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Questioning the Silence of the Bench: Reflections on Oral Proceedings at the International Court of Justice

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**QUESTIONING THE SILENCE OF THE BENCH:
REFLECTIONS ON ORAL PROCEEDINGS AT THE
INTERNATIONAL COURT OF JUSTICE**

CECILY ROSE*

The growth of the docket of the International Court of Justice over the last several decades has been both a sign of its success and a source of its troubles. Because the Court's continued attractiveness as a forum for dispute settlement depends not only on the quality of its judgments, but also on the efficiency of its procedures, the Court has responded by attempting to modernize its working methods. Literature concerning the weaknesses of the Court's procedures, however, has not focused on how oral proceedings suffer from an absence of direct exchanges between the judges and counsel. The judges' hesitancy to posit questions stems in part from a long-standing institutional concern about respecting the sovereign status of the parties which appear before it. This Article argues that the Court should shed its anxiety about questioning parties because doing so would not only pose little threat to State sovereignty, but would actually heighten the attractiveness of the Court as a forum for the adjudication of international disputes.

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INTRODUCTION

The growth of the docket of the International Court of Justice over the last several decades has been both a sign of its success and a source of its troubles. As more and more States have turned to the Court for the adjudication of their disputes, the Court's ability to conduct prompt proceedings has been strained. Because the Court's continued attractiveness as a forum for dispute settlement depends not only on the quality of its judgments, but also on the efficiency of its procedures, the Court has responded by attempting to modernize its working methods. The Court's current President, Rosalyn Higgins, has been a particularly prominent advocate of modifying the Court's procedures in order to better serve the Court's clientele.¹ This Article builds upon her call for the Court to exercise greater control over its own procedures, particularly oral proceedings.

The Court's oral proceedings are a critical weakness in its working methods because of their length and relative under-productivity. They suffer in particular from an absence of direct exchanges between the judges and counsel. Although oral proceedings often span days or weeks, the judges rarely question counsel. Their hesitancy to posit questions stems in part from a long standing institutional concern about respecting the sovereign status of the parties which appear before it. Even though a back and forth between the bench and the bar would be far more efficient and productive for the Court and its litigants, the Court has not yet gained control of oral proceedings in this manner. This Article argues that the Court should shed its anxiety about questioning the parties during oral proceedings because doing so would not only pose little threat to State sovereignty, but would actually heighten the attractiveness of the Court as a forum for the adjudication of international disputes.

This Article begins by describing oral proceedings at the ICJ (Part I) and the relevant rules of procedure and attempts at reform (Part II). Subsequent sections examine the potential utility of questioning parties during oral proceedings (Part III), as well as various defences and critiques of the status quo (Part IV). This Article concludes by comparing oral proceedings at the ICJ to oral

1. See *infra* Part IV.

arguments at the European Court of Justice and the Supreme Court of the United States (Part V).

I. A SKETCH OF ORAL PROCEEDINGS AT THE INTERNATIONAL COURT OF JUSTICE

Oral proceedings at the International Court of Justice take place sporadically throughout each year in the Great Hall of Justice of the Peace Palace in The Hague. The sheer grandeur of this Hall—complete with chandeliers, stained glass windows, and a large oil painting depicting peace and justice—instills the proceedings with a sense of import.² During the hearings, the Registrar and the fifteen judges of the ICJ, who are usually accompanied by two *ad hoc* judges, sit in almost total silence in black robes behind a long bench. From the center of the bench, the President of the Court opens the public sittings and gives the floor to one of the parties in typically no more than a few brief sentences.³ One or more representatives then proceed to address the bench virtually uninterrupted for several hours, usually by reading, verbatim, a prepared text distributed in advance to the judges.⁴ After each sitting, the Registry of the Court produces a *compte rendu* (transcript), which is typically over fifty pages long, and is followed by a translation of each day's proceedings into either French or English, the official languages of the Court. Usually oral proceedings on the merits altogether entail one or two three-hour sittings each day for two to six weeks, though in the *Genocide* case, the Court exceptionally heard nine weeks of oral arguments, often for six hours each day.⁵ In general, the proceedings consist of two rounds of oral arguments in which the parties have equal time to address the Court.⁶

During oral proceedings, questions from the bench are very much the exception rather than the rule. Judges wishing to pose

2. For information on the Great Hall of Justice, see Great Hall of Justice, http://www.vredespaleis.nl/showpage.asp?pag_id=475 (last visited Mar. 4, 2009).

