orders to determine, *inter alia*, the number and the order of the filing of the pleadings and the time-limits within which they must be filed.” *Id.*

<sup>16</sup> “The Court may authorize or direct that there shall be a Reply by the applicant

of clearing the ground so that the war horses will have room to manoeuvre in the forensic tilting of the oral proceedings. A number of well-defined contentions and arguments emerge within the opposing perimeters, while it not seldom happens that once seemingly impregnable positions appear in ruins after this battle of the printed word.

The written procedure in a case introduced by special agreement is marked, on the contrary, by parallelism and simultaneity. This is because the Rules of Court provide that each party, neither of which is any less of an applicant than the other, should file a Memorial within a time-limit fixed by the Court, which will usually expire on the same date for both parties. Counter-Memorials are subsequently filed in the same parallel way, since each party is no less of a respondent than the other.<sup>17</sup> In principle, therefore, the Court will always have four pleadings before it in a case of this nature, whereas it is possible that it might only have two to study if the same dispute had been submitted by an application. It is the third round which is optional in the case of proceedings instituted by special agreement, since the parties may request permission for each of them to submit a Reply, thus bringing the number of pleadings to six.

This parallel submission of pleadings certainly has its drawbacks, for instead of being able to adopt an outright offensive or defensive posture, each party is obliged to develop its arguments while groping in the dark, that is to say, while endeavouring to guess what its opponent may be thinking up against it at the very same time. Hence, inevitably the pleadings tend to be overloaded with hypotheses which appear to owe their inclusion solely to the suspicion that the opponent may also be exploiting

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and a Rejoinder by the respondent if the parties are so agreed, or if the Court decides, *proprio mater* or at the request of one of the parties, that these pleadings are necessary. Rules of the Court, art. 45, para. 2 (1978).

<sup>17</sup> Rules of the Court, art. 46 (1978). This article provides:

1. In a case begun by the notification of a special agreement, the number and order of the pleadings shall be governed by the provisions of the agreement, unless the Court, after ascertaining the views of the parties, decides otherwise.
2. If the special agreement contains no such provision, and if the parties have not subsequently agreed on the number and order of the pleadings, they shall each file a Memorial and Counter-Memorial, within the same time-limits. The Court shall not authorize the presentation of Replies unless it finds them to be necessary.

*Id.*



them. One wonders at times whether certain lengthily thrashed out contentions would have been given any prominence at all if the case had been instituted by an application, when there would have been far less anxiety to leave no stone unturned. This anxiety probably peaks during the preparation of the Counter-Memorials, when each party, having read its opponent's Memorial, will have discovered the chinks in the latter's armour, but will also have realized those in its own. This is perhaps why each party, when its opponent's Counter-Memorial is unveiled, tends to find it necessary that it should cover some areas anew in a Reply. Of the ten or more cases referred to the International Court of Justice by special agreement,<sup>18</sup> eight have run to three rounds of pleadings. It must be said, however, that in several cases the special agreement itself had made provision for such protracted written proceedings.<sup>19</sup>

I may here allow myself a digression considering that the special agreement may also have laid down the time-limits it is proposed to request at each stage of the proceedings, generally six months for each Memorial or Counter-Memorial, this reveals quite a lot about the attitude of states towards judicial settlement. Even taking into account a certain safety-first attitude whereby each special agreement tends to be modelled on previous ones,<sup>20</sup> it is undeniable that making provision for three rounds of pleadings does not evince excessive haste. One may conclude that in these cases one of the main attractions of judicial settlement is its stately pace, and the possibility it affords of being able to put off the solution of a thorny problem for as long as desired. It is of course quite legitimate to avail oneself of this possibility, but then in fairness it must be realized that it may be quite wrong to foist upon the Court itself the reputation of being slow and heavy.

Did I say heavy? In the famous Barcelona Traction case, though it owes its celebrity to the time it lasted rather than for the bulk of its documentation, the pleadings weighed 25 kilo-

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<sup>18</sup> See e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1984 I.C.J. 3 (North Sea Continental Shelf Cases (F.R.G./Den.: F.R.G./Neth.)), 1969 I.C.J. 4; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, 1982 I.C.J. 3 (Order).

<sup>19</sup> See e.g., *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 1982 I.C.J. 18.

<sup>20</sup> Jurists, like judges, feel comfortable with precedents which they imagine have smoothed the way for them.

grams. They amounted to 60,776 pages in all, including the annexes. But even in the average case the pleadings are voluminous even if they do not run to such impressive figures. However, the case was far from being an isolated instance. The case between Tunisia and Libya concerning the *Continental Shelf*,<sup>21</sup> and the *Gulf of Maine* case between Canada and the United States,<sup>22</sup> bade fair to snatch the record from *Barcelona Traction* which, moreover, had just managed to beat the *South West Africa Cases*.<sup>23</sup> What is more, even in a case where one of the parties withdrew after the jurisdictional phase,<sup>24</sup> namely that between Nicaragua and the United States, the documentation reached comparable proportions.

The weight of documentation does not necessarily correspond to the weight of the arguments, for at least two-thirds of the bulk consists of annexes, that is, texts produced in support of the contentions sustained in the pleadings. And the more insubstantial the contention, the more support it requires. On the other hand, the more it is substantial, the more documentary evidence should, in principle, be available to support it. Either way, the annexes are bound to proliferate. In large part, moreover, they owe their inclusion to respect for the highly justified demands of the Rules of Court which are framed to insure the authenticity of all documentary evidence.<sup>25</sup> Thus, for example, if a document not readily available is partially quoted, the entire document has to be deposited in the Registry.<sup>26</sup>

In practice, the annexes produced by parties are heterogeneous in the extreme, ranging as they do from the straightforward reproduction of legislative texts to photocopies or transcriptions of historical documents, whether in the original language or in a

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<sup>21</sup> (Tunisia/Libyan Arab Jamahiriya), 1982 I.C.J. 18 (Judgment).

<sup>22</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can./U.S.), 1984 I.C.J. 246 (Judgment).

<sup>23</sup> (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, (Judgment).

<sup>24</sup> See Military and Paramilitary Activities in and Against Nicaragua, (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment).

<sup>25</sup> Rules of Court, art. 65-69 (1978).

