Enhancing the Effectiveness of Procedures of International Dispute Settlement*

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I. Introduction

Let me begin by stating the obvious: there is no single set of rules and practices governing the international judicial process — for there is no single such process. Instead there are many tribunals, each with its own procedures for settling disputes, often set out in the form of a Statute supplemented by more specific Rules of Court. The procedures of those different tribunals reflect their very different characteristics, such as their world-wide, or regional scope; or their purely bilateral nature; or their character as standing tribunals or as *ad hoc* tribunals; or the limited, or unlimited, subject-matter of the disputes which may be brought before them. While there is, of course, much procedural borrowing of practices by one tribunal from others and while certain principles may find expression in the procedures of many tribunals, yet one cannot speak of "international rules of procedure". Questions can in practice only be pursued on a tribunal-by-tribunal basis.

There is a further problem about the topic I am addressing, and it is perhaps more fundamental. Its implication is that inter-state judicial settlement procedures are ineffective — or at least not as effective as

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they might be and are in need of improvement. Well, yes: they can indeed be improved – nothing is perfect.

But lurking behind that rather obvious implication is another – that the real problem with international judicial settlement lies in the procedures and practices of the various tribunals: improve them, the suggestion seems to be, and all will be well.

But it will not be; because that is not where the real problem lies. If we stand back and look at the broad picture of international dispute settlement by judicial procedures, what is striking is how few disputes are in fact referred for settlement in that way.

Nowadays it is widely thought that the ICJ (and its predecessor), after a relatively slow start and even, two or three decades ago, a period which could be regarded as almost one of decline, is now again more active, with more cases being referred to it, by more states, than ever before. Over the present Court's fifty-odd years of existence it has delivered a little under a hundred judgments in contentious cases between states. The Court's current website lists 23 cases as being pending before it on 22 June 2000. The figure for judgments delivered is, it must be acknowledged, not all that impressive for half a century's activity: and the size of its present list of outstanding cases, while comforting in terms of the willingness of states to have recourse to the Court, must cause concern in terms of its ability to handle those cases in the near future.

Those figures are, however, not quite what they seem. Quite a number of the judgments delivered have been on Preliminary Objections, resulting in the dismissal of the case rather than its progress towards judicial settlement. Moreover, the overall total of judgments delivered counts as separate judgments what are in fact judgments on different aspects of the same dispute. The number of disputes resolved by the Court remains depressingly small in a world which for the whole period of the Court's existence has experienced no shortage of disputes, large and small. And the current list of outstanding cases rapidly shrinks when those cases which are in form separate proceedings (e.g. the two Lockerbie Cases against the United Kingdom and the United States, and the eight Cases brought by Yugoslavia against various NATO states) are counted, as reality dictates, as in substance involving only single disputes rather than several distinct disputes. Writing just two years ago an authoritative commentator observed[1] that "it is evi-

1 J.G. Merrills, *International Dispute Settlement*, 3rd edition 1998, 164.

dent that only a handful of disputes have actually been decided by the Court" and that the picture is one "of a situation in which litigation is a wholly exceptional act and the vast majority of disputes are handled by other means".

What we have is far too many disputes, all over the world, and little readiness to resolve them by recourse to impartial third party adjudication. If we are considering how effective international judicial dispute settlement procedures are, it is difficult to avoid the conclusion that they are largely marginal to the achievement of that which they have been established to secure, namely the peaceful resolution of inter-state disputes in accordance with the law.

But then let us equally be clear where the fault lies. It lies not with the international judicial processes themselves: for all their deficiencies they do a pretty good job, when given the opportunity. The heart of the problem lies in the attitude of states, which are generally remarkably unwilling to refer their disputes with each other to impartial third party adjudication, whether by standing tribunals such as the ICJ or by *ad hoc* arbitral tribunals. Many reasons have been advanced to explain this reluctance, but it would take me beyond the proper limits of this paper to attempt to examine them here: I will observe only that states remain stubbornly attached to what they see as their sovereignty, and consequently highly resistant to any third party "interference" with their exercise of it.