3. For detailed accounts of all aspects of oral proceedings at the ICJ, see Stefan Talmon, *Article 43*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 977-1038 (Andreas Zimmermann et al. eds., 2006).

4. Representatives of the parties generally consist of agents, counsel, and advocates. See Rules of the International Court of Justice art. 61(2), 2007 I.C.J. Acts & Docs. 90, 129 [hereinafter ICJ Rules]. Behind the podium, the agents, counsel, and advocates of the Applicant and Respondent States sit at their respective tables, behind which there is seating for the press, the diplomatic corps, and the general public.

5. See Archive of Oral Proceedings Transcripts in *Genocide* Case, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=2> (last visited Mar. 4, 2009).

6. Talmon, *supra* note 3, at 1010.

questions may usually only do so at the end of a day's proceedings, after the President gives them the floor, and after the judges have discussed the proposed question amongst themselves. When the judges do pose questions, they almost never expect an immediate answer, but instead ask the parties either to prepare an oral answer for a future sitting, or to submit an answer in writing by a later date. By way of example, the bench posed a total of only three questions during the oral proceedings in the *Nicaragua-Honduras Maritime Delimitation* case which lasted for three weeks in March 2007.⁷ The first two questions went to the heart of the case but came only at the end of the second week of proceedings when the parties had already concluded the first round of oral arguments.⁸ Moreover, these oral questions nonetheless took a written form because the Court sent a written text of the questions to the parties, who could then opt to respond orally or in writing.⁹ A final follow-up question came only at the close of Nicaragua's second round of oral arguments, at which point the President had to invite Nicaragua to provide a written rather than oral response to the ques-

7. See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), at 7 (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf>.

8. See Transcript of Oral Argument, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), CR 2007/10, at 36-37 (Mar. 16, 2007), available at <http://www.icj-cij.org/docket/files/120/13749.pdf>. The *compte rendu* reads as follows:

The PRESIDENT: . . . I shall now give the floor to Judge Keith and Judge *ad hoc* Gaja, who each have questions for the Parties. Judge Keith.

Judge KEITH: Thank you, Madam President. My question is for Nicaragua. What consequences for the location of a single maritime boundary would Honduras draw were Honduras to have sovereignty over some or all of the islands and maritime features which are located north of parallel of latitude 15° N. Thank you, Madam President.

The PRESIDENT: Thank you, Judge Keith. Judge Gaja, you have the floor.

Judge GAJA: Thank you, Madam President. I would like to address the following question to both Parties. May Logwood Cay and Media Luna Cay be currently regarded as islands within the meaning of Article 121, paragraph 1, of the United Nations Convention on the Law of the Sea? Thank you.

Id.

9. See *id.* President Higgins further stated that "in this latter case, any comments that a Party may wish to make, in accordance with Article 72 of the Rules of Court, on the responses by the other Party must be submitted not later than Tuesday 10 April 2007." *Id.* at 37. Article 72 provides that

[a]ny written reply by a party to a question put under Article 61, or any evidence or explanation supplied by a party under Article 62 of these Rules, received by the Court after the closure of the oral proceedings, shall be communicated to the other party, which shall be given the opportunity of commenting upon it. If necessary the oral proceedings may be reopened for that purpose.

ICJ Rules, *supra* note 4, art. 72.

tion.¹⁰ Thus, even when the judges do ask questions, their procedures for doing so are slow, formal, and far from efficient.

II. THE RELEVANT RULES OF COURT AND THEIR HISTORY

According to the Rules of Court, proceedings on the merits at the ICJ consist of written and oral proceedings.¹¹ The often lengthy and elaborate written proceedings usually entail memorials, counter-memorials, replies, rejoinders and many volumes of supporting documents.¹² During the subsequent oral proceedings the Court may hear witnesses, experts, agents, counsel, and advocates.¹³ Although parties typically appear before the court for three to four weeks of oral proceedings, the Rules of Court specifically call for brevity. Each party's oral statements "shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing."¹⁴ In addition, oral statements shall "be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain."¹⁵ Furthermore, in a recent Practice Direction, the Court stressed that it requires the parties' "full compliance with these provisions and [their] observation of the requisite degree of brevity."¹⁶

The Rules also provide for guidance and questions from the bench during oral proceedings. Before or during hearings, the