<sup>26</sup> *Id.* art. 50, para. 2. "If only parts of a document are relevant, only such abstracts as are necessary for the purpose of the pleading in question need be annexed. A copy of the whole document shall be deposited in the Registry, unless it has been published and is readily available." *Id.*

translation into the Court's official languages, which are English and French.<sup>27</sup> All annexes have to be certified as correct copies by the agent of the party filing them, but it is customary for the agent to certify them *en bloc*.<sup>28</sup> Where photocopies of historic documents are concerned, the Judges would often willingly trade this certification for greater legibility, since they tend to be confronted with veritable palimpsests<sup>29</sup> without being as adept as a Champollion<sup>30</sup> at deciphering hieroglyphs.

Generally speaking, if the other party does not raise any objection to an annex - say, the translation of an administrative document of the Ottoman Empire - the Court sees no reason to reject it. Naturally, where the document is at the heart of a case, the Court proceeds with greater caution. But in fact, the annexes which may affect the outcome of a case are very few in number. However, the parties naturally take the same attitude as in the deployment of their arguments and leave nothing to chance, endeavouring to include everything which could possibly possess the slightest relevance. The Court is there faced, on the one hand, with a superabundance of contentions, some of which, with hindsight, will prove to have been somewhat inessential, and, on the other hand, with the illustration of each of those many contentions by a plethora of annexes. This situation has to be accepted, since the parties in the normal case, are attempting

<sup>27</sup> *Id.* at art. 70, para. 1. This rule requires:

In the absence of any decision to the contrary by the Court, all speeches and statements made and evidence given at the hearing in one of the official languages of the Court shall be interpreted into the other official language. If they are made or given in any other language, they shall be interpreted into the two official languages of the Court.

*Id.*

<sup>28</sup> *Id.* at art. 50, para. 1. "There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading." *See also, id.* at art. 52, para. 1, which provides in pertinent part:

The original of every pleading shall be signed by the agent and filed in the Registry. It shall be accompanied by a certified copy of the pleading documents annexed, and any translations, for communication to the other party in accordance with Article 43, paragraph 4, of the Statute, and by the number of additional copies required by the Registry . . . .

*Id.*

<sup>29</sup> PALIMPSESTS: "[a] parchment or the like from which writing has been partially or completely erased to make room for another text." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 1039 (1979).

<sup>30</sup> CHAMPOLLION, JEAN FRANCOIS (1790-1832). French Egyptologist. *Id.* at 245.

to gain the ear of some fifteen judges, which means that each argument has in principle some fifteen chances of touching a chord. Still once judgment has been given, the bulk of the annexes remains a problem, since everything has in principle to be printed in the Court's *Pleadings* series, and it would be extravagant to spend large sums on immortalizing documents for which the Court found no use in the development of its reasoning. For the first time, in the *Barcelona Traction*<sup>31</sup> case, the Court consequently decided to authorize the Registry to reduce the printed annexes to a selection - though the case still ran eventually to ten fat volumes of the *Pleadings* series. A similar task, which of course involves the assumption of a serious responsibility, was subsequently carried out in such "voluminous" cases as *Western Sahara*<sup>32</sup> and *Gulf of Maine*.<sup>33</sup>

A special mention should be made of land maps, marine charts and other illustrative documents such as sketches and diagrams. Maps and charts give rise to exceptional problems, because they tend to require more space than the confines of an ordinary page and demand to be printed, sometimes in colour, with particular accuracy. Owing to such difficulties, the parties themselves find it necessary to present them in separate folders and, at the subsequent printing stage, the Registry arranges for the more important among them to be presented in a special folder or in a pocket glued within a *Pleadings* volume: a most expensive, though necessary solution.

Since, in the last few years, the Court has been asked to deal with a number of cases involving maritime delimitation or land boundaries and has sometimes to deal with conflicts of territorial sovereignty, it may be well imagined that cartography has played an important role for the Court. Likewise, in oral proceedings to which we will shortly come, the spectacle in the courtroom frequently includes cartographic demonstrations conducted by counsel and experts with the aid of blackboards or projectors. In cases involving such issues, moreover, the Court

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<sup>31</sup> *Barcelona Traction, Light and Power Company, Limited*, 1970 I.C.J. 3 (Judgment).

<sup>32</sup> *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12.

<sup>33</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, (Can./U.S.), 1984 I.C.J. 246 (Judgment).

usually finds it necessary to hire a cartographer or hydrographer to assist it in mastering the relevant technical questions and in expressing its findings with all due scientific precision.

Before concluding this dissertation on the written phase, two essential remarks must be made: First, all the mass of materials referred to, submitted in one of the Court's two languages,<sup>34</sup> has to be translated by the Registry into the other language<sup>35</sup> in order to respect the equality of the Judges in terms of their chosen working language. This immense task has to be accomplished with the most meticulous care and takes considerable time, even undertaken as it is with a sense of urgency. At the end of the written proceedings, it is the translators more than anyone who have all the details of the case at their fingertips.

Second, a judge at the Court knows the loneliness of the long-distance reader. He has no one to spoon feed him after reducing this gargantuan repast into digestible pap. There are no law clerks as in the Supreme Court of the United States, or young lawyers attached directly to the service of the judge as at the European Court in Luxembourg. The Judge must do his own homework in lonely seclusion. He is left to his own devices in reading, sifting and encapsulating the whole unwieldy mass. For this he relies on his memory, his notes, his marker pens, cards, files, and today - if he has taken the plunge - the fabulous resources of a personal computer.

### III. THE THIRD STAGE: ORAL PROCEEDINGS

We now find ourselves on the threshold of the oral proceedings, the Third Stage in the supply of materials. The thrill of the Word is nigh, and the pensive reader is to become the attentive recipient of speech. To listen is the second verb a judge must

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<sup>34</sup> Rules of Court, art 51, para. 2 (1978). "If in pursuance of Article 39, paragraph 3, of the Statute a language other than French or English is used, a translation into English or French certified as accurate by the party submitting it shall be attached to the original of each pleading." *Id.*

<sup>35</sup> *Id.* at para. 1.