Looked at in a very broad perspective, the international community has at its disposal quite enough judicial processes for its dispute settlement purposes, and those processes work well enough to lead to satisfactory results. Far more than the establishment of new tribunals, or the elaboration of improved procedures for those that already exist, what is needed, if international judicial dispute settlement procedures are to be more effective in fulfilling their function of actually leading to the settlement of disputes, is a much greater willingness on the part of states to use the processes and procedures which are already available to them. Without that, the most perfect procedures for the functioning of international tribunals will not be of great assistance.

Let me leave those very general remarks there, with just the final observation that they provide a necessary background to any consideration of the ways in which international tribunals operate in fulfilling their function of settling such disputes as are referred to them.

II. Areas of Procedural Concern

Here we come up against the first problem which I noted at the outset — the lack of any across-the-board international judicial dispute settlement procedural system, and the need, consequently, to look at tribunals on an individual basis. For present purposes, I shall concentrate principally on the procedures of the ICJ. Even then, it will be possible to take only a quick look at a few of the more detailed procedural areas which seem to me to have some relevance to the effectiveness of international judicial tribunals. Some of these areas may be considered as "mainstream" topics, but others are often overlooked.

1. The Position of Counsel

Let me begin by giving some consideration to the relationship between international courts and counsel who appear before them. In preparing their cases before an international tribunal states are, of course, likely to seek the assistance of counsel — that is, speaking very generally, lawyers outside the government service who are qualified in their various states to advise on legal matters. And, of course, states may well, if the case requires it, consult others than lawyers — economists, geographers, environmental experts, and so on. But that stage of case preparation is not my present concern, which is rather with what happens at the later stage, when a case gets to court.

Article 42 of the Statute of the ICJ provides that the parties "shall be represented by agents", and "may have the assistance of counsel or advocates before the Court". Article 43 of the Statute provides that the procedure shall consist of a written and an oral part, and then provides (para. 5) that "The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates". Similar provisions apply for the International Tribunal for the Law of the Sea.[2]

Neither the Statute of the ICJ (nor its Rules), nor the Statute or Rules of the International Tribunal for the Law of the Sea (ITLOS), define what is meant by "counsel" or "advocate". In practice the ICJ at

[2] See Rules of the Tribunal, arts 44 para. 3, 53, 88 para. 1 (text published in: ITLOS (ed.), *Basic Texts*, 1998). While many of the Tribunal's procedural provisions are in substance similar to those which apply for the ICJ, their distribution between the Tribunal's Statute (in Annex VI to the Convention on the Law of the Sea 1982) and its Rules is different.

least takes a relaxed view of the matter: it does not, for example, insist that in order to be permitted to address the Court as counsel or advocate a person must have a right of audience before the courts of the state in which he or she is qualified. It does not even insist that the person addressing it be a lawyer at all. Leaving aside the rather special position of agents, the Court seems in effect to consider that if the state puts forward a person to address the Court, that person thereby is a "counsel or advocate", and will appear as such in the list of persons appearing before the Court.

Although this may seem a small point, it has implications which are worth exploring. For it reflects on the role which international judicial processes attribute to oral hearings. In the common law system, the oral nature of judicial proceedings is central to the way in which the system works. There is a belief that argument presented orally, and tested orally both by the other side and by the Court, and supported by evidence given and tested orally before the Court, is a sound — and some would say the best — way of determining the rights and wrongs of the dispute before the Court. But other legal systems, and particularly those based on the Code Napoléon, take a different view of the value of oral proceedings, preferring to see arguments and evidence put before the Court in writing. Between those two polar extremes, a whole range of approaches is to be found around the world. No one system's practices can be dominant where, as with the ICJ, the body as a whole must represent "the main forms of civilisation and ... the principal legal systems of the world.." (Article 9): a similar but not identical provision applies for the Tribunal for the Law of the Sea.[3]

International tribunals tend, at least in form, to embody a combination of the "oral" and "written" traditions. There are written pleadings, and when the written pleadings are closed, oral hearings then take place, with the oral presentation by the parties of their cases and with the possibility of evidence being heard orally (although written evidence is equally possible, and in practice more usual). Two important elements of the common law tradition are, however, conspicuous by their general absence at the international level, which therefore somewhat modifies the value of the oral phase of international litigation. One is the oral

[3] Annex VI to the Convention on the Law of the Sea 1982, article 2 para. 2, requiring that in the membership of the Tribunal "the representation of the principal legal systems of the world and equitable geographical distribution shall be assured".

questioning of counsel by the Court; the other is the shared professional legal backgrounds of judges and counsel.