10. See Transcript of Oral Argument, Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), CR 2007/12, at 53-54 (Mar. 20, 2007), available at <http://www.icj-cij.org/docket/files/120/13753.pdf>. The *compte rendu* reads as follows:

Judge SIMMA: . . . My question is directed at Nicaragua. In yesterday's hearings in the reply to the question posed by Judge Keith . . . Nicaragua presented a sketch-map which showed the cays claimed by Honduras lying to the south of the bisector line argued by Nicaragua as enclaves having 3-mile territorial seas . . . My question is: What are the reasons for the indication by Nicaragua of 3-mile territorial seas around these cays while both Parties to the present dispute in general claim 12-mile territorial seas? Thank you.

Id. at 54.

11. See ICJ Rules, *supra* note 4, arts. 44-72.

12. *Id.* arts. 49-50.

13. *Id.* arts. 61, 63.

14. *Id.* art. 60(1). Article 60(1) was Article 56 in the 1972 version of the Rules. See Rules of the International Court of Justice art. 56, 11 I.L.M. 899, 912.

15. ICJ Rules, *supra* note 4, art. 60(1).

16. Int'l Court of Justice, Practice Directions Practice Direction VI, <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (as amended on Dec. 6, 2003) (last visited Mar. 4, 2009); see also Press Release, Int'l Court of Justice, The International Court of Justice revises its working methods to expedite the examination of contentious cases, ICJ Press Release No. 1998/14 (Apr. 6, 1998).

Court may guide the parties by indicating “any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument.”¹⁷ During hearings the Court may “put questions to the agents, counsel and advocates, and may ask them for explanations.”¹⁸ Although “[e]ach judge has a similar right to put questions . . . before exercising it he should make his intention known to the President,” who is responsible for the control of hearings.¹⁹ In response to such questions, “agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President.”²⁰

These Rules are a product of the Court’s attempts to exercise greater control over oral proceedings.²¹ In the late 1960s, general dissatisfaction with the length and cost of written and oral proceedings before the Court led to the UN General Assembly’s call in 1970 for generally enhancing the effectiveness of the Court.²² Scholars had commonly observed that the Court’s procedures and work method had “become repetitive and excessively lengthy” and had “taken the form of an additional round of written pleadings, the main difference being that the parties attend to read their pleadings to the Court, instead of delivering them through their agents.”²³ In the 1970s the Court accordingly adopted a series of amendments to the Rules, which were intended to accelerate the proceedings and reduce costs for parties, partly by increasing the control of the Court or the President over written and oral proceedings.²⁴ These changes, however, had little effect. The Court’s procedures remained essentially the same as those which were developed by the Permanent Court of International Justice in the 1920s.²⁵

Consequently, the Court has made several subsequent attempts to reform its somewhat intractable procedures. Measures adopted by the Court in 2002 stressed that “the efficient functioning of justice” required parties to observe conscientiously the req-

17. ICJ Rules, *supra* note 4, art. 61(1). Article 61(1) was Article 57 in the 1972 version of the Rules. See Rules of the International Court of Justice art. 57, 11 I.L.M. 899, 912.

18. ICJ Rules, *supra* note 4, art. 61(2).

19. *Id.* art. 61(3).

20. *Id.* art. 61(4).

21. Talmon, *supra* note 3, at 982-83. Talmon writes that “[t]he Rules of Court have been the main vehicle used to bring about changes to the Court’s procedure within the broad framework set by Art. 43.” *Id.* at 982; see also Eduardo Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT’L L. 1 (1973).

22. See G.A. Res. 2723 (XXV), 1931 plen. mtg., U.N. Doc. A/RES/2723(XXV) (Dec. 15 1970).

23. Jiménez de Aréchaga, *supra* note 21, at 6.

24. Talmon, *supra* note 3, at 983.

25. *Id.*

uisite degree of brevity.²⁶ Because the length of oral arguments had frequently been longer than necessary, the Court decided that in the future the dates for oral arguments would be based on what the parties reasonably required in order to avoid unnecessarily protracted oral arguments.²⁷ Second rounds of oral arguments, if any, would be brief.²⁸ The Court further indicated that it intended to use the Rules “to give specific indications to the parties of areas of focus in the oral proceedings, and particularly in any second round of oral arguments.”²⁹

Given that oral proceedings continue to be quite protracted, the effect of these more recent attempts at reform appears to have been minimal. Amidst the numerous measures and practice directions issued by the Court, it has never emphasized, let alone taken up, its ability under the Rules to question representatives of parties. The following therefore examines the potential utility of such questioning as well as the Court's entrenched reluctance to engage the parties in this manner.

