THE INTERNATIONAL COURT OF JUSTICE IN 2002[1]

I. NEW PARTIES – THE COURT'S STATUTE

When Switzerland and Timor-Leste were admitted to the United Nations on 10 September 2002 and 27 September 2002 respectively, it increased membership in this organisation to 191.[2] This automatically brought the number of states party to the Court's Statute to the same level pursuant to Article 93(1) of the United Nations Charter.

II. NEW JUDGES

On 22 October, the General Assembly and Security Council elected five judges for nine-year terms of office beginning 6 February 2003. Shi (China) and Koroma (Sierre Leone) JJ were re-elected while Hisashi Owada (Japan), Bruno Simma (Germany) and Peter Tomka (Slovakia) were elected new judges effective 6 February 2003.[3] The General Assembly and the Security Council elect judges of the Court separately but simultaneously,[4] who must receive an absolute majority of votes in both organs pursuant to Article 10 of the Court's Statute.

Hisashi Owada was born in Japan in 1932. He obtained the Bachelor of Laws degree from Cambridge University and received doctorate degrees from Keiwa University of Japan and Banaras Hindu University, India. Presently, he holds several positions including Professor of International Law, New York University Global Law School (1994-date) and Judge of the Japanese National Group in the Permanent Court of Arbitration (2001-date). He has had a distinguished diplomatic career including Ambassador, Permanent

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[1] In this Section, the information on the Court including the more recent cases (yet to be published) may be found at its website at <www.icj-cij.org>.

[2] United Nations Website Section, "Growth in United Nations membership, 1945-2003" at <www.un.org/Overview/growth.htm> (visited October 2003); "Security Council recommends admission of Switzerland as member of United Nations", Security Council Press Release No 7464, 24 July 2002; "Unanimous decision makes Timor-Leste 191st United Nations member state", General Assembly Press Release No 10069, 27 September 2003.

[3] International Court of Justice Press Release No 2002/27, 22 October 2002.

[4] See generally Articles 4-13 of the Court's Statute.

Representative of Japan to the United Nations (1994-1998). He is author of numerous publications on international law.[5]

Bruno Simma was born in Germany in 1941. His academic qualifications include a Doctorate of Law from the University of Insbruck and he practised at the Bar in Germany. He boasts a distinguished academic career including being Law Dean, University of Munich and Director of Studies at the Hague Academy of International Law. Presently, he is affiliated with the University of Michigan Law School and since 1996 has been a Member of the United Nations International Law Commission. He appeared before the Court in *Certain Property (Liechtenstein v Germany)* from 2001-present, *LaGrand (Germany v United States)* from 1999-2001 and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* from 1991-2001. He is co-founder and co-editor of the European Journal of International Law and a member of the advisory boards of various international legal journals and yearbooks. He also authored many publications on international law.[6]

Peter Tomka was born in Slovakia in 1956. He studied law in several institutions including Charles University, Prague where he obtained a doctorate in international law. He has taught international law and had a distinguished diplomatic career and presently is the Permanent Representative of Slovakia to the United Nations. He is a member of the Permanent Court of Arbitration and United Nations Law Commission. He appeared as Slovakia's Agent before the Court in *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)* and is a member of several academic societies and editorial boards.[7]

III. THE PRESIDENT'S ANNUAL REPORT 2001-2002[8]

On 29 October, Guillaume P presented the Court's 2001-2002 Annual Report to the General Assembly. He noted that the Court's budget for 2002-2003 was increased to more than US$11 million per annum to

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[5] International Court of Justice Press Release No 2002/27, Annex, 22 October 2002.
[6] Ibid.
[7] Ibid.
[8] International Court of Justice, "2001-2002 Report of the Court", Press Release No 2002/29, 29 October 2002.

reflect its increased workload as evidenced by its sustained activities and "extremely full" docket. In fact, 2002 was a particularly busy judicial year. The recent initiatives to increase efficiency, such as the amendment of Articles 79-80 of the Rules of Court, hastened the consideration of preliminary objections and clarified the conditions for dealing with counter-claims; the circulation of Practice Directions to parties to reduce the quantity and length of written pleadings and duration of oral hearings; and the simplification of the Court's own deliberations. The success of these measures were seen, for example, in *Arrest Warrant of 11 April 2000 (Congo v Belgium)* that was decided in 16 months, while requests for the indication of provisional measures were dealt with in "extremely brief periods".

Guillaume P noted that there was a fundamental distinction between a state's acceptance of its jurisdiction and the compatibility of certain acts with international law. Irrespective of whether states accepted the Court's jurisdiction they were still bound by the United Nations Charter and responsible for acts attributable to them that breached international law.[9]

Guillaume P again pleaded for easier access to the Court by the poorest states and referred to the special Trust Fund created by the Secretary-General in 1989 to help states that could not afford the full expense of proceedings by Special Agreement between the parties. He stated that although the Fund had a useful role, this was unfortunately limited. Since the Fund's creation only four states had approached it and one, in fact, decided not to draw on the sums promised because of the complexity of the procedures. In that context, those procedures could be made easier.