1. If the parties are agreed that the written proceedings shall be conducted wholly in one of the two official languages of the Court, the pleadings shall be submitted only in that language. If the parties are not so agreed, any pleading or any part of a pleading shall be submitted in one or other [sic] of the official languages.

*Id.*

conjugate.

Truth to tell, speaking and listening already will have made their informal entry into the case. However solitary in his hours of study, no Member of the International Court of Justice is ever *unus judex*. Long before listening to the parties, each Judge will have listened to his colleagues. At this stage, there is nothing compulsory in this; every Judge is free to keep his opinions to himself and to refrain from seeking out those of his colleagues. There are characters that feel the need for their personal judgment to ripen far removed from influences: Judges who disclose very little of their thought before the first formal private discussions of the Court. Others, however, need the stimulation of exchanging impressions with their colleagues at various steps of the written proceedings, and come to hearings with some idea of how different members of the bench are likely to react to the sharpening of this or that argument.

In either case, no Member of the Court embarks upon the hearings without the appropriate baggage. He will bring to them a mass of impressions formed by his personal reading of the pleadings and any comments he may have exchanged with his colleagues. The season of listening now begins. It may last from two to six weeks with one sitting a day, or even two a day when there is time to be made up or an inexorable calendar to be respected. In exceptional cases the hearings have even continued for much longer.<sup>36</sup> Usually, there is a two or three day pause between each round, as also between the respective turns of the parties, so that counsel may have time to prepare counter-arguments.

Needless to say, the parallelism and simultaneity featured in the written proceedings when a case has been introduced by special agreement cannot be matched at the oral stage. Were counsel to take the floor in a rivals' duet, their audience would have no chance to fish their pearls. It is, therefore, inevitable

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<sup>36</sup> The South West Africa cases (Ethiopia and Liberia v. S. Afr.) Preliminary Objections, 1962 I.C.J. 319, (Judgment), notched up 112 sittings - implying 112 verbatim records, all requiring translation, making a total of 6,818 pages. Without rivalling this exuberance in duration, the parties in the Gulf of Maine case, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246 (Judgment), managed to parade some 70 advocates, counsel, experts and other supporting cast before the Court.

that one of the parties should sing first, playing as it were the role of applicant, and that the other should don the motley of the respondent, a role which has its compensation in being allowed the last word. Obviously, the order of addressing the Court is a delicate matter on these occasions, but it is one which it is usually possible to resolve without too much difficulty, through the good will of the parties.

To listen to the parties is a much more formal business than to listen to one's colleagues. In the first place, between colleagues there is a dialogue. One listens, but one also speaks. However, the Court does not enter into dialogue with the parties. During the hearings, it listens to them, or it speaks to them through the mouth of its President in order to request additional information or explanations. Any Judge is also entitled, after notifying the President, to put his own questions to the parties, and of course the President himself may also put questions in his own name. But for the most part those on the bench remain silent, like a jury listening to arguments in order to weigh their merits. Hence, their passivity during the hearings is combined with impassivity.

Oh, those interminable speeches that fill a Judge, at times, with the unfulfillable longing to stretch his limbs; that prompt many a discreet rustle of black silk lest the bench too closely resemble that row of stuffed cats so unforgettably described by Pascal, Molière and Lafontaine! However, our task is to render justice, and justice must first be done to those orators - mostly eminent jurists and scarcely less learned than the Judges - who are capable of gripping their judicial listeners by the perspicacity of their analyses and the cunning of their eloquence. As connoisseurs of the law, the members of the captive audience are often richly rewarded for their enforced patience, and even during the most arid exposition of factual intricacies, there always remains the intellectual challenge of having to disentangle for oneself the essential lines of thought, of having to extricate the heart of the matter from all the entwining details; and provided that fatigue can be held at bay the task becomes a pleasure.

Parenthetically, I feel the following requires to be said about the choice of advocates. It in no way detracts from the great merits of those who appear before the Court to point out that maybe they belong to a rather narrow circle. Is it really

right that, in a world of five billion inhabitants, a mere handful of lawyers should address the Court in case after case? Normally, a State party to a case appoints an agent of its own nationality. That is what one would expect. But for the rest, it will as often as not employ foreigners - unless it happens to be France, the United States, the United Kingdom, Italy, Belgium or Spain. So much so that the impression is created of a forbidden city: a bar closed to all except a few leading lights. Indeed, the Registry of the Court regularly receives letters from lawyers requesting to be informed as to the procedure for enrollment. Yet there is no bar of the Court. There is not even any requirement that those who plead before it should possess a legal qualification. Everything is up to the litigant states and their choice of counsel. Now, given the importance of the issues at stake, it is doubtless understandable that governments should seek to engage "horses for courses" by hiring top international lawyers who already boast long experience of the Court and hence, it is imagined, have its ear. The high price of this option is, alas, all too likely to include the sacrifice of young national talents which are doomed to remain obscure. Certainly, there are circumstances in which the restriction of the official languages of the Court to English and French may create some difficulty, but that problem can be overcome.

The best speeches are made by those advocates who are ruthless enough to weed out all unnecessary arguments. In 1978, when a long-suffering Court had enough of long-winded arguments on points of little substance, it introduced the following rules:

*Article 60*

1. 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.<sup>37</sup>

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<sup>37</sup> Rules of Court, art. 60 (1978).



*Article 61*

1. The Court may at any time prior to or during the hearing indicate any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument.
2. The Court may, during the hearing, put questions to the agents, counsel and advocates, and may ask them for explanations.
3. Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President, who is made responsible by Article 45 of the Statute for the control of the hearing.
4. The agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President.<sup>38</sup>

Nevertheless, having regard to the elementary principle that each party must be free to choose and follow its own judicial strategy and fully develop all its arguments, it is an exceedingly delicate undertaking to point out that the Court has heard enough on a particular point. More seriously still, if the Court gives too clear an indication of what it considers relevant, it may create the impression that it is inclined towards the party most sharing its view of that relevance and lay difficulties in store in the event that the deliberation evolves so as to cast doubts on the Court's first appraisal of the case. So, it is not surprising that the Court has hitherto never made use of its stated option to close the debate on a problem it has considered to have been sufficiently argued.