III. THE POTENTIAL UTILITY OF QUESTIONING PARTIES DURING ORAL PROCEEDINGS

Despite the considerable breadth of the written pleadings typically submitted by parties to the ICJ, oral proceedings may still hold some value as well as symbolic meaning. Amid volumes of written submissions, oral proceedings provide the parties with an opportunity to focus the attention of the judges in a memorable way on the core issues at stake in their dispute. Through oral arguments a party may provide the judges with a more concise, yet also more nuanced version of its case.³⁰ Given that years may elapse between written and oral submissions, these proceedings also allow the parties to update their factual and legal arguments if necessary.³¹ On a more symbolic level, the presentation of argu-

25. Press Release, Int'l Court of Justice, The International Court of Justice Decides to Take Measures for Improving its Working Methods and Accelerating its Procedure, ICJ Press Release No. 2002/12 (Apr. 4, 2002).

26. *Id.*

28. *Id.*

29. *Id.*

30. Malcom N. Shaw, *The International Court of Justice: A Practical Perspective*, 46 INT'L & COMP. L.Q. 831, 857 (1997).

31. For example, in *Armed Activities on the Territory of the Congo* (Congo v. Uganda), at 11, 14 (Dec. 19, 2005), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>, oral hearings on the merits took place in April 2005, more than two years after the last written submission in February 2003. Similarly, in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malays./Sing.), at 8-9 (May 23, 2008), available at <http://www.icj-cij.org/docket/files/130/14492.pdf>, oral hearings on the merits took place in November 2007, approximately two years after the last written submission in

ments before an audience and the press brings into the public light what would otherwise remain a relatively private and obscure administration of justice.³²

The sheer length and uninterrupted monotony of oral proceedings before the ICJ, however, significantly diminishes their potential value. On occasion, oral proceedings may consist of a "wholesale reiteration" of the arguments previously set forth in written pleadings, such that the hearings effectively become a fourth round of written submissions.³³ In addition, these hearings generate voluminous transcripts which literally function as another set of pleadings.³⁴ Also, the process of reading from prepared speeches which summarize arguments previously articulated in written pleadings hardly encourages the parties to engage with the arguments put forward by the opposing party.³⁵ The oral proceedings ultimately bear very close resemblance to scholarly lectures by professors before a silent audience.

A greater dialogue between the judges and the parties during oral arguments would significantly enhance the value of oral proceedings. Questions and follow-up questions on points of law and fact would provide an opportunity for the bench to test the strength of the parties' arguments. Questioning the parties would also allow the judges to exercise greater control over the courtroom by focusing the parties' arguments and preventing them from simply recounting large tangential tracts of their written pleadings.³⁶ By guiding the parties in this manner, the bench could both shorten and concentrate its oral proceedings, thereby greatly enhancing the value and efficiency of this procedure.

IV. DEFENCES AND CRITIQUES OF THE SILENCE OF THE BENCH

Both judges and practitioners have defended the silence of the bench at the International Court of Justice. They have argued that questioning counsel would be too informal, impracticable, unseemly, and, most importantly, too disrespectful of state sovereignty. None of these arguments, however, withstands close scrutiny.

November 2005.

32. See Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 498 (1995); Richard Plender, *Rules of Procedure in the International Court and the European Court*, 2 EUR. J. INT'L L. 1, 25 (1991).

33. See Shaw, *supra* note 30, at 857; see also Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 127-28 (2001).

34. See Talmon, *supra* note 3, at 1014.

35. *Id.*

36. See Plender, *supra* note 32, at 24-25.

In the view of Mohammed Bedjaoui, the President of the Court from 1994 to 1997, oral proceedings ought to be far more formal than when the judges listen and talk with each other.³⁷ While President Bedjaoui has acknowledged that judges may pose questions themselves or through the President, in his view those on the bench remain appropriately silent for the most part, "like a jury listening to arguments in order to weigh their merits."³⁸ These views, however, may not reflect the sentiments shared by those ICJ judges who are relatively new to the Court and who have shown a greater tendency to ask questions. Leaving aside some of the necessary formalities of oral proceedings, President Bedjaoui's remarks do not recognize that unlike the members of a jury, the President of the Court has an important role to play in conducting and controlling the proceedings, according to the Rules of Court.