The possibility of oral questioning of counsel by the Court <u>during the course of counsel's presentation of argument</u> is an essential element in ensuring that the Court fully follows counsel's argument as it develops, and can test it in discussion with counsel. Before international tribunals, however, this is scarcely practicable. When the tribunal consists of 15 members, as with the ICJ, or 21, as with ITLOS, such oral interruption of counsel's presentation of a state's case would be extremely disruptive. The practice is accordingly for any questions to be put to the parties at the end of some relevant stage in the proceedings before the Court, and for the parties to be given time in which to answer them, which they will usually do in writing.

But two other factors also come into play. One is that Judges are not well placed to ask questions of counsel unless they have fully and carefully studied the case papers in advance of the oral proceedings; and there are grounds for thinking that this may not always be the practice of all judges on international tribunals.

The other factor is that counsel are speaking for the state they are representing, and states are reluctant to allow counsel — who will often be nationals of some other country — full freedom to present their arguments in whatever way they might think best. The normal practice is for counsel's speeches to be carefully written out in advance, and checked and cleared as necessary, and then read out to the Court by counsel. Another consideration supporting this practice of counsel reading written speeches is the advisability of counsel letting interpreters have a copy of their texts, so as to ensure the best possible interpretations for the benefit of the other party and the members of the Court.

With such carefully prepared texts, the scope for interruption of counsel by judges is greatly reduced — particularly bearing in mind the time-lag in interpretation before some judges will have heard what counsel is saying. At the same time, the need for questions is somewhat reduced, since "oral" statements are quickly available in written form in counsel's own words. Indeed, it is not too fanciful to regard "oral" proceedings as in large part another two rounds of written pleadings, serving the purpose of giving an overall view of the case and sharpening the issues in dispute, presenting them with an emphasis which will be lacking in written pleadings. They are listened to, sometimes with interest, by members of the court, and when, for example, matters of geography are in issue their oral presentation and illustration by the use of maps can be of particular assistance to the court: but the predominant

impression is that the oral pleadings are carefully studied only in their written form, along with all the other written pleadings in the case.

Turning to the matter of the shared professional legal backgrounds of judges and counsel, it is clear that where judges and counsel share a common professional background, each knows what to expect of the other as regards behaviour in court and the presentation of the client's case. The proceedings in a domestic court take place against the background of a system of professional ethics which, typically, make it clear what a Court may expect of counsel, and what counsel may expect of the Court.

Inevitably, no one system of professional ethics underpins the behaviour of Court and counsel in proceedings before international tribunals: not only will the judges represent different legal traditions, but even counsel on the same team will often come from different legal professional backgrounds. Beyond basic assumptions of honesty and integrity, a Court can assume very little of counsel; beyond similar basic assumptions of impartiality and a desire to dispense justice, counsel can assume very little of the Court.

From personal experience I can offer a clear and very practical example. Many rules of international law are crystallised in the major quasi-legislative conventions based on the work of the ILC. Counsel wanted to invoke one of those rules in his state's written pleadings. He referred to Article x, which set out the rule. He quoted it in the pleading, setting out paras 1 and 2. And therefore, the pleading argued, this clearly showed such-and-such. Counsel's quotation of paras 1 and 2 was wholly accurate, and those paragraphs did indeed set out the rule. But he omitted the last words of para. 2, which qualified the rule by saying (in effect) that it applied "except as provided in the following paragraphs": there followed three further paragraphs setting out various exceptions, which were very relevant to the case in hand. To an English lawyer that kind of misleading, partial quotation is contrary to our code of professional conduct and to counsel's duty to the court. In international proceedings counsel will by no means take that view, and many governments would be horrified if they did. But that difference in attitude is not in itself the point, which is that the English court knows that it is counsel's duty to put everything relevant before the court, and counsel knows that the court knows the extent of counsel's duty: the court can rely on counsel assisting the court in that way. Moreover, an English court not only knows that it can rely on counsel behaving in certain ways, it also knows that barristers appearing before it are subject to a system of professional discipline should they fail to comply

with their professional code of conduct. The same is obviously not true of international tribunals, which cannot therefore rely on counsel in the same way.

