

Chapter Nine

THE ROLE OF THE INTERNATIONAL LAWYER IN INTERNATIONAL LITIGATION

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Introduction: The International Bar

In the small world of public international law we may at present speak of the “mafia” of the International Court of Justice. Although this is not very respectful, and certainly should not be taken as intending any criminal connotation, there is an element of truth in this expression. There is only a small number of persons who revolve around the World Court: in addition to the 15 Judges, the Registrar and his staff, there are only a few dozen persons - which, informally speaking, includes half a dozen or so “possible” *ad hoc* judges and the restricted group of Counsel who are familiar with the Court, and one or two law firms which have care of cases before the Court.

I have prepared some tentative and not particularly scientific statistics for the period of the last 12 years (1986-98). I have chosen this period not for any pseudo-scientific reason based on the fact that the Court delivered its celebrated judgment in the *Nicaragua* case in 1986, but for the more personal reason that this was the first case in which I was involved. Since then I have been involved in 14 more cases if one includes advisory opinions and ongoing cases, which certainly makes me a part of the “mafia”. The statistics show, on a purely empirical basis, the indisputable existence of an “invisible Bar” of the International Court of Justice. Between 1986 and the end of 1997:

- 20 cases have been decided by the Court, at least at one stage, whether on an application for provisional measures, or on preliminary objections to jurisdiction or on the merits of the case (here I do not include advisory opinions);
- excluding diplomats, experts - whatever their legal status - and members of advisory law firms, 54 counsel and advocates have pleaded;

- although this last number may seem rather high, it is misleading: of these 54 persons, 33 have pleaded in only one case and usually for their own national State, seven have pleaded twice, usually for the same client, which means that only 14 have pleaded three cases or more. I suggest that it is only these latter who deserve the dubious title of “mafiosi” of the World Court!

Among these members of what could be called more respectfully the “invisible Bar” in The Hague, seven have pleaded in three cases; two in six, and the five others respectively in eight, nine and 10 cases. Its existence is all the more interesting as the Rules of the Court do not include any rules concerning the conditions to act as Counsel before it, their recruitment or their deontology.

As has been explained by Keith Highet, who, too, is a member of the “invisible Bar”, this Bar is made up of:

“those international lawyers who have practised and continue to practise as oral advocates before the Court, who represent a variety of foreign States other than their own governments, who are well known to the Judges and the Registrar of the Court, who know how things work out in practice and who understand by experience the difficulties, pitfalls and tricks of the trade”.¹

This quasi-monopoly of a dozen persons is sometimes criticised - and I can understand that colleagues, who are excellent international lawyers but have never appeared before the Court, aspire to do so. Not only for financial reasons (and in this respect I wish to say once and for all that, certainly, we are correctly paid, but not more than that, and probably much less than commercial lawyers earn for sometimes much more basic cases), but also and first of all because of the legal, political, historical and intellectual interest of most of the cases introduced before the ICJ and the excitement of the job, an excitement which after years and a dozen or more cases, even the most *blasé* members of the “mafia” always feel. I can also understand that the Judges themselves might sometimes tire of us and would enjoy hearing new voices, seeing new faces, facing new styles while listening to usually very long and probably rather boring pleadings.

At the same time, I advocate some continuity, not for any “Malthusian” or monopolistic reasons, but as a result of my experience: acting as Counsel before

¹ Keith Highet, “A Personal Memoir of Eduardo Jimenez de Arechaga” 1994, ASIL Proceedings, p. 579.

the World Court is a profession. No doubt a very special profession that you can only learn "on-the-job" and one that is not regulated by any legal rules, but, nonetheless, a real and specific profession with its own usages and its own very particular proceedings. It is thus highly comforting and reassuring to work with colleagues who know the "rules of the game", the usual practice and even the layout of the Peace Palace in The Hague.

This being said the problem is one of balance: the "dream team" is probably one which mixes old *habitués* and newcomers, experienced Counsel who can avoid worrying slips and have solid know-how and other able international lawyers who can bring "new blood" and new ideas.