IV. NEW CASES

(a) Frontier Dispute (Benin/Niger)[10]

On 3 May 2002, Benin and Niger jointly seised the Court of a dispute concerning their boundary. The Court's jurisdiction was based on a Special Agreement that the parties signed on 15 June 2001 in Cotonou,

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[9] Refer judgment in Arrest Warrant of 11 April 2000 (Congo v Belgium) at <www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (visited June 2003).

[10] International Court of Justice, Press Release No 2002/41, 20 December 2002.

Benin and entered into force on 11 April 2002. Under Article 1 of the Special Agreement, the parties agreed to submit their dispute to a Chamber of the Court formed under Article 26(2) of the Court's Statute, with each state choosing an *ad hoc* judge.

Under Article 2, the parties presented the Court with three issues: (a) determination of the course of their boundary in the River Niger sector; (b) ownership of the islands in the River particularly Lété Island; and (c) determination of the course of their boundary in the River Mekrou sector. Under Article 7 entitled "Judgment of the Chamber", (a) the parties agreed to accept the Court's judgment as final and binding; (b) they had 18 months from the date of the judgment to start demarcating the boundary; and (c) either party may seise the Court under Article 60 of the Court's Statute if the judgment was hard to implement. Under Article 10, the parties gave a "special undertaking" to preserve peace, security and quiet amongst their peoples.[11]

On 27 November 2002, the Court by Order decided unanimously to grant the parties' request.[12] On 20 December 2002, it formed a Special Chamber of five judges to deal with the case by Order. The judges were Guillaume P; Ranjeva and Kooijmans JJ; and Bedjaoui (Niger) and Bennouna (Benin) JJ *ad hoc.*[13] Oda J appended a declaration to this Order stating that although he voted in favour of the Order, he had views on the formation of *ad hoc* Chambers under Article 26 of the Court's Statute especially since he was now the only judge on the Bench who participated in the formation of all four previous Chambers in the Court's history. He stated that the Chamber was essentially an arbitral tribunal. As such, before it was constituted, the disputing parties should agree on the number of members and who they should be.[14]

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[11] Ibid No 2002/12, 3 May 2002.

[12] Ibid, Order at <www.icj-cij.org/icjwww/idocket/ibn/ibn_orders/ibn_iorder_20021127.pdf> (visited October 2003)

[13] Ibid, Declaration of Oda J at <www.icj-cij.org/icjwww/idocket/ibn/ibn_orders/ibn_iorder_20021127_Declaration_Oda.pdf> (visited October 2003).

[14] See declaration of Oda J in Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Constitution of Chamber, Order of 8 May 1987, [1987] International Court of Justice Reports 13; Oda, "Further thoughts on the Chamber's procedure of the International Court of Justice" (1988) 82 American Journal of International Law 556.

(b) El Salvador requests a revision of the Judgment delivered on 11 September 1992 by the Chamber of the Court concerning the Land Island Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening[15]

On 10 September 2002, El Salvador filed an application for revision of the judgment delivered on 11 September 1992 by the Chamber of the Court in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening).*[16] It stated that the "sole purpose" was the revision of the sixth disputed sector of the land boundary the Court had fixed for El Salvador and Honduras. This was the first time that an application had sought revision of a judgment rendered by a Chamber of the Court. The application was based on Article 61(1) of the Court's Statute, which provided that:

> [A]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

El Salvador alleged that from the Chamber's reasons for establishing the boundary line in the sixth sector the following could be inferred:

(1) that a decisive factor in dismissing El Salvador's claim to a boundary along the old and original riverbed was the lack of evidence of an avulsion of the Goascorán River during the colonial period; and
(2) that a decisive factor that persuaded the Chamber to accept Honduras' claim to a land boundary that follows the current course of the Goascorán, purported to be the course of the river at the time of independence in 1821, was the chart and the descriptive report of the Gulf of Fonseca that Honduras presented and that were supposedly drawn in 1796, as part of the expedition of the brigantine *El Activo.*

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[15] International Court of Justice, Press Release No 2002/21, 10 September 2002; ibid, No 2002/40, 20 December 2002.
[16] [1992] International Court of Justice Reports 351.

To satisfy the above, El Salvador claimed that:[17]

(1) now it had scientific, technical, and historical evidence showing that the old course of Goascorán River debouched in the Gulf of Fonseca at the Estero 'La Cutú';
(2) the river abruptly changed course in 1762;
(3) this evidence, which was unavailable to El Salvador prior to the judgment, could be classified as a *new fact;*
(4) the *new fact's* character was such that it opened the case to revision and transformed hypothetical fact into juridical reality, thereby changing substantially the judgment's assumptions and *ratio decidendi* and obliging the Chamber to consider the consequences that the avulsion of the Goascorán River had for the previously delimited boundary in the disputed sixth sector.

