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The Anatomy of Courts and Tribunals

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The rather obscure title that the organisers of this fascinating meeting have given to this session offers one a certain amount of liberty in the manner in which to proceed, and I am more inclined to use this title than the summary of its supposed content figuring in the programme, which slightly troubles me. Such summary invites an examination of the "internal aspects" of the organisation of courts and tribunals, a subject that I am wholly unqualified to address since I am an "external observer" (and user).

Having thus done away with the subject matter of this session, as suggested to me when I was so kindly invited to participate in this conference, I propose precisely to provide the point of view of an observer and user on "the global efficiency of courts and tribunals." Cheating a little with that which was promised, I will concentrate on a subject that I know the least badly: The International Court of Justice (with nevertheless certain incursions into other jurisdictions when I feel capable of it).

Furthermore, as the subject remains, even when "re-interpreted" in this – very broad – way, if one wants to avoid being excessively superficial, it is best to pick and choose among the various issues that this topic raises. I propose to address the following points, albeit in a somewhat arbitrary manner, (in a presentation that is more in line with Anglo-Saxon empiricism than the French Cartesian plan: London oblige, and I find myself being influenced by my Anglo-Saxon friends and colleagues as a result of pleading with or against them...):

1. The formation of international courts and tribunals (I have indiscriminately included these under the term "courts"). Such courts confront very specific problems in terms of "efficiency." This will lead me to address questions related to the language of proceedings and the educational background of judges;

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2. Paradoxically new technologies can constitute a burdensome factor and can decrease the efficiency of international court proceedings;
3. This burden is without doubt aggravated by the way in which the courts function, even if this remark is more pertinent to the International Court of Justice than to its co-generics or successors; and
4. In any case, the global efficiency of courts and tribunals has less to do with internal factors than with the support (or lack thereof) of States.

I. The Formation of International Courts and Tribunals Makes Them Susceptible to Very Specific Problems in Terms of "Efficiency"

The three, five or 15 judges that constitute a national court are in the large majority of cases from the same mould. They have followed the same studies, they are imbued in the same judicial or jurisprudential tradition and in the large majority of cases they speak the same language. This is not the case when we pass to the international level, whether at the universal or regional level.

You will not be surprised that being a good Frenchman, I will immediately address language (even if I am less than others an advocate of French as an international language). Paradoxically, the problem of linguistics is more serious at the universal level than in regional frameworks, even if astute solutions often circumvent these problems.

Let us take the example of the European Court of Justice. Pursuant to Articles 29 et seq. of its Rules of Procedure, all official languages of the 27 Member States of the Community can be used as the language of the proceedings. There are 23 official languages, which allows in principle for 450 possible linguistic combinations. However, in practice this is less troubling than it appears. Except for joint cases, a single procedural language is used for each case and as the Court has the excellent practice of working in a single language, that being French, each file ultimately only exists (generally speaking of course, as there are often exceptions) in two languages: the language chosen by the applicant as the language of the proceedings (or that of the defendant Member State) and the language of Robert Schuman or Paul Reuter (and this language only in cases where the procedural language is French). Unless I am mistaken (but the President of this session

will correct me), the practice of the European Court of Human Rights is less "considerate" for both applicants and the French language. While claims can be introduced in the official language of any of the States party to the Rome Convention, once the request has been deemed admissible, a decision must be made for either English or French (and choice of the aforementioned is largely dominant, even if I believe French continues to "hold its own").

At the global level, the tradition that has been inherited from the Permanent Court of International Justice (the Hague Conventions of 1899 and 1907 leave open the question in regards to the Permanent Court of Arbitration) remains a bi-lingual French and English one, with the exception of criminal jurisdictions that allow the accused to express himself in his own language. As is well known, Article 39 of the Statute of the International Court of Justice, whilst not entirely precluding the use of a third language by the parties, holds that "the official languages of the Court are French [firstly, and in spite of alphabetical order] and English." This provision is of course explained by its historical context. The period from 1920 to 1945, which was crucial for the adoption of the Statute, marks the occasion in which English supplanted French as the international *lingua franca*. This provision has significant consequences, both practical as well as more fundamental.