I shall now address the following questions:

- *first*, I will discuss the composition of the team, and what its profile and qualities should be, and also say a few words about the position of counsel as individuals, and how they are contacted and retained; and
- *secondly*, I shall envisage the team as a collegiality and try to explain how it works internally, and how the tasks are organised and shared during the various phases of the proceedings.

My purpose is not to make a theoretical study, but rather to show as concretely as possible how things work. I shall also limit myself to the work of Counsel before the Court I know best : the ICJ. Though I could have made some additional remarks relating to international administrative tribunals, I believe that the role of Counsel is too different to be considered simultaneously.

The Composition of the Team

As I have said, no legal rule governs the profession of Counsel before the ICJ: the only rules in the Statute or in the Rules bear on the immunities and on the role of Counsel during oral pleadings. Anyone can be appointed Counsel provided he or she is retained as such by a State Party. I say "he or she" but it has to be admitted that the "mafia" is rather masculine and that only a very few ladies have acted so far as counsel, Mme Bastid being the first in the *Barcelona Traction* case, I believe. I think this imbalance is a reflection of the world of international lawyers as it stands, and the question as to why it is a male-dominated world can be answered by reasons of a contextual nature which all of us know only too well.

It is worth noting that two nationalities are clearly prevalent, at least among the "inner circle": since of these 14 advocates, six are British and four are French, the other four being respectively an American, an Australian, a Belgian and an Uruguayan.

Another striking feature of the "World Court Bar" is that it is composed mainly, in fact almost exclusively, of university professors. Out of the 54 Counsel I have identified since 1986, 51 are professors, even though British Counsel are often both professors and barristers, usually QCs. Most of them belong to what has been described by Oscar Schachter as "the invisible college of international lawyers". Of course, if as a matter of fact this is so, it does not mean that it is a legal pre-condition, nor indeed a condition at all - although, as a Professor myself, I can of course see some merit in this unwritten practice.

In any case, even if this is an unwritten quasi-condition, it is not a complete explanation, as all professors do not belong to the core of the Bar of the World Court. Therefore two questions are often asked of Counsel before the ICJ, namely, how and why do you become Counsel? And how and why do you join the invisible Bar?

Here again there are no scientific answers. The answers are probably complex and uncertain: chance plays a role; as do circumstances, professional connections, reputation in the field of international law (which may explain why professors have gained their quasi-monopoly, since they alone have the time and the pleasure or "vocation" of writing books on international law). All these are likely to play a role in the decision of a State on the selection of Counsel. In this respect I can only relate certain incidents from my own experience.

My first case was *Nicaragua v. USA*.² The Nicaraguans went about their selection in a rather rational way. They visited both the legal adviser to the Foreign Office at that time, Mr Guillaume (now Judge Guillaume), and the Prime Minister's Office, and asked both to provide them with a list of possible names. I imagine it was thought that Mr Guillaume would nominate persons whose scientific or technical abilities he could warrant, while the Prime Minister's Office was likely to ensure that their nominees were not too conservative. I was quite young and Mr Guillaume told me that I was very low on his list (but I was included as he had retained my services some months earlier in an advisory case in the field of civil service law, which was an area in which I had specialised at that time). However mine happened to be the only name appearing on both lists - though I have always suspected that the main reason why Nicaragua chose me was that I was probably the least expensive person they could get! I was also fortunate that I did not meet opposition from the two senior Counsel already in the team.

At much the same time, I was retained by Burkina Faso³ in quite different circumstances, since I was recommended by a Judge of the Court and was also

² See [1984] ICJ Rep. 169-207, 391-637 and [1986] ICJ Rep. 13-546.

³ In relation to the *Frontier Dispute (Burkina Faso/Mali)*, in which judgment was given on 22 December 1986, see [1986] ICJ Rep. 553.

a close friend of a more senior professor, and a former French Minister, who was also instructed in this case. On a more recent occasion I joined a team in part on the recommendation of a friend and colleague, but the client told me that they had contacted me only after ascertaining that I had pleaded a great many times during the last ten years - and even quoted the statistics to me.

