

The Importance of Pre-Trial Procedure in International Courts

Roger M. Johnson

Repository Citation

Roger M. Johnson, *The Importance of Pre-Trial Procedure in International Courts*, 3 Wm. & Mary L. Rev. 444 (1962), <https://scholarship.law.wm.edu/wmlr/vol3/iss2/13>

THE IMPORTANCE OF PRE-TRIAL PROCEDURE
IN INTERNATIONAL COURTS

ROGER M. JOHNSON

Once a decision has been made to bring a matter before the Permanent Court of International Justice, questions of procedure become especially important to the advocate in preparing his case. In matters of procedure, the Court has shown no inclination to guide advocates around the pitfalls¹ which could have a determinative effect on the results of a case. This is proved by the existence of the doctrine of *forum prorogatum*. In international law the establishment of jurisdiction by voluntary submission, without which the Court would be powerless, is termed *forum prorogatum*.²

Usually international tribunals are granted authority to determine their own rules of procedure. When, in 1922, the Permanent Court was given the task of establishing its rules, it was able to gain little assistance from the practice of the *ad hoc* arbitral tribunals which preceded it. Although there was considerable standardization among such bodies, the difference in the type of case with which the new Court was to deal made many of the rules of arbitral tribunals inapplicable.³ The Statute of the Court gave aid by enjoining the use of "the general principles of law recognized by civilized nations."⁴ Elsewhere the President of the Court is directed to "ascertain the views of the parties, with regard to questions of procedure," and again, "any agreement between the parties shall be taken into account."⁵ Where the consideration of a particular case

¹ Hambro, *The Reasons Behind the Decisions of the International Court of Justice*, 1 CURRENT LEGAL PROBLEMS 212 (1954).

² Waldock, *Forum Prorogatum*, 2 INT'L LAW Q. 377-391 (1948).

³ Hudson, *The 1931 Rules of the Permanent Court of International Justice*, 30 AM. J. INT'L LAW 463, 470 (1936).

⁴ SCHWARZENBERGER, MANUAL OF INTERNATIONAL LAW 243 (1960).

⁵ DICKINSON, CASES AND MATERIALS ON INT'L LAW 621 (1950); see also, Art. 37, RULES OF COURT, I.C.J.; see also, Hudson, *supra* note 3 at 466.

reveals gaps in the rules, the Court must be presumed to be authorized to devise appropriate regulations, taking into consideration the views of the parties.⁶ Surprisingly, it is rare that the tribunal specifically adopts municipal legal systems as a guide.⁷ This practice has made recourse to adjudication more attractive to sovereign litigants by allowing them an appropriate degree of control over procedure.⁸

Generally speaking, the procedure of the International Court follows closely the patterns established by the Permanent Court. At the same time a general evolution is discernible. No two cases ever present quite the same features, and (except for the general matters of principle mostly governed by the Statute and certain fundamental features necessary to maintain the essential framework of the judicial processes) it would be neither practical nor wise to attempt to regulate the procedure any more closely than is done at present.⁹

Proceedings may be instituted by two means, corresponding to the voluntary or contentious jurisdiction of the Court. There can be an agreement between the governments which may be filed by only one of the parties,¹⁰ or a proceeding can be instituted by unilateral application in those cases where the obligation to reply is established by a treaty,¹¹ or by the optional clause of Article 36 of the Statute.¹² Applicants need not be members of the United Nations or parties to the Statute. The Court has approved a statement accepting the jurisdiction of the Court and "all obligations of a Member of the United Nations under Article 94 of the Charter."¹³

⁶ SCHWARZENBERGER, *supra* note 4; see also, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, P.C.I.J., ser. D, No. 2 at p. 52 (1922).

⁷ HUDSON, INTERNATIONAL TRIBUNALS 86 (1944).

⁸ SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 30 (1939).

⁹ ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 415 (1956).

¹⁰ HUDSON, *supra* note 3 at 466.

¹¹ FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 108-109 (1932).

¹² Feller, *Conclusions of the Parties in the Procedure of the P.C.I.J.*, 25 AM.J. INT'L LAW 491 (1931).