However, the rest Article 61 has proved its utility in enabling the Court or its individual members to acquire clarification on points considered as basic or in satisfying the curiosity aroused by signs that an advocate is evading certain points. Sometimes a Judge's question has been more effective than an opponent's irony in discovering the Achilles' heel in a party's case. Then again, addressing the same question to both parties has often resulted either in the illumination of an entire aspect

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<sup>38</sup> *Id.* at art. 61.

of the dispute or in compelling the parties to admit that their positions are in fact closer than as adversaries they had felt able to concede.

Each normally three hour sitting, features a mid-way break fixed in courteous dialogue between the President and the speaker so as not to throw the speaker too much out of his stride by interrupting the onward march of eloquence and gesture. This welcome break provides the Judge with relief, but little relaxation for it is during this quarter of an hour or so that the Court discusses and formulates such questions as it may be desired to put, comfortably seated round an oblong table under the alert, remote or enigmatic gaze of the Court's former Presidents, whose portraits adorn the beautiful room, hung in red velvet, through whose door the bench makes its exits and entrances into the Great Hall of Justice. If the leaders of world politics have invented the working breakfast (to go one better than the business lunch), be it known that international justice had already practised the working/business coffee break.

To emerge from generalities, let me give one example, from the not too distant past, of the difficulty of keeping the oral arguments to what, in the Court's view, are the essentials. I refer to the *Continental Shelf*<sup>39</sup> case submitted to the Court by special agreement between Tunisia and Libya. Both these parties, basing themselves on rival interpretations of the doctrine of natural prolongation<sup>40</sup> featured in the case law, went to great pains throughout the written proceedings to develop arguments based upon geology and geomorphology.<sup>41</sup> Their pleadings were underpinned by a powerful array of learned and technical studies concerned with the physical formation of the Mediterranean basin. But perusal of the Judgment in the case reveals that, in the eyes of the Court, all those arguments (merely to read which had been a Herculean task) had been either beside the point or mutually destructive, for it was without any findings on that scientific debate that the Court, on the basis of legal criteria, took its

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<sup>39</sup> *Continental Shelf* (Tunisia/ Libyan Arab Jamahiriya) 1982 I.C.J. 18.

<sup>40</sup> The doctrine of natural prolongation, as described in *Continental Shelf* refers to the extension of land territory into and under the sea. *See id.* at 26.

<sup>41</sup> GEOMORPHOLOGY. "[T]he study of the characteristics, origin and development of land forms." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 552 (rev. ed. 1982).

decision.

Would it then have been normal for the Court to have told the parties at a given point in the oral arguments, "Enough of geology and geomorphology!?" Perhaps, if the Court had been absolutely sure of itself. But it has no right to certainties before hearing the parties out. Listening has, after all, one very important function, which is to sow doubt, to generate the philosophical "skepsis" which cleans out all preconception from the Judge's mind before he embarks upon his ultimate function of decision.

The verbatim record of each hearing is published within a few hours of the Court's having risen, and the translation follows after a day or so. Hence, the verb "to read" continues to be conjugated, even during the high season of listening. Perish the thought that a Judge, seen to be listening with his eyes lowered (an obvious sign of pensiveness), could irretrievably lose the thread of argument. That very evening he will open them wide to scan with the greatest attention the arguments first conveyed by an orator whose timbre he had found a whit too soothing. The recent decision of an appeal court in Berlin, which found that a Judge is not asleep unless he snores, is therefore of no relevance to the bench of The Hague.

Even after reading all the verbatim records, the Judges have more reading in store and will, in fact, each contribute to the sum of pages to be read. As soon as the oral proceedings have been closed, the President of the Court will convene them to present his "list of issues" to be settled and to determine a time limit for the filing of their "written notes"<sup>42</sup> which may - this is optional - follow the lines indicated by that list. But writing exists to be read. Hence, the Judges have to face one more deluge of written pages, which constitutes the *fourth and last stage* in the provision of materials for the deliberation.

#### IV. THE FOURTH STAGE: PREPARING FOR DELIBERATION

During the two-to-four weeks in which each Judge composes his "written note," he is not obliged to lose contact with his col-

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<sup>42</sup> Resolution Concerning the International Judicial Practice of the Court, arts. 2, 3 1975-76 I.C.J.Y.B. 119-20 (1976).

leagues. In fact, it has become somewhat of an institution for the Judges informally to put their heads together when tea-time arrives, which it does at around three o'clock in the afternoon, since everything bar the summer is precocious in Holland. It is then customary for such Judges who so desire to offer each other biscuits and arguments in the first-floor lounge of their building. They regain their offices, or accompany a colleague to his, or remain chatting in the corridor, imbued with the passing illusion of having convinced the others of a point, or with an anxious sense of having treated some aspect too lightly. Tea-time at the Court, no less than in the Security Council, has thus become a standing institution which nobody is obliged to frequent but which has its habitués, its occasional patrons and its outsiders, its heightened exchanges and its dying falls.

Now the Judge has to write. Another verb to conjugate in the first person singular. This is the moment of truth, a moment spread over several weeks. No stage in a case is so revealing for a Judge as when he finds himself committing to paper the substance of his thought on the opposing contentions, and his proposed solution. I have said that one is never *unus judex* at the Court; but what a Judge is called upon to pen in his "written note" is, in final analysis, a personal mini-Judgment. Hence, there are notes which, for that very reason, take on maxi-dimensions.

One might imagine that the Judges then proceed to an "exchange of notes" as diplomats do. This is not the case. To exchange them would be a breach of anonymity, so that the degree of influence felt on reading any particular note might conceivably depend on the relative esteem in which the known author is held. The procedure followed in fact consists of transmitting one's note to the Registrar so that he may circulate it and its translation, while identifying it not with the name of the author but simply with a Roman numeral. However, "le style c'est l'homme",<sup>43</sup> and this rather vain ritual cannot but bring to mind the subtitle of the *Barbier de Seville*,<sup>44</sup> namely *La Precaution inutile*.<sup>45</sup>

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<sup>43</sup> Simply put, the style is the man.

<sup>44</sup> G. Rossini *Barber of Seville* (1816).

<sup>45</sup> Loosely translated, the useless precaution.