What matters, for my immediate purposes, is not so much which way of behaving is right or wrong, but rather whether the way counsel presents his case fits in with the professional expectations and assumptions of the Court. If the Court assumes that counsel will make full disclosure of everything relevant, but counsel takes the view that all's fair in love and litigation — that "anything goes" so long as it advances his client's case — then the scope for confusion is immense and the interests of justice are damaged.

There is something missing in a judicial system, such as the international judicial system, which has no clear code of professional ethics to guide those who practise within it, and equally has no procedures by which to regulate the conduct of those who may transgress against that code. It would seem to be essential for both counsel and the Court to be playing by the same rules; and it is equally essential that counsel must, in presenting their client's case, be aware of their duties towards the Court as well as their duties to their client. What seems to be lacking in international judicial dispute settlement procedures is an adequate relationship between Court and counsel to complement that between counsel and client.

It may be thought that those who practise before international tribunals — who after all are people engaged by states to represent them — are unlikely to behave improperly. Apart from being a dangerous assumption to make, especially as the number of international tribunals increases steadily and with it the number of international practitioners, the issue is not simply one of misbehaviour: it is more about knowing what are the proper standards of conduct to be observed in international proceedings, so that the relationship between counsel and the Court — which is fundamental to the sound administration of justice — can be fostered. An "international Bar" exists only in the informal sense that there is a small group of international lawyers who appear frequently before international tribunals, but otherwise have no formal links between them. It is out of such shared professional experience that common standards can emerge, and the time may soon have arrived when some such development should be encouraged.

All of this puts the oral proceedings in cases before international tribunals in a very special light. They lack the full quality of oral proceedings known to some national legal systems, and in some respects have characteristics likening them to additional written pleadings. That

being so, it is perhaps understandable that – and here I return to the point at which I started – international tribunals do not take too strict a view as to who is entitled to present oral arguments before them. In many ways, it does not matter to the Court whether the person before it is a qualified barrister, or avocat, or Rechtsanwalt, or whatever. If the State party to the dispute before the Court has sufficient confidence in the person that it is willing to let him address the Court in the name of the state, why should the Court want more? Will not an academic professor of law with no professional qualification be just as acceptable an exponent of the state's views? – of course, "Yes": and many of those who practise most successfully and effectively before international tribunals fall precisely into that category.

Yet there is one particular circumstance in which it does become important to know whether or not someone is a counsel or advocate. If, in effect, anyone can be "counsel or advocate", even without legal qualifications or even legal training of any sort (and therefore, it may be noted, no familiarity with those legal professional rules of conduct which underpin the relationship between counsel and court), this opens up the possibility for a state to put forward as one of its counsel or advocates a person who is in reality an expert witness. One does not have to look far for an explanation of why a state might want to do this: an expert witness is, but an advocate is not, subject to cross-examination (but too much should not be made of this: effective cross-examination is a skill which many practitioners before international tribunals do not possess and which many international judges are ill-fitted by experience to evaluate).

The balance is not an easy one for states to make. By using an expert witness as if he were an advocate the state might gain from the absence of hostile cross-examination, but it loses something in the perceived independence attaching to an expert testifying as such: an advocate is clearly partisan, putting forward what are known to be not so much his personal views as simply the best arguments he can think of in support of his client's case, whereas an expert is known to be putting forward his own beliefs and opinions as to matters within his range of expertise, and is relying on his known authority in his own field.

In practice it is easy for a state to get its expert's opinion before the Court as if it were an advocate's presentation of its case. It is simply a question of drafting his speech in appropriate terms, so that he speaks not in personal terms but in the more indirect terms of an advocate presenting someone else's (i.e. the client's) argument. In putting his views in that way, the expert can still appear as an advocate, while his known

authority in his particular field will also be known to the Court and will inevitably colour the court's view of what he says.

While all this presents an intriguing tactical challenge for a state in deciding how best to make its case to the Court, from the point of view of international adjudicative procedures it is a matter for some criticism that it is possible for there to be such a blurring of the roles of advocate and expert. The possibility only arises, as I have said, because international tribunals do not apply any strict notion of what is meant by being a "counsel or advocate", and this is a matter which could perhaps be looked at more closely.