At the practical level, the result is a very heavy workload for the Court Registry. As long as written procedure remained, with certain exceptions, within reasonable dimensions, the obligation to translate all procedural submissions into the other official language remained acceptable. This requirement became excessive with the increase (which I will come back to) of the length of submissions and above all their annexes. While I cannot be entirely sure – I am after all obviously an external observer – it appears to me that the Registry has wisely refused to translate the entirety of these annexes, which despite the opinions expressed by certain lawyers, the parties insist on accumulating. However, if this is the case, it is regrettable that the Judges are not required to understand, or at least have a passive understanding of the other official language. French is reputed to be a difficult language but it is a working language of the Court, and even French can be learned…

Given the subsequent burden of bi-lingualism for the International Court of Justice (as well as other universal courts) it must be asked – should

the policy of bilingualism be reviewed? Not being, as I have mentioned, an activist of the French language, I have often pondered about that myself. After all, the deliberations of the European Court of Justice are conducted exclusively in French and this has enormous advantages. Judges are able to exchange their ideas directly without having to communicate through an interpreter. Furthermore, this tradition has not been questioned despite the successive spread and multiplication of languages used in the Community. Why therefore do we not implement a single procedural language, to the benefit of the international language, which today is English?

The one reason which in my opinion detracts from the simplifying and practical appeal of such a solution is that bi-lingualism is not just a source of frustration and constraint, but also one of enrichment.

One should not cover up the fact that the disappearance of the French language would result little by little, perhaps slowly, but surely without doubt, in the increased rejection of counsel from Latin countries in favour of Anglo-Saxon counsel, which is already today largely predominant in the "invisible bar." Furthermore, this absence will, indirectly but surely, affect the jurisprudence of the International Court of Justice and thus the evolution of international law itself. Of course one can plead in English before a French, Madagascan or Moroccan Judge, but language is not in itself a neutral agent. I believe that the opportunity to address the International Court of Justice in both a language that constitutes a natural vehicle for common law and on the other hand one that is more linked to the particulars of Roman law is a source of complementary and mutual enrichment.

However, language is merely the tip of the iceberg. Beyond this is the legal approach to international relations; the very concept of international law is at stake. This results from the essential encounter of two legal traditions: Romano-German law, of Latin origin, which without doubt is practiced in the majority of the world's countries and whose influence was certainly predominant when the foundations of modern international law were suggested and thought of in the 17th and 18th centuries, and on the other hand, common law, with its very different methods of reasoning. Moreover, pursuant to Article 9 of the Statute of the International Court of Justice or Article 2 of the Statute of the International Law of the Sea Tribunal, the Judges of the Court or of the Tribunal are chosen in order to assure "in the body as a whole the representation of the main forms of

civilization and of the principal legal systems of the world." This diversity provides great richness even if the educational background of the Judges is in fact rather uniform. They have, in the majority of cases, been schooled in English or American Universities and, less commonly, in French ones – but indeed, whether we like it or not, the "principal legal systems" are in reality only two.

What is true for the International Court of Justice seems also true for other international courts that are so well represented in this room. I must say that, for the little that I know, I am not convinced that the equilibrium between French and English and furthermore between the Latin jurisprudential traditions and that of common law are as courageously maintained in other courts as they are at the International Court of Justice. While this appears to be the case for the European Court of Justice and, I think, for the European and Inter American Courts of Human Rights or the African Commission, I have to say that I have strong doubts on this point when it comes to international criminal jurisdictions in which I have the impression that the proclaimed bi-lingualism cannot hide a clear preference not only for English (the Rwanda Tribunal being an exception), which, as I have said, would be a minor evil, but also a pronounced singular preference for common law.

I must say that I was at the time shocked that the project for the statute of the Tribunal for the Former Yugoslavia was "corrected" by the Secretary General of the United Nations in a way that was exclusively "common law" focused (with above all a not-so-thinly veiled endorsement of the accusatory procedure to the detriment of the inquisitory procedure – which is as worthy a procedure) and furthermore by the adoption by the Tribunal itself in its rules of procedure and evidence which were a sort of "copy and paste" of American criminal procedure principles. Things have partly evolved since then. The Tribunal for the Former Yugoslavia itself seemed to realise that it was not an Anglo-Saxon jurisdiction and has (quite regularly) amended its rules, (which nevertheless remain very unbalanced) in a less "militant" way. Similarly, the Statute, together with the rules of the International Criminal Court have achieved a more acceptable blend between the two great jurisprudential criminal traditions – nevertheless with a leaning in my opinion distressingly towards the side of accusatory procedure.

II. New Technologies Can Pose a Burdensome Factor and Decrease the Efficiency of Procedures Before International Jurisdictions

Mr. President, new technologies represent the best and the worst of things. The best of things because they allow, for example, the simultaneous translation of oral pleadings. Oral proceedings are not the most thrilling of exercises for those that have to endure them, but I think with horror about the time not so long ago I believe, when the unlucky judges of the International Court of Justice had to endure two oral pleadings which, due to consecutive translations, were the only possibility. Technology represents the best of things also because the transcripts of pleadings are completed extremely quickly. At the International Court of Justice, we receive transcripts of the speeches two to three hours after having pled, and transcripts appear immediately, while the speaker is speaking, in the case of criminal courts. It represents the best of things as well because new technologies can result, or could result, in a non-negligible reduction in the cost of pleadings, whether they be written or oral.