I imagine that the personal histories of colleagues is quite different, but at least these episodes show that the whole process is rather contingent. The same is certainly true in relation to the other question i.e. why do you become part of the "invisible Bar"? It is probably for a lot of imponderable reasons, *inter alia*, work capacity (for, to be honest, while being Counsel before the World Court is certainly exciting, it is also rather time-consuming and, sometimes, exhausting!), a good sense of the file, an ability to integrate within the team, and last, though perhaps not least, some knowledge of international law.

I firmly believe that a State Party to a dispute before the ICJ does not have an unlimited choice of Counsel. As regards the persons, there is certainly quite a wide choice, provided that as I have already said there is mix of the old *habitués* and newcomers. However there must exist a more global balance within the team.

First there must be correct balance in the specialisms, although this may not always be paramount. After all the Judges are themselves usually generalists in international law and I maintain that it is a bad judicial tactic to overburden them with technicalities, in relation both to legal and, even more, to extra-legal technicalities, which they may not understand, and certainly cannot evaluate. Moreover, it is very striking that the core group of Counsel before the Court is itself made up of "generalists" whom I consider as being nearly interchangeable.

More important is the geographical balance, or more seriously, the balance between the two official languages of the Court, and above all between the legal systems of the world. As is well-known Article 39 of the Statute provides that "[t]he official languages of the Court shall be French and English" and it is no secret that the Judges, and certainly the French-speaking Judges are very sensitive to hearing the language with which they are more familiar. However this is but one aspect of a more difficult and fundamental problem.

According to Article 9 of the Statute, the composition of the Court must realise "as a whole the representation of the main forms of civilisation and of the principal legal systems of the world" and, in fact, globally, it does. My classification can certainly be discussed in detail, but, as I see it today, eight Judges belong clearly to the civil law "legal tradition" and four or five are mainly influenced by the common law system, the others being more difficult to classify. In itself, this is rather satisfactory, as international law is an integral whole which mixes both of the main legal cultures, borrowing from each and, globally at least, integrating their concepts. However it makes life more

difficult for both the Judges and the Parties. For example, it may be a personal failing on my part, but I must confess that as a pure product of the "Latin" system of law, I have never understood the concept of "cause of action" in spite of having received lessons from the best professors including Sir Derek Bowett, Sir Arthur Watts and Professor Brownlie! This concept does not exist in civil law systems, nor do we have, for example, estoppel or conspiracy. On the other hand I am not sure that I have succeeded in convincing my friends and colleagues of the interest and usefulness of notions like the *pouvoir discrétionnaire* or the distinction between *moyens* and *conclusions*.

The same holds true for the Judges themselves. They are "situated lawyers" with a personal history and with a legal background. Here again I can offer an illustration. In the *Nauru*⁴ case I was acting for Australia and the written pleadings had been drafted in cooperation with Counsel, but by the Australians themselves. As will be recalled the case involved some very intricate questions of international responsibility. Sometime before the oral hearings I met one of the "civil law" Judges, who said to me "Well Alain, I have read all of this material, but to be honest, I am not sure I have understood all of the reasoning". I answered "Well Judge, I am not sure I have understood it myself". There was a pause before he asked "Who is going to plead that part at the hearings?" When I answered "I think I should do it", I had the feeling he was somewhat relieved. Then, after the oral hearings we met again and he told me "I think I have understood now". However he voted against Australia and I am not sure it would not have been better from our point of view if he had not understood that part of the argument.

Whatever one makes of this story, it does, I believe, illustrate an important point. The pleading team must address a Bench which has very diverse legal "sensitivities". They must arrive at a common solution and thus Counsel must use a "legal language" which may be understood by 15, or 16 or 17 Judges, as different as a British former Professor and QC, a member of the French *Conseil d'État*, a former Soviet Professor, a Chinese civil servant, a Brazilian Diplomat and so on. This legal "melting pot" can only be reached if the team is itself reasonably composed, by which I mean that it should be "legally diverse".

From this point of view, I feel that the former practice of the so-called "great powers" and in particular, the US, France and the UK has been less than satisfactory, in that they have only been represented before the Court by their own nationals, at least officially. In this respect I was very pleased when in the 1995 *Nuclear Tests* "non-case",⁵ France retained Sir Arthur Watts. With the

⁴ *Case concerning certain phosphate lands in Nauru - (Nauru v. Australia)*. The case was settled but not before the Court had rejected most of Australia's preliminary objections to jurisdiction - see [1992] ICJ Rep. 287.