Others have argued that the bench ought to maintain its silence because sustained, insistent questioning from the fifteen members of the bench would be excessive and unmanageable.³⁹ Incessant questioning by all of the judges, however, would be highly unlikely. Not all, or even most, of the judges would, in fact, pose questions on any given issue, especially because the practice of questioning counsel from the bench does not exist in many legal cultures, particularly in civil law jurisdictions.⁴⁰ Even in the United States, where such questioning does form part of the legal culture, not all of the justices of the Supreme Court consistently question counsel.

Some have also argued that it would be inappropriate for the judges to posit questions during oral proceedings because the parties would be able to discern the judges' opinions on given issues and the judges might appear to have prejudged the case.⁴¹ Here the underlying presumption is that probing questions would be likely to signal bias on the part of the judges. Indications that the judges are predisposed to rule one way or another, however, would primarily demonstrate their awareness of the critical issues in the cases before them and their interest in guiding the parties accordingly.

The most forceful arguments in defence of the status quo presume that questioning the counsels, advocates, and agents who appear before the bench would be inappropriate given their status

37. Mohammed Bedjaoui, *The "Manufacture" of Judgments at the International Court of Justice*, 3 PACE Y.B. INT'L L. 29, 42 (1991).

38. *Id.*

39. See Higgins, *supra* note 33, at 127-28.

40. *Cf. id.*

41. Bedjaoui, *supra* note 37, at 44.

as representatives of sovereign States. Some argue that sovereign States should not be denied the opportunity to present their arguments to the fullest extent.⁴² According to Professor Allain Pellet, who frequently appears before the bench:

[t]he judges must not forget that these are sovereign States that come before them, and one cannot treat sovereign States as being in the service of the Court. . . . I do not think you can threaten a sovereign State, saying that their case will not be heard to the end in the way it wishes.⁴³

While Pellet concedes that it would be advisable for the Court to indicate to the parties before oral proceedings which issues are of importance to the bench, he still defends the parties' prerogative to speak about whatever they see fit.⁴⁴ In other words, sovereign States should have the last word.⁴⁵

Another sovereignty-based objection to such questioning could be made by arguing that a representative of a State should not be required to provide immediate answers to questions put to them by judges without an opportunity to seek the approval of their foreign ministry. This line of reasoning suggests that, in a worst case scenario, a representative who answers questions without obtaining prior authorization could inadvertently commit his State to an authorized legal strategy or contribute to binding his State to an emerging customary international norm, even though the government he represents may actually object. Statements made by State representatives during oral proceedings could therefore have the unintended and potentially adverse effect of contributing to the formation of customary international law through state practice and *opinio juris*.

In contrast to Judge Bedjaoui and Professor Allain Pellet, other ICJ judges and practitioners have critiqued the Court's deeply engrained tendency to defer to State sovereignty at the expense of controlling its proceedings.⁴⁶ President Higgins argues that in its next wave of procedural reforms, the Court should move away from a culture of excessive "deference to the litigants by virtue of

42. Higgins, *supra* note 33, at 127-28.

43. *Modernizing the Conduct of the Court's Business*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE: PROCEEDINGS OF THE ICJ/UNCITAR COLLOQUIUM TO CELEBRATE THE 50TH ANNIVERSARY OF THE COURT 117-19 (Connie Peck & Roy S. Lee eds., 1997).

44. *Id.* at 119.

45. *Id.*

46. See, e.g., Higgins, *supra* note 33, at 124, 131-32.

their rank as sovereign States.”⁴⁷ Such deference is unwarranted given that States appearing before the ICJ have already consented to the jurisdiction of the Court.⁴⁸ Thereafter, the Court should be in control of its proceedings because the “privileged position [of the litigants before it] is sufficient by way of sovereignty-based deference.”⁴⁹

According to President Higgins, “[t]he Court will only have proper control over its own procedures if it changes the legal culture that underlies its dealings with its clients.”⁵⁰ Such change could be effected in part through the issuance of practice directions, which impose requirements rather than requests upon the parties.⁵¹ In support of this position, President Higgins notes that the parties in the *Legality of the Use of Nuclear Weapons* case and the *Kosovo* case accepted, without complaint, the Court’s imposition of time restrictions on oral proceedings.⁵² President Higgins points out that States have welcomed restraints on their ability to demand the fullest possible oral argument because these limitations not only help them closely focus their arguments, but also allow the Court to render its judgments within reasonable time frames.⁵³