## V. THE DELIBERATION

That was the end of my interminable prelude. Now that every Judge is aware of, and has had an opportunity to meditate upon, the views of his colleagues, the Court can at last begin to deliberate. It proceeds to do so with all the formality that the word "deliberate" suggests. Witness the text of Article 5 of the Resolution of the Court concerning its internal judicial practice:

i) After the judges have had an opportunity to examine the written notes, a further deliberation is held, in the course of which all the judges, called upon by the President as a rule in inverse order of seniority, must declare their views. Any judge may address comments to or ask for further explanations from a judge concerning the latter's statement declaring his views.

ii) During this deliberation any judge may circulate an additional question or a reformulation of a question already brought to notice.

iii) On the request of any judge the President shall ask the Court to decide whether a vote shall be taken on any question.<sup>46</sup>

It is always stimulating to be able to listen to and question enthusiastic colleagues sharing the same responsibility but trained in very different schools, colleagues whose manner of thinking may vary widely and each of whom will have his own priorities. When one's own turn comes, it is no less stimulating to explain oneself and confront their questions, though these sometimes manage to shake conclusions for which one had thought one possessed cast-iron justifications.

What results, in a way, is a new adversarial debate, but this time within the Court itself. I say, "in a way," because it would be wrong to suggest that the Judges take sides with this or that party, defending one or attacking the other. Far from it because, the subject at issue now is much rather the soundness of each Judge's analysis rather than the soundness of the parties' contentions.

Towards the end of this debate which may last four or five days during which the Court sits morning and afternoon a ma-

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<sup>46</sup> Resolution Concerning the International Judicial Practice of the Court, 1975-76 I.C.J.Y.B. 119 (1976).

jority trend will emerge and be noted by the President, who according to the rules will be the last to expound his understanding of the case.<sup>47</sup> The Court then proceeds to elect a Drafting Committee, which immediately meets in order to plan its task.<sup>48</sup> It will enjoy the technical assistance of the Registry (1) to ensure that the two texts of the draft - for there must be one in English, and another in French will march in step, (2) to draft the recital of the procedural history of the case (known as the "*qualities*") which will precede the reasoning in the judgment, and (3) to check the accuracy of every factual statement, date mentioned or quotation, without ever relieving the Judges of the responsibility for everything within the final text of the Judgment. It is therefore normal that the Registrar or the Deputy-Registrar of the Court, should attend every meeting of the Committee, together with the senior officials charged with the above-mentioned technical tasks, who are going to nurse the text through all its transformations until the final delivery of judgment.

There is no rule to dictate the method the Drafting Committee has to follow in producing a preliminary draft judgment within the time allowed by the Court, which runs from three to six weeks according to the scale of the task. However, to save time, it is usual for the task to be divided among the members of the Committee in accordance with various factors, including the greater or lesser interest manifested by each one of them, with regard to certain aspects of the case.

This means that in practice one problem is almost bound to arise, namely that of the composite nature of the text under preparation. What it amounts to is that the partners in the Drafting Committee, whose colleagues have condemned them to agree, have to be brought into some alignment. With a certain give and take, this is always achieved, for it is the very essence

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<sup>47</sup> *Id.* art. 5(i) at 120.

<sup>48</sup> *Id.* art. 6(i) at 120-21. Article 6 of the resolution applies. It begins with the following provisions:

i) On the basis of the view expressed in the deliberations and in the written notes, the Court proceeds to choose a drafting committee by secret ballot and by an absolute majority of votes of the judges present. Two members are elected who should be chosen from among those judges whose oral statements and written notes have most closely and effectively reflected the opinion of the majority of the Court as it appears then to exist.

*Id.*

of drafting a judicial decision. The problem not infrequently becomes a stylistic one also. How can the lapidary, laconic or even elliptical style of one Judge be seamlessly welded to the highly decorative, rhetorical and parenthetical style of another who may, moreover, be using the other language of the Court? This is a problem demanding no less cunning than tact, especially on the part of the Registry, which is supposed to ensure homogeneity while at the same time providing translations that, while they might be taken for original texts, do not stray too far afield from a style which is perhaps uniquely characteristic of the other language.

In the long run, even this problem will become soluble within the framework of the multiple recastings which the draft Judgment is destined to undergo, and one may add that after a certain experience of the Court, each Judge tends, by a subtle osmosis, to absorb the house style, which certainly serves to reduce disparities. These points are not without interest, given the fact that some commentators, who presume to criticize the style of the Court's Judgments, appear to imagine that they are produced in one fell swoop by a single pen.

Admittedly, the entire preliminary draft could be entrusted to a single person, but this is rarely the case. Besides, whatever gain in homogeneity might result, a single draftsman might find it more difficult to get his text endorsed by his colleagues on the Committee than if they, for their part, had to seek his approval.

However that may be, the preliminary draft judgment which will emerge from the crucible in two languages for distribution to all other Members of the Court, will present a line of reasoning personal to the Committee and a draft operative section in which the Committee endeavours to reflect what it understands to be the Court's future findings. This preliminary draft will be the first of three successive versions, to be presented in double-spacing, with each line numbered, in order to facilitate the task of correction and amendment. Like, all the drafts, moreover, including the definitive text which will finally be printed in the series of the Court's reports, it is assembled "*en regard*." Thus, that is to say, with the text in one language on one page, and that in the other language on the facing page, this being a wise method of ensuring that the equivalence of the text can be checked at every step. The fact that the Court pre-

serves this presentation right up to and including the official publication, symbolizes this equivalence, which in the Court's eyes, is scarcely affected by the final, obligatory choice of the authoritative text.

Once the Members of the Court have the preliminary draft in their possession, they are all invited, no matter whether they belong to the potential majority or the potential minority, to contribute to the perfecting of the text.<sup>49</sup> To that end, they are given a short time in which to submit their written amendments. This is, therefore, the moment as from which every Judge may play his part in the drafting of the judgment. Not all, however, will wish to intervene at once. Those who refrain from doing so may either feel relatively happy with the initial drafting, feel different about their own talents as draftsmen, be holding their fire or count themselves as dissenters. Some likely dissenters, on the other hand, consider that all is not lost and believe that, through tabling amendments, they may succeed in having the judgment redrafted more in tune with their own opinion of the case, which may enable them eventually to vote in favour or even win over converts from the other camp.