⁵ See the Court's Order of 22 September 1995 in *New Zealand v. France* [1995] ICJ Rep. 287.

greatest of respect to him, I do not think that Sir Arthur came up with arguments which were very different from what we had planned to say (and had pleaded) but he presented them very eloquently, and, I am bound to say, differently, and I am convinced that this was of great help. Perhaps, and I would dare say probably, France would have won even without his very appreciable input, as we had a good case, but it was undoubtedly reassuring for us that he was part of the team and probably simplified the lives of judges trained in the common law system, like Judge Koroma and Judge Schwebel, considerably.

This being said, this necessary "forced coexistence" of the team of Counsel who belong to different legal cultures does not always simplify the lives of its members, since before speaking to the Court they must first speak to each other. This profession (and I insist that it is a profession rather than a hobby) of being Counsel before the ICJ is both a solitary job - one is left alone in front of one's computer for dozens or even hundreds of hours, sometimes cursing one's acceptance of the retainer - but also involves a good deal of team-work, and this from my point of view is one of the most exciting aspects of the job.

However it is not the only one, and I would say in passing that another aspect which I particularly enjoy - besides the intellectual excitement of fighting, which as a fighter myself, I relish - is the wide variety of interest and of new fields each case offers. I learned a lot in for example the *Burkina Faso/Mali*⁶ and *Libya/Chad*⁷ cases on the division of Africa between the colonial rulers and on the French colonial system; in *Nauru*⁸ and *Cameroon v. Nigeria*,⁹ on the Mandate and Trusteeship systems; in *Gabčíkovo*¹⁰ on dams and ecology (though I may have had to learn a little too much of these aspects of this case!); and on a sadder note in the *Genocide*¹¹ case on the history of the Balkans and the atrocities men inflict on one another, or, in *Nicaragua*,¹² on secret war and international life.

The work within the team

I have described until now the point of view of an individual member of the team. I wish to turn now to the work of the team itself and try to explain how it works. I should start with a *caveat*, just as it is difficult if not impossible to

6 See fn. 3, *supra*.

7 See [1994] ICJ Rep. 5.

8 See fn. 4, *supra*.

9 Case ongoing.

10 [1997] ICJ Rep. 7.

11 Case ongoing.

12 See fn. 2, *supra*.

speak of "the" point of view an individual counsel before the International Court, similarly it is indeed an oversimplification to describe the work of the team in the abstract: very quickly each team develops its own traditions, its peculiarities, its specific profile and its private jokes. Moreover, I guess that each of us sees it and "lives" it in his or her own way. Thus, just as for what I have said until now, what follows is something of a *compendium* of my experiences in the various teams in which I have been fortunate enough to work. I can say quite sincerely, that each team has been a wonderful experience. Of course some teams are more difficult than others, and I have had the odd disappointment with one or another colleague at certain times. However, truly, I cannot cite one team in which I have not been happy and from which I have not received a lot, nor can I name a single colleague with whom I would refuse to work in other cases.

It is important to bear in mind, even though it is self-evident for practitioners, that a team is not made up of Counsel alone. First there is the Agent who, alone, according to Article 42, paragraph 2, of the Statute, "represents" the State Party. In practice, his role can be very diverse depending upon his personality, his rank in his country,¹³ and his knowledge of international law. In my experience I would not say that this latter is an indispensable quality; the most important qualities for an Agent are that he should understand the problems, that he should listen and that he should be able to make decisions in the rather rare cases where a strategic decision needs to be taken and Counsel are unable to reach a consensus. He may be assisted, and is assisted in more and more cases, by a one or more co-Agents. Again it is not indispensable in all cases, but will become so when the Agent is a Minister or an over-busy Ambassador, because somebody must be the constant link between the "client" and the team and must be able to speak on a day-to-day basis in the name of the client and to take, sometimes swiftly, any necessary political decisions.