It has been looked at closely in an analogous context, where counsel appearing for a party overstepped the boundary between speaking as an advocate and speaking as someone with personal knowledge of the facts to which he was referring. This happened in the *Elettronica Sicula S.p.A Case* (the "ELSI" Case),[4] before a Chamber of the ICJ. That case concerned the way in which the Italian authorities had treated an American company, Raytheon; the United States brought proceedings against Italy. One of the persons who had advised Raytheon during its dispute with the Italian authorities, who was an Italian lawyer, was also a member of the United States team in the proceedings before the ICJ. He addressed the Court, but during his speech it became apparent that he was not just presenting legal argument on behalf of the United States but was referring to matters of fact within his knowledge as one of Raytheon's lawyers. Italy immediately protested that in respect of those matters counsel was not addressing the Court as counsel but as a witness of fact, and that as a witness of fact he should be subject to cross-examination. The President agreed; and counsel was duly subject to cross-examination on what he had said.

2. The Registry

Let me now turn to some very brief observations about registries of international tribunals. They are the unsung heroes of international litigation. In particular, their proper functioning is absolutely vital for the effectiveness of the international adjudicative process.

Yet they are faced with some serious problems in doing their work, and those problems, unless solved, have an inevitable consequential ef-

4 ICJ Reports 1989, 15 et seq., (19).

fect upon the effectiveness of the tribunals which they serve. And the problems can be summed up in one word – money.

Different tribunals, of course, have their different particular problems and are financed in different ways, but all share the same characteristic of being dependent upon some source of finance, and these days – and for the forseeable future – every institution is subject to very considerable financial restraints. Tribunals, as institutions, in effect consist of three elements – the judges, the registrar and his permanent staff, and the *ad hoc* staff recruited temporarily from time to time (e.g. the interpreters needed when oral hearings take place): this last category, of course, is part of the responsibilities of the registrar. When pressure is put on institutions to cut costs, that means that either the judges are put to the sword, or the registry is – and there are no prizes for guessing where the sword falls!

The impact is felt, of course, not just by the registry but by the tribunal itself. And it is felt right across the board. Take, for example, translation facilities – that is, not so much the (usually) simultaneous interpretation of oral proceedings, but rather the basic task of translating documents submitted to the tribunal. As a member of the ICJ has recently put it –

> "We have an insufficiency of translators. Because everything has to be in French and English, the Court's two working languages, everything will grind to a halt if the translation can't keep up."[5]

Again, take proposals for speeding up the Court's work by a greater use of chambers. It has been noted that if a major case is referred to a chamber, the rest of the judges are in effect left on the sidelines until the chamber's work is concluded. Perhaps, therefore, the judicial skills of the unused judges might be avoided if the 15 members of the court were to sit simultaneously as two or three 5-member chambers. As the same judge put it, sitting as a single 15-member court

> "is a bit of a luxury when the docket gets so heavy, but we could not meet in three chambers of five without more resources. Our registry can't deal with three fully fledged cases in their major phases simultaneously."[6]

There is no need to labour the point – which is, in short, that the international community gets the sort of international judicial dispute

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5 Judge Rosalyn Higgins, in an interview reported in: *Counsel*, London, February 2000.

6 Ibid.

settlement procedures it is willing to pay for. For the most part the remedy lies (again!) with states.

But there is one thing which tribunals might wish to consider. The emphasis which is now so strongly placed on financial matters has led in all fields to the emergence of financial management as a separate discipline. Courts are not just financial enterprises to be run on the basis of a profit and loss account, and a financial manager would not be the right person to run the judicial side of a court's work. But the financial management of courts as institutions is a significant factor in their overall effectiveness. There might accordingly be room for considering always having a fully qualified financial or business manager as part of the registrar's staff, who could free the registrar to concentrate more on the management of the judicial side of the court's work.

3. Judicial Delays

Justice delayed tends to be justice denied, and a tribunal before which justice is denied can by no means be regarded as "effective". The lack of registry resources is one constraint upon an international tribunal's ability to deal speedily with cases coming before it, and due account must be taken of that factor. But it is far from a complete explanation or justification for what are sometimes quite inordinate delays which occur between the initiation of proceedings and the final judgment in the case. The ICJ's current list of pending cases includes the *Qatar v. Bahrain* Case which began in 1991, and in which the Court is at present deliberating on its judgment, which may be delivered later this year or early next year; the *Lockerbie* Cases brought by Libya against the United Kingdom and the United States began in 1992, as did the *Oil Platforms* Case brought by Iran against the United States; the *Bosnia Genocide* Case began in 1993; and in *Cameroon v. Nigeria,* which began in 1994, the written pleadings will not be completed until next year, with oral hearings to follow when the Court's schedule allows, and only after that can one begin to consider the possible timing of the Court's judgment.