Prominent international lawyers who have frequently appeared before the bench have similarly advocated greater control by the Court over its proceedings. In contrast to Professor Pellet, Professor Elihu Lauterpacht has argued that while due respect must be paid to the sovereignty of the litigants, once they have come to the ICJ, nothing should prevent the Court from telling them just how long they may plead orally, and just how long their-submissions may be.⁵⁴ Sir Franklin Berman and Sir Ian Sinclair have also emphasized that States appear before the Court in the capacity of litigant, and as such, they have specifically consented to the Court’s jurisdiction and submitted themselves to an ordered and disciplined procedure.⁵⁵

However much individual judges and practitioners may wish for a greater dialogue between the bench and the bar, a significant obstacle to change is the institution’s long-standing deference to State sovereignty. Yet such institutionalized deference is mis-

47. *Id.* at 124.

48. *Id.* at 131-32.

49. *Id.* at 132.

50. *Id.* at 124.

51. *Id.*

52. *Id.* at 128.

53. *Id.*

54. *Modernizing the Conduct of the Court’s Business*, *supra* note 43, at 120.

55. *Id.* at 121, 125.

placed and counterproductive. If nothing should prevent the Court from restricting the length of oral pleadings, then similarly, nothing should impede the Court's exercise of its ability under the Rules to question parties during oral proceedings. Given that States consent to appear before the Court as litigants in often large and complex disputes, it would be highly appropriate for the Court to ask questions which clarify legal and factual issues. Parties tend to speak at length during oral proceedings about somewhat tangential issues which have already been fully addressed in the written pleadings, but this is not an exercise of State sovereignty which should continue to go unfettered. Finally, because of the relatively well-defined legal parameters of the disputes which come before the ICJ, it would be very unusual for representatives of parties to face broad, unexpected questions, the answers to which might inadvertently bind States to emerging customary international norms. In this unlikely event, however, the practice of the Court would certainly permit representatives to consult with their foreign ministries before providing the Court with an answer.

V. ORAL ARGUMENTS AT OTHER INTERNATIONAL AND DOMESTIC COURTS

Questioning during oral proceedings is hardly unprecedented, as dialogues between judges and counsel play significant and useful roles at other international courts, as well as in domestic common law courts. The following therefore examines the similarly limited questioning which takes place at the European Court of Justice, as well as the degree to which the United States Supreme Court demonstrates the potential utility of a dialogue between the bench and the bar.

A. *Oral Arguments at the European Court of Justice*

Because sovereign States also litigate before the European Court of Justice (ECJ) in Luxembourg, the ECJ's experience with oral proceedings forms a useful basis for comparison with the ICJ. In some respects, oral proceedings at the European Court differ significantly in practice from proceedings at the International Court, even though the ECJ's Statute and Rules are based on those of the ICJ.⁵⁶ Unlike the ICJ, the European Court of Justice presides over much shorter, hour-long oral proceedings in which the differences between the parties have been substantially nar-

56. See Plender, *supra* note 32, at 1.

rowed.⁵⁷ In addition, questions during oral hearings have assumed an increased importance in recent years due to the influence of common law members of the Court.⁵⁸

However, oral hearings at the European Court of Justice still suffer in general from a lack of interaction between counsel and the bench.⁵⁹ By contrast to oral hearings at the Court of First Instance, where the judges' concerns emerge through debate between the bench and counsel, the judges of the ECJ tend to sit in silence, posing no questions during oral arguments.⁶⁰ This reticence may partly reflect the practical constraints on proceedings before the ECJ. The Court's heavy case load requires judicial business to proceed efficiently and without prolonged questioning, during which time interpreters may struggle to keep up with unexpected interruptions.⁶¹

From the advocate's perspective, however, the bench's silence is regrettable and may suggest that the judges are unengaged and lacking familiarity with the cases before them.⁶² In the absence of any guidance from the bench, counsel may inadvertently miss an opportunity to clarify issues of importance to the judges while instead investing time in discussing uncontroversial points.⁶³ From the judges' vantage point, oral arguments are unproductive and time-wasting when counsel merely reads from a prepared script which bears close resemblance to the party's written submissions, but has little relevance to the issues of importance to the judges.⁶⁴ Meanwhile, time constraints and