Now the role of the Agent (and/or the co-Agent(s)) also varies according to the State on the one hand and the composition of the team on the other. It is quite obvious that Australia, for example, or France will not expect the same things from Counsel (and the rest of the team) as for example would Chad. In the case of the former, all the material tasks will be performed by the Ministry in charge of the case, usually the Ministry of Foreign Affairs or the Attorney-General's Office. Moreover, the written pleadings - Memorials, Counter-Memorials, Reply and Rejoinder - will usually be prepared directly by the State, Counsel only participating in defining the legal strategy and reviewing drafts and suggesting improvements, deletions and additions.

¹³ He is not always a national of the State Party, though it is usual and, I feel, preferable that he should be so.

This, I have to say, is not always the most comfortable position for Counsel. First because they do not "implicate" themselves in the case as much as they do from the very beginning when they draft the written pleadings. Therefore important aspects may escape their attention and they can have unpleasant surprises when during the final phase they have sole responsibility for preparing the oral pleadings. In the same vein, it is indeed much better for Counsel to participate - or at least that some experienced Counsel participate - in the "pre-contentious phases", that is the drafting of the Special Agreement or of the Application.

The second disadvantage for Counsel when they do not draft the written pleadings themselves, is that they may find themselves in the awkward position of not being on the same "wavelength" as the client - my little misadventure in *Nauru* is an example of this. Indeed that incident was entirely my fault as I had not gone far enough in putting myself in the shoes of Australia. I hasten to add this was not out of laziness, but out of shyness and respect, as I had thought that since my "common law" colleagues and friends had been satisfied with the passage of the argument in question, I should just agree with them. However when I was preparing my oral pleadings I realised it would have been better to raise more questions, and maybe even objections, earlier. I must admit that after that I changed my approach in the *East Timor*¹⁴ case, in which, though it probably did not make the life of the Australian team any easier, I felt that I better deserved my fees by being more demanding. This is not because we lost in *Nauru* and won in *Timor*, but rather because I personally did a better job by being more "French" and Third World oriented, that is in "teasing" the client until we convinced each other.

I experienced the other extreme when working for Chad and Burkina Faso. There are simply no international lawyers in either country. This means that of course all the work had to be performed by Counsel. But I must say that in both cases, and one in particular, I was fortunate enough to have wonderful Agents, both of whom had confidence in Counsel, and, in one case at least, was extremely clever, careful and both flexible and firm. However, not only had Counsel to write everything, including the procedural documents and all the letters to the Registrar etc, but they had also to take care of the material preparation of the case, including collecting documents, going through the archives, photocopying, reproducing, assembling and submitting documentation to the Court.

This I must say can be rather depressing and rather harassing. It makes it almost indispensable to instruct a law firm (although this was not done in the

¹⁴ [1995] ICJ Rep. 89.

Burkina Faso case). I do not mean that using a law firm is only useful for very poor and developing countries, simply that in these cases it is difficult to do without it. This has the rather paradoxical effect of increasing the expense of the case, thus the poorest countries may be faced with the most expensive cases, and the very limited financial assistance which can be offered by the UN Secretary-General's Trust Fund, has little impact on this.

Here again, the role of the law firm can be diverse. At a minimum they will offer indispensable infrastructure and assume all the material tasks. I usually expect this from my own law firm when we handle a case and, as such, the law firm is not involved in defining the legal strategy, nor with the drafting. However some law firms are much more active and assume a general role of piloting the case. There is some merit in this but, to be quite frank, I believe it can lead to problems with Counsel, who may not always accept easily that such persons, who may not be specialist international lawyers (though there are exceptions to this), interfere too much. In any case the inclusion of a law firm, and certainly a law firm of this second type, modifies the general profile of the team, since the tri-partite relationship (between the client, the law firm and Counsel) takes the place of the usual bi-partite relationship. And, even though from the outside it might seem somewhat ridiculous, or childish, there is always a kind of competition for "leadership".