El Salvador further claimed that prior to its application, it had obtained cartographic and documentary evidence showing the unreliability of the documents forming the core of the Chamber's *ratio decidendi.* Further, a new chart and a new report from the expedition of the brig, *El Activo,* had since been discovered. This discovery recalled the case of Farallones del Cosigüina created by a huge eruption of Cosigüina volcano in 1835 where there was no logical explanation for that geographic accident. Like others caused by the same eruption, it had appeared on charts drawn up 40 years before the eruption. As a result, El Salvador concluded:[18]

> [T]he fact that there are several versions of the 'Carta Esférica' and the report of the Gulf of Fonseca from the *El Activo* expedition, that there are differences among them and the anachronisms they share, compromises the evidentiary value that the Chamber attached to the documents that Honduras presented, essential in the Judgment. Irrespective of the authenticity issue, there is no reason whatsoever to establish some hierarchy among the various versions. No one 'Carta Esférica' or expedition report could be considered so completely credible as to regard them, as the Chamber did, as the basis of a judgment founded upon proven facts. For purposes of this revision, we have, then, a second *new fact,* whose implications for the Judgment have to be considered once the Application for

[17] International Court of Justice, Press Release No 2002/21, 10 September 2002.
[18] Ibid.

> revision is admitted. Because the evidentiary value of the 'Carta Esférica' and the report of the *El Activo* expedition is in question, the use of the Saco negotiations (1880-1884) for corroborative purposes becomes worthless, a problem compounded by what the Republic of El Salvador considers to be the Chamber's erroneous assessment of those negotiations. In reality, far from reinforcing each other, the *El Activo* documents and the Saco documents contradict each other.[19]

Accordingly, El Salvador argued that the following assertions could be made based on the scientific and historical evidence now available:[20]

(a) the present course of the Goascorán River was not the course in 1880-1884, much less in 1821;
(b) the old riverbed was the recognized boundary; and
(c) this riverbed was north of the Bay of La Unión, whose entire coastline belonged to the Republic of El Salvador.

For all the above reasons, El Salvador requested the Court:[21]

(a) to proceed to form the Chamber in light of the parties' Special Agreement signed on 24 May 1986;
(b) to declare El Salvador's application admissible based on the existence of new facts of such a character that opened the case to revision under Article 61 of the Court's Statute; and
(c) once the application was admitted, to proceed to revise the judgment of 11 September 1992 so that a new judgment would determine the boundary line in the sixth disputed sector of the land frontier between them.

Responding, Honduras requested the Chamber to declare El Salvador's application for revision inadmissible.[22]

On 27 November 2002, the Court by Order[23] decided unanimously to grant the parties' request for the creation of a special Chamber of five

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[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Oda J appended a declaration to the Order: see ibid No 2002/41, 20 December 2002.

judges to deal with the application. The Chamber was to comprise of five members, namely, Guillaume P; Rezek and Buergenthal JJ and Torres Bernárdez (Honduras) and Paolillo (El Salvador) JJ *ad hoc.*[24]

(c) Certain Criminal Proceedings in France (Congo v France)[25]

On 9 December 2002, the Congo filed an Application in the Court instituting proceedings against France to annul the investigations and prosecution measures taken by French judicial authorities. The Congo found the Court's jurisdiction under Article 38(5) of the Rules of Court.[26]

The Congo's claim concerned crimes against humanity and torture allegedly committed in the Congo against Congolese nationals, which were the subject of complaints filed in France by various human rights associations against Congolese authorities including the President (Sassou Nguesso), Minister of the Interior (General Pierre Oba), Inspector-General of the Armed Forces (General Norbert Dabira) and Commander of the Presidential Guard (General Blaise Adoua).[27]

The Congo contended that by so doing, France violated its obligations in international law, namely:[28]

(1) the principle that a state cannot, in breach of the principle of sovereign equality among all members of the United Nations exercise its authority on the territory of another state, attribute to itself universal jurisdiction in criminal matters, and arrogating to itself the power to prosecute and try the Minister of a foreign state for crimes allegedly committed by him in

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[24] Ibid No 2002/40, 20 December 2002. *Editor:* On 17 June 2003, Chamber rejected the Congo's application for the indication of a provisional measure: ibid No 2003/20, 17 June 2003.

[25] Ibid No 2002/37, 9 December 2002.

[26] Ibid. *Editor:* France consented to the Court's jurisdiction by letter dated 8 April 2003. Public hearings were held in April 2003. Here, the Congo confirmed its request for the indication of a provisional measure and France asked the Court to reject that request. By Order of 17 June 2003, the Court found (by 14:1) that the circumstances were not such as to require it to indicate the measures and accordingly rejected the Congo's request: ibid No 2003/20, 17 June 2003.

[27] Ibid No 2002/37, 9 December 2002.

[28] Ibid.

connection with the exercise of his powers for the maintenance of public order in his country; and

(2) the criminal immunity of a foreign Head of State, an international customary rule recognised by the jurisprudence of the Court, by issuing a warrant instructing the police to examine the Congolese President as a witness in the case.