To an outside observer this looks terrible: "10 years!". And the conclusion looks inescapable: "What a dreadful Court!" But that conclusion would be wrong: the situation is considerably more complex.

Once more, it must be noted that much of the delay is attributable to the states concerned, and not to the Court at all. States are regularly

given nine months for their written pleadings, although often only six months for the second round: so on that basis, even with the most straightforward case some two and a half years is immediately accounted for. Often states seek extensions of time for their pleadings, which are usually granted. And often, of course, there are various intermediate stages which a case may go through, such as, the submission of Preliminary Objections or requests by third states to intervene, which can easily add another couple of years or more to the timetable.

One might ask whether the relatively long periods regularly granted to states for the preparation of their written pleadings could be shortened. There are two answers. One is "Yes": the other is "No". To take the affirmative answer first, there is undoubtedly a tendency – a perfectly natural tendency – for states to make the maximum use of whatever time they are given: give them nine months, and they will fill that nine months with work on their pleadings; but give them only six months, or even three months, and they will still manage to put in a pretty good pleading – perhaps not as full as it would be if they had had more time, but probably still more than adequate for the purpose in hand. States – and particularly their counsel – have become accustomed to quite long periods in which to prepare their written pleadings, and it may be a question of seeking to get them accustomed to a somewhat different, and tighter, régime.

But the "No" side of the balance is quite compelling. International cases – even those which are sometimes dismissed as being "small" – are for the states concerned matters of very considerable importance; some are indeed matters of war and peace. Many raise sensitive issues of state sovereignty, or are highly charged in terms of domestic politics, or have enormous economic consequences. No state will readily accept a procedure whereby it does not have the fullest opportunity to prepare and deploy its case before an international court. And in a world in which the submission of disputes to a court is generally a voluntary and optional matter for states, no international court will wish to impose upon a state a procedure depriving it of what it considers it needs in order fully to present its case.

Geography is another factor which plays a significant part in the time states need to prepare their pleadings. States often choose to use as counsel people from distant countries. Meetings – several meetings – between representatives of the state and its counsel are an inescapable part of the preparation of the state's case. But meetings with counsel, especially where, as is usual, there are several, are not always easy to arrange, and certainly not quickly – especially since it is either the team

of counsel which has to travel to the state which is their client, or the team of relevant officials from that state have to travel to some other place where it may be more convenient all round for the meeting to take place.

Serious problems affecting the timetable can also be caused by the needs for documents to be translated. This operates at three levels. At one level, it is essential for counsel to have access to all potentially relevant documents in order to decide how to deploy the state's case to best effect: and access means not just physical access, but also comprehension access — the documents must be accessible to counsel as readers. At a second level, all members of the state's team working on the case must have access to the pleadings — both those being prepared by their own side and those submitted by the other side. Usually such pleadings will be in English or French, and it cannot be assumed that all officials dealing with the case can work in those languages. At a third level, of course, the documents to be submitted to the Court — the pleadings and its annexes — have to be translated into a language which the Court will accept: often this means English or French, as with the ICJ and ITLOS. The time taken for all these translations naturally varies from case to case: in some cases, if for example both parties are anglophone, or both francophone, and all relevant documents are in those languages, there will be no problem. But in other cases the translation needs can be immense, and very time-consuming.

States do, it must be said, sometimes try to cut down on the time they take for their pleadings, especially where they submit a case to the Court by special agreement. But even then, events may get the better of them. Thus in the case concerning the islands of *Sipadan* and *Ligitan* between Indonesia and Malaysia, which is currently before the Court, their special agreement provided for quite tight timetables for the various rounds of written pleadings, but in the event extensions had to be sought, and were granted by the Court. This is even more likely to be the case when an agreement is concluded for the submission to arbitration of certain categories of future disputes: when the time comes to go to arbitration, the commendable wish of states when concluding their agreement to get future disputes settled expeditiously may prove wholly unrealistic once the nature and scale of a dispute becomes apparent — as happened, for example, in the *Heathrow Airport User Charges* arbitration[7] in implementation of the dispute settlement provi-

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[7] *ILR* 102 (1996), 216 et seq.

sions of the so-called "Bermuda II" air services agreement between the United Kingdom and the United States.