This is a non-legal, but quite interesting aspect. In every team, I have seen one Counsel emerging from the team and playing a "leading role". There is no first, second or third Counsel; but there is always one amongst them who is accepted as what we might call the "main Counsel". Why? Nobody knows. He will usually be an experienced Counsel, but he will not necessarily be the most senior one. More often than not he will be the first to have been contacted by the client, and this means that he will usually have some kind of privileged contact with the Agent or other State authorities. Only in rare cases is this made apparent, as was the case in *Chad* and the case in *Cameroon*, where I was appointed a "Deputy Agent", but only in order to concretise this role of "main Counsel", *vis-à-vis* the Court and to permit me to have direct contacts with the Registry for organisational problems (I would never use this position to contact the Court concerning policy problems). However such concretisation would never be necessary *vis-à-vis* other Counsel, because, among Counsel at least, this role never leads to major problems. I think all of us feel the need for somebody to take this responsibility, though here again I must make it clear that the role of *primus inter pares* varies greatly according to the case, the Agent, the personality of other Counsel and the presence of a law firm.

However in the majority of cases the main Counsel or "front rank man" assumes the following functions:

- he is the link between the Agent and the team - and this proves indispensable for very big teams, such as the one we have for Cameroon, for example, where when we all meet we are more than 35 in number;
- he will usually (but not always) accompany the Agent in meetings with the President of the Court and the other Party;
- he coordinates the work of the whole team; and
- he will usually prepare the first draft outline of the various pleadings.

This certainly does not mean that he alone is "the team" and I think that it is very important that he does not substitute for the Agent or neglect the views of his colleagues, and that he accepts that he has no power of decision on any problem. Moreover, this special, but non-official, position imposes on him a very heavy burden: he *must* be aware of absolutely every aspect of the case, since his coordinating role is not only, or even mainly, practical, but intellectual. This does not mean that other Counsel are supposed to ignore the aspects of the case they do not plead, but my considered view is that the main Counsel owes to his colleagues and to the client a real and in-depth knowledge of all of the case.¹⁵

While this is by and large how things are, there is in what I have just said an important part of reconstruction of the reality. In practice things are more contingent. What is important is the constant dialogue which exists inside a good team - and in this respect I must repeat that I have always (or nearly always) worked in good or excellent teams.

Proceedings before the Court

Now the case is before the Court. The first meeting of the team is decisive. It is the occasion to make acquaintances - not so much of other Counsel, usually we know one another and often are already good friends - but it is the first time that we meet the "local team" collectively, that is the people of the country which we serve. This is very important: each "side" "sizes up" the other. We try to appreciate the support we will receive, the confidence we will enjoy, the importance the client gives to the case. We explain how a case develops before the ICJ. They present the case as they see it and give the background and it is essential to listen carefully as first impressions are usually right.

The first meeting is also the occasion to try to evaluate the strengths and weaknesses of the case (which preferably, each Counsel will already have studied from the usually very rudimentary file he has obtained from the client).

¹⁵ For a similar point of view see D. Bowett "The Conduct of International Litigation" in Bowett and others *International Court of Justice: Process, Practice and Procedure*, (London, BIICL 1997) pp. 1-20, at p. 13.

From that the team will try to define the general strategy.¹⁶

The next stage is the preparation of the written documents. There is little original to say on the technicalities of this. However I would say that I do not favour the "simultaneous" proceedings contained in Article 46(2) of the Rules of Procedure for a case commenced by a Special Agreement which does not provide otherwise. I feel that it is very uncomfortable to draft written pleadings which do not answer each other but which first try to guess what the other side will say, then answer their previous pleading.

I turn now to the practical aspects of pleading. As I have already said, it can happen that Counsel are not in charge of drafting the written pleadings. However I will consider here only the situation where they do undertake the drafting. The first thing of course is to agree on an outline. This has to be carefully debated, though I must admit that this is not always so, and that even experienced Counsel sometimes have a troubling tendency to "expedite" this most important aspect without giving it sufficient attention.

The second phase is more exciting, as it consists of sharing the task of drafting between Counsel, deciding who will draft what parts, which obviously creates great excitement among our rank! For good or bad reasons, whilst it is important to have the right person drafting the right part, I have to admit that many of us try to escape the parts which are seen as dull and secondary, and vie for the most "rewarding" parts, which enable us to look learned before the Court! Of course, the Chapters are not signed, but usually each member will keep his or her part from beginning to end - although I must say that I have always disapproved of this, but my efforts to obtain some flexibility and readjustment of tasks has never (or perhaps rarely) met with any great enthusiasm or success among colleagues.