I put this in the conditional tense because I have certain doubts on this point (which merits further study). The parties have a disturbing tendency to abuse modern technology or rather to misuse it.

There have been excesses in the past. The *South West Africa* and *Barcelona Traction* cases are without doubt two topical examples in which the procedures (both written and oral, it is true) gave rise to the publication of twelve and nine printed volumes, respectively, which only partially reproduced, or not at all in the case of *Barcelona Traction*, the parties' annexes to written pleadings. However, I believe that the excesses of the past do not excuse the present derivations which translate into an absurd increase in annexes (less so in written statements themselves, which I believe remain within acceptable limits), the number and length of which often seem unjustified. I will not give examples, as this would border on masochism: those which come to my mind are cases in which I was, or I am, counsel. However, I can guarantee that this accumulation of annexes which appears counter-productive is not my doing. It stems from progress in reproduction. It is so easy to photocopy a document, and then another. When in doubt, go ahead. What's the harm in adding an annex? What's the risk? Something very regrettable to tell the truth, that is, that judges get weary and they no longer read – they can no longer bear to read – the annexed documents.

This being the case, technology is an easy target. It responds to the demands of its users. Counsel and their "clients," State authorities, bear the real responsibility for these excesses. At the risk of sounding biased and making some more enemies, allow me to be more precise. Quite honestly, in my opinion, it is the large Anglo-Saxon law firms that bear principal responsibility for this state of things. Often in reading their "products," which are often very good, I cannot help but think that they "make paper" without this always being justified by the complexity of the case. I wholeheartedly disapprove of the arbitral practice which consists of producing in its entirety jurisprudence and doctrine that is cited. Judges and even arbitrators are supposed to understand the law and in any case they are capable of finding the cases, awards or articles that are cited. This indifference to deforestation seems to me to be unjustified, irresponsible and therefore culpable. Unfortunately, this frustrating habit has affected procedures not only before the International Court of Justice, but also, it is my impression, before European Community and human rights courts, not to mention international criminal procedures with their pack rat cumbersomeness, as seen from the outside it is true, seem equally oppressive. The practice of parties before the Appeals Chamber of the World Trade Organisation is apparently even worse in this respect, which confirms my conviction that American and British law firms are principally responsible for the state of things, as they hold the head of the field before these organs.

In a more anecdotal manner, though nevertheless significant, this derivation presently manifests itself during oral procedures through so-called "judges' folders." This refers to folders that parties have over the years become accustomed to hand over to members of the courts, in which figure in principle certain essential documents and illustrative outlines or summary tables of what has been said. While I think that this could be a positive innovation that facilitates judges' lives if limited to essential information, the actual procedures, which lead to a very excessive accumulation of documents seem to me highly questionable. In a recently pleaded case we even saw a party reproduce in the judges folders in question several pages of case law from the court itself. As known, such case law is available in the collections of decisions. The judges each have a copy in their offices and the internet site of the International Court of Justice is very easy to navigate. Too much! It is too much!

In the same vein, I am also critical of the "scientific hubris" of written or even oral pleadings before the International Court of Justice and the

Appeals Chamber of the WTO. I am not sure whether this is applicable to the European Court of Justice. When technical questions are discussed, in particular concerning cases related to environmental protection, it seems to me that the files constituted by the parties are abusively technical and abstruse – or in any case, incomprehensible for normally constituted jurists who have only limited training in chemistry, geology or hydrographics. Yet judges are lawyers, not chemists, geologists nor hydrographers, and I think that the parties would be well advised to limit production to information that is accessible to non-specialists and to simplify the lives of judges, that is, to source the information and not present it unless it is the most important and truly useful in reaching a final decision and in making a legal reading. In this respect, I always think with admiration of the pleading of Elihu Lauterpacht, (he was not yet Sir at the time) in the case – or, better, the non-case – regarding the request of New Zealand for an examination of the situation of the testing of nuclear arms. This brilliant pleading showed that one can "render understandable" legally and simplify complex scientific and technical information. This is surely more efficient than hundreds or thousands of pages of writing in scientific jargon that is totally inaccessible to non-specialists.