All that said, and while recognising that the scope for shortening the time taken by major international litigation may not be as great as might at first be thought, it is possible to do something to speed matters up. Indeed, something must be done about this, if the reputation of international judicial dispute settlement procedures is not to suffer. ITLOS has so far managed to avoid excessive delays, for which it is to be congratulated – although congratulations may need to be tempered by the observation that it has not yet experienced the kind of full-scale set-piece international litigation which has been the staple of the ICJ over the years.

How timetables are to be speeded up, however, is no easy question. No two cases are the same: what may be a reasonable time in the circumstances of one case may be quite unreasonable in the circumstances of another. This applies as much to practices followed by judicial tribunals themselves as to the preparation and presentation of cases by the parties. Three aspects of international judicial procedures do, nevertheless, seem to need urgent reconsideration. Given the time, I will just list them, without comment. They are, first, the apparently luxurious practice, in the ICJ at least, of generally dealing only with one case at a time (exceptions being made if urgent matters arise unexpectedly – a request for provisional measures, for example); second, there is the relative brevity of a "day's" sitting during oral hearings; and there are the practices associated with the preparation of judges' notes on a case, which may sometimes be quite voluminous – and thus time-consuming, both in their preparation and then their translation.

These are matters within the control of the tribunal in question, and something can clearly be done in those areas to improve matters. The ICJ has indeed recently been actively trying to move in this direction, and has done so with a measure of success which, while still quite limited, is nevertheless greatly to be welcomed. But it seems probable that a tightening up of the internal practices of international tribunals is a prerequisite for any steps they might wish to take to tighten up also on their control of states which litigate before them, for example by seeking to impose on states much shorter, and stricter, deadlines for the preparation and submission of their cases. That, however, touches what might be the heart of the problem, on which some brief remarks are called for.

III. Concluding Observations

Perhaps the most important aspect of international judicial dispute settlement procedures is that, traditionally, they have been voluntary. Even the so-called "compulsory" jurisdiction of the ICJ is nothing of the sort: the more correctly phrased language of "jurisdiction pursuant to declarations under the optional clause" makes the situation perfectly clear — jurisdiction is optional, and entirely voluntary. It is an unfortunate fact that the majority of states have not chosen to take that voluntary step. It is even more unfortunate that of the five permanent members of the United Nations Security Council, two (Russia[8] and China) have never accepted the "optional clause" of the Court's Statute, and while the other three have accepted it, only the United Kingdom still does so (although subject to a number of reservations), the other two (France and the United States) having withdrawn their declarations many years ago.

The creation of the Permanent Court of Arbitration a century ago, the establishment of the PCIJ in 1920, under the League of Nations, carrying the process another notable step forward, followed in 1945 by the establishment of its successor, the ICJ, marked great progress in making international judicial procedures an effective part of the international legal order. But they were characterised by one common feature: they were all voluntary. They were, in effect, "add-on" extras which states might — or might not — choose to adopt, rather like some technical refinement which you may be offered when buying a new car.

Courts which depend upon the voluntary submission of parties to their jurisdiction are not well placed to be "strong" courts. So long as the international judicial system is no more than an "add-on extra" for the international community, it will never be a really effective means for the settlement of international disputes: it will at best be an effective system within its limits, but those limits will continue to be quite considerable. The way forward needs to be by way of making international judicial procedures an integral and automatic part of the international system: it has to be a standard fitting, not an optional extra.

The best way to achieve this is probably by incorporating compulsory dispute settlement procedures in institutional structures which deal with non-judicial matters and in which states feel it essential to participate, in pursuit of their own national interests. A clear example is

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[8] Both as the USSR and (as now) the Russian Federation.

afforded by the European Communities. Most of the states eligible for membership consider it essential to join, for essentially economic and in some cases political reasons; but in joining, they submit themselves also to the European Court of Justice. They have no choice in the matter: the Court comes as part of the package. If the attraction of the package is sufficiently compelling, states will accept the judicial system within the overall institutional structure which they join, even though, if it were an "add-on extra", they might well prefer not to do so.