Then begins the solitary phase. Each member has his or her part which he or she must draft. This means a lot of research, a lot of requests for documents to the client or the law firm - and quite often unsuccessful requests - and a lot of drafting. Each of us has his or her own method. I tend to take a long time preparing, but usually draft quickly and without changing my first draft too much, whereas a very experienced Counsel, Prosper Weil, has told me he would never write less than ten drafts. I also have another particularity, in that I always work with an assistant since I feel it is fairer to the client, assistants being less expensive than professors. I feel it is useful for me in that it reduces my research time and allows me to try out ideas on him or her. Perhaps more importantly I think it is good for the assistant, since it is an opportunity to see

¹⁶ In this respect see Shaw "The International Court of Justice: A Practical Perspective" (1997) 46 ICLQ 831-865; see also Bowett *op. cit. supra*.

from the inside how things work - but this might be because, even when acting as Counsel I remain a professor, though I know colleagues who do not share my views on this point.

When drafts are ready, they are circulated among Counsel (and with the "local team") and "cross-read", by which I mean that each of us usually reads all the drafts of the other Counsel and exchange criticisms and suggestions during a meeting of the team, which usually carries out a line by line or at least page by page reading. This is not always pleasant when it is one's own turn, and some Counsel are very rigid and stick to their points. However I would say that these are exceptions and that usually the exercise is really enriching and helpful. Then one has to start again - that is one has to include all the agreed corrections and deletions and complete the draft in accordance with the decisions made in the team. Of course during the meeting important problems of principle might arise and lead to lengthy discussion. Here again the important thing is to bring it to an end. Fortunately, we usually reach a consensus, but when this is not possible the Agent has to decide (though in my experience this is rare). We might appear arrogant and tough, but perhaps we are less so underneath, or perhaps we all are, and none of us want to lose face - in any event, at the end of the day, we reach a compromise.

Sometimes there are several meetings of this type for each pleading and for the preparation of oral pleadings which, *mutatis mutandis* follows the same general scheme. From my own point of view, one such meeting is usually sufficient for each stage, provided Counsel, as they usually do, comply loyally with what has been decided. Two such meetings are a maximum and three always too many. Usually they take place at weekends, since these are often the only periods when we can all free ourselves, even though the non-Professors amongst us - like our families - tend not to favour Saturdays and Sundays for such meetings.

Of course other meetings are necessary to study the written pleadings of the other parties and prepare the outline of the Counter-Memorial, then of the Reply and of the Rejoinder. Except when provisional measures are requested, all this can usually be planned well in advance, since World Court cases take several years. I shall not dwell on this nice problem as it is dealt with in some detail in the British Institute's Report prepared by a number of the leading Counsel who are based in the UK.¹⁷ On this I would say in passing that I tend to agree partly with the usual view of the Judges that there is some exaggeration by the Parties in the length of the written proceedings and the importance of the annexes, and

¹⁷ See "The International Court of Justice: Efficiency of Procedures and Working Methods", in Bowett and others *The International Court of Justice: Process, Practice and Procedure*, (London, BIICL, 1997), pp. 27-84, esp. at pp. 34-51.

that in this respect Counsel must take their share of the responsibility. However on the other hand, I feel the Court is entirely or at least mainly responsible for the undue delay between the written phase and the oral hearings, and for those occasions on which there is an excessive length of time taken over the drafting of the Judgment, not to speak of some recent Advisory Opinions.

I also feel that the current practice of the Court concerning oral hearings is not satisfactory. There might have been some abuses in the past, but hearings have now been shortened excessively. The 14 half days in the *Gabčíkovo/Nagymaros* case were not enough (especially when compared with, for example, the 64 half days in the *Barcelona Traction (second phase)* Case).