III. The Cumbersomeness – Partly Inevitable – of International Court Proceedings is Aggravated by the Way in Which Courts and Tribunals Function

The third sub-theme that I have thought of, itself, merits without doubt an entire discussion. But I will be brief because I understand that "procedural issues" will again be addressed by the following panel. Therefore, I will only make a few remarks in telegraphic style which I hope nevertheless will not pre-empt those that Lucius Caflisch has planned to say. As indicated, I will concentrate here principally on the International Court of Justice.

Firstly, the International Court of Justice certainly remains the respected mother of all international courts, but I do not think this is sufficient reason for the court to be immune to procedural innovation. Innovation contributes, without a doubt, to the increased efficiency of the majority of its counterparts, whether in relation to – at least in certain cases – the refusal to appoint a judge in charge of legal enquiry so as to replace the

collective editing committee, of which the president is in principle a member, despite he or she being overwhelmed by other tasks; the absence of qualified clerks; or even the length of decisions which I find to be more and more abusively encumbered by an overly detailed review of the parties' positions, whilst the response that is provided by the court is often characterised by excessive conciseness.

Last but not least, I am among those who strongly regret the Court's reticence to fully use its powers of instruction or investigation, which exist in theory by virtue of Articles 48 to 51 of the Statute and 61 and 62 of the Rules. Certainly, States are sovereign and they tend not to expect to be curbed by the excesses of their jurisprudential strategy; however, once they have accepted the jurisdiction of the Court, they are to be judged and must accept the Court's instructions. It appears to me that it would be in their best interests to know the points about which the judges wish to have more information or clarification, without taking into account the risks and perils related thereto. In any case, it seems certain to me that between the interventionism of the Luxembourg Court, for example, which would not be adapted to Hague-style litigation and the non-interventionism of the ICJ in procedure and the instruction of means of evidence, a reasonable middle-ground would be appropriate.

Secondly, despite the predominant feeling, I remain reserved in respect of the constitution of chambers within the ICJ so long as the parties remain in control of the decision to resort to the chambers or not and, to speak freely, so long as the cases do not impose the creation of several chambers working simultaneously. Now, despite what is often said, it is not correct to say that the World Court is crumbling under the weight of its docket. It is true that the Court was seized of four new cases in 2008 so far but no cases were submitted to the Court in 2007. The average remains reasonable. Despite my well-known critical spirit, I must nevertheless recognise that, in the last few years, the Court has caught up with the excessive delays that it allowed to accumulate in the treatment of cases. This constitutes a very good performance and demonstrates that it is possible that the delays that we found deplorable some time ago were not inevitable. Pray to God and to the judges that this satisfactory situation is not questioned in the years to come.

Thirdly, oral hearings are often the object of squabbling in discussions between judges and counsel. The first impute to the second a desire to

stretch the length of the hearings to the maximum. The second suspect the first of wanting to shorten the hearings below the reasonable minimum. I, for my part, have a rather nuanced opinion. I agree with the judges that hearings are often too long and lead to useless repetitions. I also know from experience, that, whether wrong or right, the States favour relatively long hearings. The judges are "obliged to hear," and, we hope, to listen, and their public opinion can constitute an acknowledgement that all possible arguments were raised. As I have often said, concern that high courts limit hearings to that which is reasonable is understandable, but on two conditions:

- the first is that of course everything is relative. In certain cases a few hours of hearings are sufficient. In others this would not allow that justice not only be done but furthermore seem to be done;
- the second would be that we renounce imposing on counsel the exhausting rhythm which is often imposed. Without increasing the number of hearings it is indispensable to carefully handle the different rounds of pleadings, the preparation phases which are often reduced to the most simple expression such that the term periods do not permit counsel the time to seriously study opposing arguments and obligates them to either dash through insufficiently reasoned responses or to read their pre-prepared texts before the hearing or pleadings to which they are supposed to respond. Here again however, I can note a certain improvement in recent years. I am now able to get some sleep in The Hague, (I mean to sleep in a bed not in a hearing room, even if sometimes I do succumb to a discreet somnolence which is not reserved only to certain judges), and this even when I am responding.