¹³ [1953] I.C.J. Rep. 37.

At the time of application agents are designated by the parties to provide communication with the Court and to enter into negotiation concerning preliminary matters including modification of the rules of procedure.¹⁴ Although an application for interim protection may be entertained at any time,¹⁵ in practice such applications are made during the preliminary stage. The function of interim measures is to protect the right of either party.¹⁶ The Court may grant such measures *proprio motu*, but it must first consider any request for such measures made previously by the parties.¹⁷ In either case the essential condition is that the measure be necessary for the protection of the rights in dispute before the Court.

Under the 1926 rules the decision to provide such measures could be made by the President.¹⁸ He is now limited, however, to "such measures as may appear to him necessary in order to enable the Court to later give an effective decision."¹⁹ Before revoking or modifying interim measures of protection, the Court must provide an opportunity for the parties to make oral or written objections.²⁰

French and English are the official languages of the Court,²¹ and the parties are responsible for supplying all materials in one of these languages.²² This requirement applies to both written and oral proceedings.²³

After consideration of the application or special agreement and in consultation with the parties, the Court will impose time

¹⁴ *Ibid.*

¹⁵ Art. 61, RULES OF COURT, I.C.J.

¹⁶ Hudson, *Amended Rules of the P.C.I.J.*, 25 AM.J. INT'L LAW 427 (1931).
See also OPPENHEIM, INTERNATIONAL LAW 71.

¹⁷ Dumbauld, *Relief Pendente Lite in the P.C.I.J.*, 39 AM.J. INT'L LAW 393 (1945).

¹⁸ HUDSON, *supra* note 16 at 435.

¹⁹ Art. 61, RULES OF COURT, I.C.J.

²⁰ Dumbauld, *supra* note 17 at 405.

²¹ Art. 39, RULES OF COURT, I.C.J.

²² FACHIRI, *supra* note 11 at 108.

²³ HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 at 540.

limits for the submission of the pleadings. The Court is liberal in granting requests for extensions.²⁴ The Rules of Court emphasize that time limits must be mutually agreed upon.²⁵ This is an example of the fundamental doctrine of the equality of parties from which many features of the procedure are derived.²⁶

Where the nationality of a Judge of the Court is that of one of the parties, another party to the case may choose a Judge to sit with the Court during the proceedings.²⁷ He is usually referred to as a Judge *ad hoc*. The fear that political consideration would control such Judges²⁸ has not been justified by history. Inexperience of such Judges has not presented a problem, since the tendency of nations has been to reappoint the same individuals.²⁹ This provision for an *ad hoc* Judge has created no difficulties. Rather, it has provided opportunities to clarify details peculiar to the case of the appointing nation and, more importantly, it has increased confidence in the impartiality of the Court.³⁰

Preliminary objections, though often seemingly groundless, nevertheless serve to draw attention to the exclusively consensual basis of jurisdiction. In considering these objections the Court has refused to consider the merits of the case.³¹ The Court has emphasized that the rule requiring that local remedies be exhausted is meant to resolve conflicts of jurisdiction between international and municipal tribunals.³² Where the wrong is a breach of both local and international law, the rule, by merely suspending proceedings becomes in fact a procedural one.³³

²⁴ Minguieras and Ecrehos Case, [1953] I.C.J. Rep. 50.

²⁵ Art. 41, RULES OF COURT, I.C.J.

²⁶ Weinschel, *The Doctrine of the Equality of States and Its Recent Modifications*, 45 AM.J. INT'L LAW 441 (1951).

²⁷ Art. 31, RULES OF COURT, I.C.J.

²⁸ Hill, *National Judges in the Permanent Court of International Justice*, 25 AM.J. INT'L LAW 681 (1931).

²⁹ *Id.* at 683.

³⁰ *Ibid.*

³¹ Anglo-Iranian Oil Case, [1952] I.C.J. Rep. 111.

³² Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?* 31 BRIT. YB. INT'L L. 454 (1954).

³³ FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE 407 (1938).