Furthermore this hurried rhythm of the pleadings imposes undue pressures and constraints on Counsel without serving a useful purpose and with unfortunate results. I shall explain this by returning to my description of the work of Counsel. Once the written phase has been completed, the team of course begins to prepare the oral pleadings. Several points again tend to cause excitement. This time it is not so much the sharing of the task - as I have said, each Counsel will usually "keep" (and jealously keep!) his previous part or parts. However there are two other sources of excitement and sometimes tension:

- *first*, how long each of us will be allocated; given the scarcity of time currently allowed by the Court, this is not always very easy, the more so (and this is only human) as each Counsel tends sincerely to think that his part is the most decisive and that he therefore needs more time; and
- *secondly*, the problem of whether it is better to speak first or second.

This latter question, of course, does not arise when the case is commenced by Application, as the Applicant will go first and the Respondent second. However how should one choose in the case of a Special Agreement? I honestly think that the pros and cons neutralise each other, at least in principle: when you go first you orient the pleadings; when you go second you have the last word.

However the problem is that given the excessive speed of the oral procedure, in reality, at least during the first round of pleading, the Respondent does not really "respond": just like Counsel for the Applicant (or more generally, of the first Party to take the floor), Counsel for the Respondent will have prepared their pleadings well in advance. The result is that there are two parallel speeches which do not answer each other but which mainly sum up the written pleadings, or at best in conformity with the Rules,¹⁸ will stress the main points that "still divide the Parties" and make a few additional points.

Naturally Counsel for the second State will try to adjust their own pleadings

¹⁸ Article 60, paragraph 1.

during the opposite side's pleadings. However it is unrealistic to expect that in the short amount of time available they will build entirely new drafts. Take for example the Preliminary Objections phase in the *Cameroon v. Nigeria* case.¹⁹ Nigeria went first and had two days (that is five hours and 20 minutes for which they had had the previous 22 months to prepare, i.e. since Cameroon's filing of her Written Observations). Cameroon then had one day to prepare her answer and very naturally Counsel for Cameroon had to rely largely on "ready made" answers. Things were no better in the second round. Nigeria had two days (the weekend) to prepare their Reply; then Cameroon again had one day to prepare the rejoinder. Why such precipitation? Oral pleadings are exciting and enjoyable, but why make them so exhausting for Counsel? It makes no sense: as Sir Derek Bowett elegantly puts it, "harassed Counsel are rarely at their best."²⁰ Moreover after having let us wait for 22 months it would have been perfectly sensible to allow Cameroon one week to build a real answer; and then one week for Nigeria for her reply and another week for Cameroon for her Rejoinder. I do not suggest that the pleadings themselves should last that time, as that would have been too long for this case. However I maintain that the job could be done better and more professionally if the interval between each phase of the oral proceedings could have been longer - much longer. Neither would this make much difference to the overall picture: the case had been pending for over five years before the preliminary phase was completed.

Be that as it may, when the oral hearings commence, Counsel have no choice - they must plead. It is a very exciting and "full" moment since one has the feeling that one can still do something, and this aggravates the "fright" induced by the solemnity of the Great Hall of Justice and its decorum (although I have to say one does get used to that part of it). However this is not only an occasion on which one pleads oneself, the others also do so, and, whether one wants to or not, one has to listen. First because it is more polite to do so; and secondly, it might prove useful, especially if your team must answer (even though the Registry is very efficient in this respect and prepares verbatim records for the evening of the same day); and thirdly when you know the case, it is usually actually rather interesting, though I suspect for the audience it must be rather boring and the fact is that from the second day on, the oral hearings do not prove a great popular success.

The oral pleadings are the last act of a long play - and the most intense and the most tense. The crammed preparatory work reinforces solidarity between Counsel: I will have visited James Crawford when he awakes at 4 am which is

¹⁹ Oral hearings on Nigeria's preliminary objections to jurisdiction were heard between 2 March and 11 March 1998.

²⁰ *Op. cit. supra* fn. 14, at p.18.

when I go to bed (when we can sleep!); we will have had lunch and dinner every day together; we will have had meetings of the team (preferably short meetings) every day to comment on the pleadings of the other Party or review the drafts of the members of the team. This creates links - but just at this time we all have to quit - until the reading of the Judgment. This is the epilogue, the last occasion for the whole team to meet - a last lunch together, comments, regrets, congratulations. The curtain is down.

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