The European Communities may be thought a somewhat special case.[9] But the same phenomenon is to be found elsewhere. A good example is afforded by the dispute settlement system of the World Trade Organisation. Most states cannot afford to be left outside that trading system: but when they therefore join it, they have to accept also the dispute settlement system which goes with it, whether they like it or not.

Closer to home, of course, are the provisions of the 1982 Law of the Sea Convention. The generality of states want to become parties to the Convention, for reasons which have nothing to do with the settlement of disputes. But once they have joined, they become subject to the Convention's dispute settlement provisions, and while these are somewhat complex, they do involve, in the last resort, what may be regarded as a flexible system of compulsory jurisdiction.

Now all these examples still, in a formal and legal sense, incorporate dispute settlement provisions which are essentially voluntary. States are under no legal obligation to participate in the Law of the Sea Convention, or the World Trade Organisation, or the European Communities. They do so, and thereby willy-nilly submit themselves to dispute settlement procedures under those treaties, because they choose to do so: in the final analysis their submission is voluntary. The pressure to act in that voluntary way is extra-legal. It is essentially practical, political or economic (or all three): in short, it reflects the real world in which states exist, and is <u>for that reason</u> very strong.

All three examples involve institutional and legal structures being established *de novo*. While the pattern which they have adopted might conceivably be followed if some new world-wide international organisation were to be set up to replace the United Nations, the fact is that

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9 But other similar economic integration organisations, especially in the Americas, have equivalent structures.

that is unlikely in the foreseeable future. Where, then, does that leave the ICJ? Is it condemned to continue to be an "add-on extra"?

Perhaps; indeed, probably; but by no means necessarily. The evolution of the European Court of Human Rights is instructive. The Council of Europe was created by a statute signed in 1949. Its membership was open to European states which "accept the principles of the rule of law and of the enjoyment by all persons within [their] jurisdiction of human rights and fundamental freedoms". The following year, 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted, including the machinery of a quasi-judicial Commission, and a Court, to guarantee the rights and freedoms set out in the Convention. The formal, legal link between the 1950 Convention and membership of the Council of Europe was at first somewhat tenuous: but the political link was substantial, with the 1950 Convention being increasingly seen as the practical implementation of the general standard enshrined in the 1949 statute. It became so strong that nowadays a state wanting so join the Council of Europe must become a party also to the European Convention for the Protection of Human Rights and Fundamental Freedoms, along with its judicial structures in the human rights fields. Thus, in practice, the political will of European states evolved over time so as to ensure a wide degree of compulsory submission to judicial dispute settlement in the human rights field.

It may be fanciful to contemplate any parallel development of political will on the part of the membership of the United Nations, whereby a *sine qua non* for membership will become acceptance of the ICJ's jurisdiction — particularly when most of the permanent members of the Security Council set such a bad example themselves; and in any event, there are now only a few states still to become new members of the organisation. Yet some sort of parallel with the Council of Europe is there for those who might wish to use it. New members of the United Nations have to be peace-loving states which accept the obligations of the Charter.[10] What better way of showing a state's commitment to its obligation to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered than by accepting the Court's jurisdiction?

If such a development within the United Nations itself is unrealistic — as it probably is, at present — is it inconceivable, eventually, that forms of international assistance (such as perhaps, IMF support) be

10 Article 4 para. 1, read with Article 2 para. 3.

made conditional on a genuine and practical commitment to the United Nations' principal judicial organ – not just the somewhat formal commitment of being, compulsorily, a party to the Court's Statute? Before dismissing such thoughts out of hand, it should be recalled that much the same might have been said a quarter of a century ago about using such forms of persuasion to strengthen democratic government or to secure improvements in human rights or environmental practices: yet nowadays such aspects of international cooperation are commonplace.

The short point to be made is that any such developments in relation to international judicial procedures are essentially a matter of the international community wanting to demonstrate a real commitment to making international judicial dispute settlement procedures more effective. If they really want that result, there are ways and means by which they can achieve it. If they do not, and if international judicial settlement remains largely an "add-on extra" to the main structures of the international community, then those procedures will never, overall, be as effective as a community dedicated to the rule of law desires or deserves.