57. Article 56(1) of the Rules of Procedure of the European Court of Justice provide that: "The proceedings shall be opened and directed by the President, who shall be responsible for the proper conduct of the hearing." Rules of Procedure of the Court of Justice of the European Communities art. 56(1), 1991 O.J. (L. 176) 19. In addition, Article 57 of the Rules of Procedure of the Court of Justice and Article 58 of the Rules of Procedure of the Court of First Instance provide that: "The President may in the course of the hearing put questions to the agents, advisers or lawyers of the parties." *Id.* art. 57; Rules of Procedure of the Court of First Instance of the European Communities art. 58, 1991 O.J. (L. 136) 11.

58. BUTTERWORTH'S EUROPEAN COURT PRACTICE 108 (K.P.E. Lasok & David Vaughan eds., 1993).

59. During oral hearings at the Court of First Instance and the European Court of Justice, each party has 15 minutes for their main speech in a three-judge case, and 30 minutes in a five-judge case. JANET DINE, SIONAIDH DOUGLAS-SCOTT, & INGRID PERSAUD, PROCEDURE AND THE EUROPEAN COURT 68 (1991). Questions and answers and replies to the other party are on top of this basic allowance. *Id.* The CFI has been substantially more generous than the ECJ in granting extensions to the parties of the time allowed for oral hearings. *Id.*

60. Ian S. Forrester, *The Judicial Function in European Law and Pleading in the European Courts*, 81 TUL. L. REV. 647, 714 (2007).

61. *Id.*

62. *Id.* at 715.

63. *Id.*

64. *Id.*

considerations of courtesy may dissuade the judges from interrupting counsel or posing questions after arguments have been presented.⁶⁵

Ian Forrester, a practitioner who has appeared before the European Court, has proposed that the judges abandon their tradition of silently listening to the parties during oral arguments. Instead, they should put questions directly to counsel, as do the Justices of the United States Supreme Court.⁶⁶ Forrester argues that:

questions and interruptions, far from being a discourtesy, are a welcome means of assisting counsel to do the job of being an advocate. There is no discourtesy in voicing a doubt to, or seeking a clarification from, someone who is paid to remedy doubts and dispel uncertainties . . . the judge is helping counsel to do a better job by asking that the relevant points be addressed and in a manner that is technically compatible with the ECJ's constraints of language and time.⁶⁷

In comparison to practitioners before the ICJ, Forrester has thereby taken his call for reform one step further by pointing to how debate between the bench and the bar would significantly enhance the quality of oral hearings at the ECJ.

Although the judges of the ICJ and the ECJ similarly refrain from questioning counsel during oral proceedings, their shared silence stems from markedly different institutional concerns. While the ICJ's stance towards national sovereignty poses a barrier to questioning during oral arguments, practical considerations appear to preclude this practice at the ECJ.

The ICJ's deferential attitude towards State sovereignty reflects its status as the principal judicial organ of the United Nations, an institution based on the principle of the sovereign equality of all of its members and the protection of their territorial integrity and political independence.⁶⁸ In keeping with an institution whose Charter precludes it from authorizing interventions in matters which are essentially within a State's domestic jurisdiction, the ICJ refrains, generally speaking, from adopting proce-

65. *Id.*

66. *Id.* at 716.

67. *Id.*

68. U.N. Charter art. 2, para. 1; Plender, *supra* note 32, at 3. See generally U.N. Charter ch. 1 (concerning the purposes and principles of the United Nations).

dures which would in any way restrict the exercise of State sovereignty.⁶⁹

By contrast, the European Court of Justice reflects the European Union's overall emphasis on eliminating rather than protecting the barriers separating the sovereign States of Europe. The Single European Act of 1986 provides that Europe may make its own contribution to the preservation of international peace and security in accordance with the United Nations Charter by "speaking ever increasingly with one voice and . . . act[ing] with consistency and solidarity in order more effectively to protect its common interests and independence."⁷⁰ In 1964 the European Court of Justice starkly portrayed the implications of such unity:

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation in the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.⁷¹

Thus, the Court held that a State's transfer of powers from its domestic legal system to the community legal system results in a permanent limitation of its sovereign rights.⁷² By comparison, the States appearing before the ICJ have transferred a relatively minute degree of sovereignty to the Court.