Fourthly, it should be said that these problems of delays are not specific to the ICJ. In a particularly well informed discussion at the conference in Lille of the French Society for International Law in 2002 – however the situation has not fundamentally improved since then – the current Registrar of the Court remarkably shed light on the problem of "the backlog of litigation cases" which was not limited only to the ICJ but which also existed in the Tribunal for the Former Yugoslavia, the European Court of Justice, the International Criminal Court, the European Court of Human

Rights and the World Trade Organisation. It is not useful to review all of these points, but I will make the following remarks:

- The reforms of European Courts introduced by Protocol n°11 concerning the European Court of Human Rights and the Nice Treaty regarding the European Court of Justice and the International Criminal Court have also proven to be completely insufficient; the failure to modify Protocol n°14 of the Lisbon Treaty risks worsening the situation;
- I will also note that the tendency to lengthen the time for treating cases by the Appeals Chamber of the World Trade Organisation remains a disturbing problem. The Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda will have a hard time "closing shop" satisfactorily in 2010. Furthermore, their procedures of 2001 have proven insufficient to bring to a close the very excessive amount of witness testimony;
- Very broadly speaking, I will say that seen from the outside, international criminal justice does not in itself have a very positive image. The proceedings are long, difficult to follow and certain decisions, which I will not enumerate, seem a little farcical. It concerns furthermore an extremely expensive form of justice, although I do not think that it would be good form to compare the cost of criminal justice to "civil justice" in which, *mutatis mutandis*, we can compare justice rendered by the ICJ or the dispute settlement body of the World Trade Organisation.

Under the guise of a conclusion, Mr President, it appears to me that:

IV. The Global Efficiency of Courts and Tribunals is Less Affected by Internal Factors Than by the Support or Lack Thereof by States

Contrary to national courts which benefit from "territoriality," from the privilege of force and the strong solidarities that characterise a state, international courts and tribunals are in a way "extra-territorial." Not only does their jurisdiction exceed by definition the borders of a single state, but also and above all international courts and tribunals are deprived of the means

and the ability to act in their own regard to attain their mission. Entirely dependent on the support that they receive from states, these states ultimately hold the key to their success or failure.

This indispensable support takes many forms. Firstly, it is necessary for the very existence of courts. International courts and tribunals are creations of States. States institute such courts and tribunals by treaties emanating from their will. It is on state territory that they must be established, even if The Hague tends to become a sort of world-wide court capital (my apologies to Hamburg, Geneva or Arusha). There does not exist an "international court district" that is extra-territorial. There are also the privileges and immunities that States grant to the court as well as to their auxiliaries of justice, who are counsel and lawyers, which allow them to function in relative independence. Of course, courts and tribunals are entirely dependant on states for their financing. And if one speaks of criminal courts, their efficiency depends entirely on state cooperation which in general is needed for locating necessary evidence to condemn or acquit the accused; only states have the necessary means to restrain or arrest an individual, or even to carry out the sentencing of those found guilty.

All of this is necessary, in fact indispensable, but there is nevertheless a more subtle form of state support which perhaps determines more profoundly the efficiency of international courts. This is the state of political spirit, an ideological stance which I confess to having much difficulty evaluating in the real world. Are states really attached to international courts, which are now numerous, and which they have created at both the universal and regional level, with general or specialised vocations, exclusively inter-state or mixed? In one word, yes; certainly within the context in which we are, that of the Council of Europe; abroad it is certainly less so, even if the geographical diversification of standing before the ICJ, the WTO or the International Tribunal for the Law of the Sea shows encouraging signs of a more universal conscientiousness of the usefulness of international jurisdictions.

However, in reality, I am doubtful. The extreme indifference with which the Fifth Committee of the General Assembly treated specific needs – budgetary and personal – of the International Court of Justice; the difficulties of executing certain decisions – more and more so I have the impression those of the European or Inter-American Courts of Human Rights; and the reluctance to accept the compulsory jurisdiction of the World Court or

the Tribunal for the Law of the Sea, are evidence of a certain defiance with respect to international courts and tribunals.

Nevertheless, there is one sign that is perhaps not misleading and which permits us to end on an optimistic note. It is that of multiplication or "proliferation;" there are perhaps too many of these courts. We have created numerous courts. When they exist, they multiply. Such was the case in the European Union, where after having separated the Court of First Instance from the European Court of Justice, a new Tribunal of the European public function was created and the institution of other courts or chambers is contemplated if need be. When the creation of an international court appears truly impossible, one creates mixed forms which are not any less of an indication of the internationalisation of justice.

We criticise international justice, criticise its slowness, are ironic about its clumsiness, complain about its costs, and with exceptions, whilst acknowledging that such criticisms are not applicable to all jurisdictions, many, it is true, are in part justified. It nevertheless remains that the global importance that states place on such courts and their insistence on creating new ones, despite the slowness, despite the costs, despite their cumbersomeness, are signs of the vitality of the international court phenomenon. Furthermore, without a doubt, to quote President Bedjaoui, they constitute "la bonne fortune du droit des gens".

(*Translation from the French*)