But there we anticipate and simplify. In the first place, we anticipate the division which may eventually take place, for it is as yet too early to speak of dissent. Let us rather put it this way, that in the course of the deliberation a certain minority trend or trends will come to light. In principle, nobody is committed to a definite role until the final vote, which is still a long way off. And we simplify, since the questions dealt with and the points of law considered in the reasoning worked out by the Committee are always complex. Whatever agreement or disagreement the preliminary draft may arouse in each Judge will therefore always be subject to nuances. Besides, even a Judge who disagrees with the findings may legitimately feel concern for the exactitude of the statement of the grounds of decision, which may eventually constitute case law on crucial principles in wide areas of international law. It is quite conceivable that a Judge may share the views of the Committee on three-quarters of its reasoning, and it would not be right for his disagreement on the remaining quarter to be allowed to obliterate his right, and indeed his duty, to

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<sup>49</sup> *Id.* art. 7(i) at 121.



join in the betterment of the text. Of course, it will be up to him to choose the appropriate moment to put forward his suggestions. Generally speaking, this is most effectively done at the first opportunity, that is to say, at the stage of the written amendments.

In order to prepare all the Judges for an enlightened participation in the first reading of the draft judgment, the Registry transmits to each, in his own working language, all the amendments of substance received. Meanwhile the Drafting Committee is considering these in particular, but also any suggested emendations of style. It is at this moment that it becomes aware of the warning shots fired to announce the impending battle of the votes. For it is the concern and duty of every Drafting Committee to win the maximum possible number of votes for the main arguments of the Judgment.

A large number of the amendments received will be accepted; others, without being followed to the letter, will prompt modifications in the text; others again will be considered incompatible with the reasoning followed and be consequently rejected, for the Committee has so far remained master of its text, which is not yet that of the Court. At times the Committee prefers not to take a decision and, in the case of an important amendment which would introduce a new argument into the text, the Committee incorporates it within brackets.

## VI. THE PRELIMINARY DRAFT

The life of a preliminary draft is very short. Once the Drafting Committee has concluded its examination, it quickly issues a new draft for consideration in the "first reading."<sup>50</sup> In this second version, every line diverging from the preliminary draft is indicated by a cross in the margin.

And so the Judges proceed, in private session, to the so-called "first reading" of the draft judgment. In preparation for this phase, the Drafting Committee usually decides which of its Members will have the principal burden of explaining and, if need be, defending the draft. This will not normally be the President, because it is already his task to direct the discussion. Nat-

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<sup>50</sup> *Id.*

urally, the spokesman of the Drafting Committee will, from time to time, call on its other Members to provide further information to the Court. During the session, he will have alongside the draft a set of notes enabling him to explain, when the time comes, why a given amendment has been treated in a certain way.

The procedure followed is very methodical. The first pages of the text, which contain the "*qualities*," are considered and approved one by one without being read aloud, unless there is any request to the contrary. Already however, the Drafting Committee is no longer the master of its text, which is becoming that of the Court. The procedure changes once the first paragraph of the reasoning is broached. From then on every paragraph is read aloud by a First Secretary of the Court in the working language of the President, and then by another official in the other language of the Court. The Committee's spokesman then provides whatever explanation is called for and any Judge may request the floor in order to make his comments, seek the reason for the rejection of one of his amendments, propose new amendments (or re-table the same), criticize the economy of the text, request that emphasis be placed on a point he finds understated, challenge the style, spelling or punctuation, suggest that the language be toned down or strengthened, raise the question of the equivalence of the text in both languages, or even congratulate the Drafting Committee for an admirable text notwithstanding.

And so the scope of the interventions, though all are useful, may range from the acutest of accents to the gravest of questions. But each draft judgment contains one or more bones of contention which, for the most part, consist of doctrinal statements. These passages may even unleash a virtual resumption of the deliberation. At such times the Drafting Committee will wonder whether the majority, assembled round the findings, will ever manage to agree upon the grounds of decision. Let us not forget that the members of the Drafting Committee, while assured that their individual notes or their individual contributions to the deliberation were considered as representative of the majority, (1) have not composed their text in compliance with any directive and (2) have had to rely upon such impressions as they will have retained of the deliberation and upon their own analyses.

When a moment of deadlock occurs, the President decides either to set aside the contentious issue for the moment and continue the first reading with the next paragraph (in which case the Drafting Committee subsequently tables a compromise text) or to suspend the sitting in order to give the supporters of the conflicting opinions an opportunity of reaching an understanding before the first reading resumes. It is crucial at this stage of the first reading to agree upon a text which attracts as many votes as possible without suffering either from a deficiency of reasoning or, at the other extreme, from being an amalgam of reasons which for each Judge, in his own way, constitutes a mixture of what he sets store by and what he could never accept.

The delicacy of this operation cannot be overstated. If, for the sake of votes, you try to please everyone, you finally satisfy no-one and see your majority evaporate; hence, there is a point beyond which it is futile to persist in your effort to increase the majority. On the other hand, if you wish the Judgment to make an impact and strengthen the case law of the Court, you must always persevere until that maximum point is reached. The closer the Court comes to unanimity, the more the world will respect its authority. Nevertheless, it must never be forgotten that it is the absolute duty of a Judge to reject any compromise incompatible with his innermost sense of justice and of the limits of the reasoning that may lead to it.

The first reading continues in this fashion until the Court reaches the draft operative clause, which naturally is considered with particular care. However, no vote is taken at this stage. As in the deliberation, the Court will have sat morning and afternoon throughout the first reading (which in a major case - or in a minor case giving rise to a major judgment - will take about one week). The two First Secretaries serving the Drafting Committee will have noted all the changes introduced into the text. There remain only two things for the President to do: To ask which Judges intend to append to the Judgment an individual opinion, and to lay down a time limit for its submission.<sup>51</sup> Those Judges are not obliged to say whether their opinion will concord with or dissent from the majority. After all, no vote has yet been taken and it is quite possible that the potential author of an

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<sup>51</sup> *Id.* at art. 7(ii).

opinion does not yet know how he will be voting. On the one hand, the text is going to be modified before the second reading, and on the other, it is possible that the operative clause will eventually be divided into several paragraphs, on some of which he may be able to vote in favour.