Ultimately, a more formidable institutional barrier stands in the way of reform at the ICJ as opposed to the ECJ. While judges and practitioners at both Courts advocate reforming oral proceedings, the ECJ's practical concerns about efficiency may be more surmountable than the ICJ's institutionalized tendency to defer to the sovereign status of its litigants.

B. Oral Arguments at the Supreme Court of the United States

Oral arguments at the Supreme Court of the United States are of somewhat lesser relevance to oral proceedings at the ICJ because of the Supreme Court's role as a domestic rather than inter-

69. U.N. Charter art. 2, para. 7.

70. Single European Act pmbl., Feb. 17-28, 1986, 1986 O.J. (L. 169) 1, 2.

71. Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585 (1964).

72. *Id.*

national court. For our purposes, however, oral arguments at the Supreme Court are significant because they amply demonstrate the utility of questioning counsel during oral arguments. Despite the relative brevity of the hour-long oral arguments at the Supreme Court, the Justices regularly pepper counsel with a range of questions which probe the legal and policy implications of the cases before them.

According to conventional wisdom, oral arguments at the Supreme Court have little if any impact on how the nine justices decide whether to affirm or reverse lower court decisions.⁷³ In a recent book on oral arguments and decision making at the Supreme Court, however, Timothy Johnson counters this assumption with empirical data showing that the Supreme Court justices use oral arguments as an information gathering tool to help them make legal and policy decisions.⁷⁴ While the justices already receive an abundance of information through lower court decisions, briefs on *certiorari*, and briefs on the merits (including *amicus curiae* briefs), oral arguments present the sole opportunity for the justices to exercise control over the information which it obtains.⁷⁵ The data gathered by Johnson shows that the justices use oral arguments to obtain information beyond that which the parties have provided.⁷⁶ In fact, the justices raise a strikingly large number of new issues during oral arguments pertaining to the extent of their policy decisions, the preferences of external actors such as Congress, and how external actors might react to their decisions.⁷⁷ Therefore, although oral arguments may not affect the dispositive outcomes of cases before the Supreme Court, they do have a significant impact on how the justices reach their substantive decisions.⁷⁸

Finally, John Harlan, a former Justice of the United States Supreme Court offers anecdotal evidence of the significance of questioning during oral arguments.⁷⁹ While acknowledging that some judges may harmfully interrupt counsel by asking too many questions,⁸⁰ Justice Harlan stresses the important role that oral arguments play in “the hard business of decision.”⁸¹ Justice Harlan writes that

73. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 122 (2004).

74. *Id.* at 122-23.

75. *See id.* at 55-56.

76. *Id.*

77. *Id.* at 54.

78. *Id.* at 3.

79. *See* John M. Harlan II, *The Role of Oral Argument*, in JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O'Brien ed., 2003).

80. *See id.* at 106-07.

81. *Id.* at 104.

the job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.⁸²

While the judges of the ICJ will most likely never engage with counsel to the same extent as do Supreme Court justices, oral arguments at the Supreme Court still stand as an important example of what exchanges between the bench and counsel may achieve.

CONCLUSION

Institutional inertia may currently pose the largest obstacle to the reform of oral proceedings at the International Court of Justice. Reform at the Court has historically been stymied in large part by its anxieties about placing procedural requirements upon sovereign states. Now, however, both ICJ judges and practitioners support questioning during oral proceedings, or, at the very least, shorter and more efficient hearings. Perhaps the Court's longstanding deference to the sovereign status of its litigants has now morphed into a general institutional reluctance to alter its proceedings in any really significant manner. Unsurprisingly, change comes slowly to this relatively old and conservative institution. While many of the judges of the International Court of Justice may wish to see the bench actively question counsel during oral proceedings, a consensus on this point may not come easily to a bench composed of 15 judges from very different legal backgrounds. Moreover, the Court's Rules do not necessarily lend themselves to this kind of change. Because the Rules require the judges to make their intention to ask questions known to the President, questioning counsel during oral proceedings may never be rapid and spontaneous. Nonetheless, a greater dialogue between the bench and the bar could still play an important role in the Court's modernization of its working methods. The critical question remains whether

82. *Id.* at 105.

the International Court of Justice possesses the necessary institutional will to effect such change.