A counterclaim, although not a preliminary objection, is usually raised at a preliminary stage of the proceedings. Although the rules from their inception have provided for counterclaims, the claims can only be granted where it is within the competence of the Court to grant them and they must satisfy the same strict requirements with respect to jurisdiction as the original application or special agreement.³⁴

The meticulous caution, amounting almost to skepticism, shown by the Court when investigating the basis of its jurisdiction is balanced by its tenacity in retaining jurisdiction once it has been established. A default of appearance, no matter how complete, cannot subsequently affect it.³⁵

Although the Court's jurisdiction must have been clearly established, an express acceptance is not necessary.³⁶ In cases instituted by a unilateral application, the acceptance of the Court's jurisdiction by the respondent may be implied through its actions. Nevertheless, "such an application may prove abortive, since it is not enough by itself to establish jurisdiction, but it is not irregular."³⁷

Where a dispute has come before the Court by special agreement, the pleadings will consist of a memorial, counterclaim and replies. When the institution of suit has been by unilateral application, the pleadings consist of a memorial from the applicant, a countermemorial from the respondent, a reply from the applicant and a rejoinder from the respondent. The memorial contains the facts, the law, and the submissions.³⁸ All pleadings, whether written or oral, should contain a submission revised to include the parties' latest theory of the case.³⁹ The importance of the submission justifies great care in their composition since their scope and nature become limitations on the

³⁴ PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, ser. D, No. 2 at 140.

³⁵ Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 29 BRIT. YB. INT'L L. 62 (1952).

³⁶ SCHWARZENBERGER, *supra* note 4 at 242.

³⁷ Waldock, *supra* note 2 at 318.

³⁸ Art. 41, RULES OF COURT, I.C.J.

³⁹ ROSENNE, *supra* note 9 at 410.

judgment which the Court is competent to pronounce. In one case the judgment failed to answer the very question which had brought the parties before the Court because the submission had been phrased in legal abstractions.⁴⁰

Pleadings, once submitted, can in principle be amended only with the consent of the other party. Since the statement of conclusion may require modification during oral argument it is not governed by this limitation. However, the Court may call upon the parties to present their final conclusions before the end of the hearing.⁴¹

In cases where the Court may have to interpret a multi-lateral treaty, third party signatories may make application to intervene under Article 62 of the Rules of Court. If the application is accepted, the intervening party is bound by the judgment. The application to intervene takes the form of a memorial and must be filed with the Registry before the commencement of the hearing.⁴² Although the judgments of the Court are binding only on the parties before the Court, third parties may be precluded from intervention if the question of interpretation on which intervention is based is *res adjudicata* as between the parties.⁴³

International Courts, with their often demonstrated willingness to fit procedure to the needs of justice,⁴⁴ are themselves the source of many modifications in practice, most of which have not resulted from changes in the rules but rather from the Court's own interpretations. As was stated in the judgment of June 7, 1932, by the Permanent Court, respecting late submissions by the French Government, "because the decision of an international dispute of the present order should not mainly depend on a point of procedure, the Court thinks it preferable not to entertain the plea of inadmissibility and to deal on their

⁴⁰ Van Essen, *The Procedure in the Asylum Case and the Hoya de la Torre Case*, 2 NETHERLANDS INT'L L. REV. 199 (1954).

⁴¹ FACHIRI, *supra* note 11 at 116.

⁴² HUDSON, *supra* note 23 at 543.

⁴³ Van Essen, *supra* note 40 at 201.

⁴⁴ U.S. Nationals in Morocco Case, [1952] I.C.J. Rep. 180.

merits with such of the new French arguments as may fall within its jurisdiction”⁴⁵

The problems of international procedure have been summarized as follows: “Rules must be adjusted to fit the problems and the difficulties peculiar to the particular arbitration. Differences in the legal systems of the parties must likewise be foreseen and guarded against.”⁴⁶ Although the proceedings of international tribunals often seem unnecessarily time-consuming, it is unlikely that any streamlining of the process of litigation is forthcoming.

⁴⁵ *Ibid.*

⁴⁶ CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 3.