The second reading, for which the Committee provides an amended text with the changes marked by oblique strokes in the margin, takes place a week to ten days after the conclusion of the first.<sup>52</sup> During that time three parallel operations will have been proceeding. First, the Drafting Committee, meeting together with the Registrar and his Secretaries, concerns itself with the preparation of the above text, which they try to render definitive. Second, those Judges intending to append an opinion draft their text. They are not supposed to reopen the entire debate by raising aspects of the case which the Judgment has discarded as irrelevant. If they nevertheless do so, the Drafting Committee, on receiving a copy of their texts, may add to the Judgment a paragraph to indicate why, according to the Court, the aspect in question had not been thought worthy of treatment. This possibility, which has rarely to be put into practice, exerts of course a certain deterrent effect.

At the same time, the linguistic services of the Registry do their utmost to complete the translation of the opinions, which in principle, should be distributed to each Judge in his working languages an important element of information, before the second reading takes place. But in practice, given the size of certain opinions, it is not always possible to complete the entire task in time. Remember, these are judicial texts destined for publication, and therefore, they have to be translated with scrupulous care.

Usually the second reading moves at a good pace, especially if the Drafting Committee has emerged from the first with unambiguous instruction; for that is the key to its ability to submitting a definitive text. This time, the text is not read aloud, and comments are invited page by page, instead of paragraph by paragraph. Normally, the comments are limited to the suggestion of stylistic emendations. However, a Judge may always call for a change of stress or even propose a change of substance.

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<sup>52</sup> *Id.* at art. 7(iii).

This seldom happens. However, from time to time the Drafting Committee will indicate that, to respond to a given passage in an individual opinion, it proposes a final amendment, which may involve the alteration or withdrawal of a passage, or even entail the complete withdrawal of the opinion, especially if the Judge's main aim in filing it had been to secure the amendment in question.

## VII. THE VOTE

When the Court returns to the operative clause, this is read aloud in both languages, and this time, the Court votes. The moment of decision has arrived. The votes are expressed orally. Abstention is not permitted, and the vote of each Judge on each issue has to be expressed with a simple "yes" or "no."<sup>53</sup> As one might expect, the very simplicity of these two rules creates difficulties at times, especially for Judges whose reasoning features nuances not shared by the rest. A Judge, for example, may say that he is unable to answer "yes" or "no" on a paragraph of the operative clause as presented by the Drafting Committee. To enable him to vote, it will then be necessary to divide the issue so that he can vote "yes" on one aspect and "no" on the other.

Once the votes have been taken, the authors of opinions are invited to describe to the Court any modification they intend to make to their texts and to indicate whether they consider their opinions to be merely "separate" (i.e., concordant) or "dissenting." This is not an easy question to answer where the Judge has voted "yes" to some parts of the operative clause and "no" to others. The Court next decides which text (i.e., that in English or the one in French), will be authoritative; it will usually be the text in the President's working language. That decision does not relegate to the rank of a mere translation the text drawn in the other language and elaborated from the beginning in parallel with the first. But the needs of legal certainty require a choice to be made, and Article 39, paragraph 2, of the Statute renders the choice obligatory.<sup>54</sup> The situation is different in the case of the separate or dissenting opinions. Here, the text not in the work-

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<sup>53</sup> *Id.* at art. 8(v).

<sup>54</sup> Statute of the International Court of Justice, art. 39, para. 2 (1945).

ing language of the author will be clearly marked as a translation and, as such, will be entirely the work of the Registry and not engage the direct responsibility of the Court.

The next decision to be taken concerns the date on which the public reading of the Judgment will take place. This will be fixed in light of the time required for preparing the official edition of the Judgment, which will include the separate and dissenting opinions now integral with the Court's decision.<sup>55</sup> Instead of the double spacing hitherto employed, single spacing is used for the reproduction of this edition, so that nothing can be inserted. Another consideration affecting the choice of date is the notice required to be given to the parties so that their representatives can be present.<sup>56</sup> It is the date of the public reading which becomes that of the Judgment, and not the date on which the votes were taken.

### VIII. THE JUDGMENT

So the Court has finally finished conjugating the verb "decide." The Registry now reproduces the text of the Judgment and opinions in hundreds of mimeographed copies,<sup>57</sup> while the First Secretary in charge of information draws up a summary analysis for inclusion in a communiqué intended for the press and public, which is reproduced in thousands of copies.

Thus, elaborated through a long process of transformation, the text of a Judgment by the Court may well be somewhat heterogeneous in character, since it is the end result of the collaboration of some fifteen Judges. The reader will nevertheless discover in each Judgment a guiding thread of reasoning which scarcely ever breaks. This shows that those fifteen Judges from different countries, each with a different background, and exper-

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<sup>55</sup> *Id.* art. 57.

<sup>56</sup> *Id.* art. 58.

<sup>57</sup> Rules of the Court, art. 26, para. 1(i).

1. The Registrar, in the discharge of his functions, shall:

(i) be responsible for the printing and publication of the Court's judgments, advisory opinions and orders, the pleadings and statements, and minutes of public sittings in cases, and of such other documents as the Court may direct to be published.

*Id.*

iences with different philosophies, nevertheless possess something in common, namely, the convergent universality of modern international law and the intellectual approach to its treatment. This is no trivial fact. It is however undeniable that some Judgments do contain tortuous passages prompting the reader to wonder why, for example, the Court has here expressed a relatively simple idea in such involved language; or why, at another point, it has gone out of its way to dispose of a hypothesis which the parties do not appear to have advanced. Why are some aspects dispatched in four lines while others, no more important, are treated at the length of four pages? Some commentators have picked on such phenomena simply to criticize the level of competence allegedly revealed by the drafting. For example, one American jurist devoted a whole article, a few years ago, to criticizing what he found to be the excessive complexity of the Court's Judgments. To prove his point, he took one paragraph of a Judgment and "translated" it into the clear and simple terms which he believed should have been employed. But in doing so he merely demonstrated his own failure to grasp the Court's meaning.

A Judgment of the Court cannot be read like the award of a single arbitrator or like a well-balanced doctoral thesis. The Court neither employs nor intends to employ any rapporteur or advocate-general. Its work is collegiate, and each of its Judgments is the product of collective labour. It should not be surprising that the Court sometimes has recourse to verbal niceties or finely-graded qualifications, to ensure that the text is acceptable to all who vote for it.

The reasoning of any Judgment of the Court is merely the highest common denominator of the Judges' views. Were it to represent more, it would exceed the point beyond which it would be possible to obtain the maximum number of favourable votes. An initiated reader may, therefore, feel that there are other elements which could have been added to the text. The Judges themselves feel this no less.

Thus, the separate opinions, and even the dissenting opinions, appended to the Judgment are integral with it and cannot be detached from it. By allowing these opinions to act as a foil to the Court's reasoning, one can extract the full substance of the judicial decision and grasp the entire scope of its contribu-

tion to jurisprudence.

The deliberation and the examination of the drafts will sometimes have been very protracted and the corresponding Judgment long. In the more distant past, the decisions which were taken after the shortest deliberation were those in the *Anglo-Iranian Oil Company Case*<sup>58</sup> and those concerning the request for provisional measures in the case concerning *Haya de la Torre*.<sup>59</sup> In more recent times, the shortest deliberation will have been that which concluded with the order of 10 January 1986 whereby provisional measures were indicated in the *Frontier Dispute*<sup>60</sup> between Burkina Faso and the Republic of Mali. The longest deliberation in the Court's history concerned the *Corfu Strait*<sup>61</sup> decision, in which the Judgment was, in contrast, the shortest in the history of the Court. But the record for length on both counts was established on 27 June 1986, by the Judgment on the merits in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,<sup>62</sup> between that country and the United States, when the deliberative phase, was not only the longest hitherto known but the judgement also was the longest in the Court's existence, amounting in the printed edition to 1100 pages of Judgment and opinions, including the texts in both languages.

#### IX. PUBLICATION OF THE JUDGMENT

Now the Judges of the Court have reached the destination of their long journey. They have all read, listened, written, deliberated and, finally, decided. The Judgment has been adopted; the date for its public reading has been fixed; the Registry has undertaken to ensure that, when that day comes, there will be available not only the official copies,<sup>63</sup> but also some hundreds of

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<sup>58</sup> *Anglo-Iranian Oil Co. Case* (U.K./Iran) 1952 I.C.J. 13.

<sup>59</sup> *Haya De La Torre* (Colom./Pera) 1951 I.C.J. 71.

<sup>60</sup> *Frontier Dispute* (Burkma Faso/Republic of Mali) 1986 I.C.J. 554.

<sup>61</sup> *The Corfu Channel Case*, (U.K./Alb.) 1948 I.C.J. 124.

<sup>62</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicar./U.S.) 1986 I.C.J. 14.

<sup>63</sup> The official copies are bound with ribbons from which hangs an impressive seal in red wax bearing the emblem of the Court. These copies are destined for the parties and the Court's archives.



other copies,<sup>64</sup> so that law reporters, chancelleries and legal scholars may curb their impatience pending the availability of the printed edition of the Judgment. That printed edition, it should be realized, is always the second edition of a decision by the Court. A Judgment has to be eaten hot, and a vehicle requiring less time in the preparation, hence a mimeographed edition, is needed for that purpose.

Each case has to be dealt with while avoiding any unjustified delay in the course of justice; taking into account such factors as the time limits requested by the parties themselves, the time the Judges need in order to master the case file, and above all, the meticulous care that must be exercised where judicial settlements are concerned. Not for nothing has the word "deliberate" comes to signify the reverse of "hasty."

However, at this final stage, where what has to be done is no longer to deliberate but to publish a result, that speed is required in order to put an end as rapidly as possible to the "pendency" of the case, that is to say, the suspension of justice which is obviously in itself a state of injustice. This principle holds good for any tribunal. But there is another reason for acting quickly, namely that one must always reckon with the possibility of a "leak," even in the closely guarded system of procedures employed by the Court. This is therefore, a delicate time for the Registry, when extra vigilance and increased internal measures of security are required. It is the Registry also which deals with the practical arrangements for the public sitting at which the Judgment will be read out.

To ensure a respectable audience for the sitting, to which of course the representatives of the parties are the first to be invited, the Registry, through its information services, sends invitations to the diplomatic corps of The Hague and the international press agencies and issues a communiqué making public the date of the sitting. The summary analysis mentioned above is attached to another communiqué which is immediately released once the reading of the Judgement has been concluded.

The President reads the Judgment aloud. His colleagues sit mute beside him on the bench, feeling reduced to a supporting cast, if not merely parts of the décor, in this final scene. They

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<sup>64</sup> Sans ribbons and sans seal.

reflect perhaps that a deliberation is indeed the opposite of a liberation. Throughout their consideration of the case, they have sacrificed much of their freedom of speech towards the outside world, but at the same time their freedom to keep silent before their fellow Members of the bench. During that deliberation, some will even have felt, as it were, confined within the precincts of the Peace Palace, rather like those Roman conclaves when the world awaits the plume of white smoke. For such Judges, the deliberation was the sentence to be served before the moment of liberation, when the President of the Court, in solemn public sessions, pronounces the final word of the last paragraph of the operative clause of the Judgment. Yet, it is with a certain feeling of regret, even nostalgia, for a case that has passed into history, that a few minutes after the Court has risen, those same Judges will remove their robes and hand them to an attentive usher. For they will have been happy without realizing it. To deliberate, is after all, an engrossing activity which may seize, invade and tyrannize the mind and whose cessation may cause severe withdrawal symptoms. There is, then, something of a vice about it and, like all the best vices, deliberation is secret. The Statute of the Court makes no bones about this: "The deliberations of the Court shall take place in private and remain secret."<sup>65</sup> That is the third paragraph of Article 54 of the Statute of the Court.

## X. CONCLUSION

These pages have revealed the secrets of the Court's deliberations. If they are fortunate enough to find a reader, that person will surely take care to respect their confidentiality. He knows that they were intended for his eyes alone by benefit of special election, and that they should therefore remain strictly between him and their author as a matter of right-thinking and friendly complicity.

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<sup>65</sup> Statute of the Court, art. 54, para. 3.