

## Making and enforcing procedural law at the International Court of Justice

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### 1. *Introduction*

The International Court of Justice (ICJ or the Court) appears to enjoy a relatively wide freedom in procedural matters. The ICJ's Statute does not contain detailed rules and the Court has considerable leeway in interpreting them and, eventually, in filling the gaps. States parties to the Statute have few means at their disposal for exercising a direct control over the Court's activity in this field. The procedure for amending the Statute is too cumbersome and does not represent a viable option;<sup>1</sup> indeed, it has never been used. This means, incidentally, that a text that in largest part was drafted almost one century ago has been progressively adapted to meet changing contexts and new developments only through the interpretative activity of the Court. Moreover, unlike the case of other international tribunals,<sup>2</sup> States parties play no role in the procedure for the adoption of the Rules of the Court; the Statute leaves entirely to the Court the task of adopting such Rules.<sup>3</sup>

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<sup>1</sup> Art 69 of the Statute provides as follows: 'Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.'

<sup>2</sup> For a general overview see Ch Brown, *A Common Law of International Adjudication* (OUP 2007) 38-40.

<sup>3</sup> See below para 2.2.



Commentators have long highlighted the freedom of action retained by the ICJ in procedural matters.<sup>4</sup> Some of the tools available to the Court in this field – such as the recourse to general principles of procedural law or the assertion of inherent powers – has been extensively studied.<sup>5</sup> Others, such as the method used by the Court for the interpretation of its own Statute,<sup>6</sup> still wait to be fully explored. It is evidently beyond the scope of the present article to provide a comprehensive picture of the many problems that may be raised when studying international procedural law from the standpoint of the theory of international sources. I will focus on two issues: the processes regarding the *creation* of international procedural rules and the instruments for their *enforcement*. Rather than attempting to directly answer the question of the special nature of rules of procedure governing the activity of the Court, the present study will address such question by following a different path. The perspective here adopted is that of an assessment of the Court's powers in the creation and enforcement of its own procedural rules.

I will first deal with the power of the Court to adopt rules of procedure (2). My intention here is to assess the procedure followed in practice by the Court for the adoption of such rules, as well the different instruments by which this regulatory power is exercised. I will then examine the 'power of sanction' of the Court (3), namely the ways and means by which the Court may sanction the parties of a dispute in case of a breach of a procedural rule or when a party attempts to exploit such rules to obstruct the administration of justice. By focusing on (international procedural) law-making and (international procedural) law-enforcement,

<sup>4</sup> See eg HWA Thirlway, 'Procedural Law and the International Court of Justice' in V Lowe, M Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (OUP 1996) 389, 405.

<sup>5</sup> On general principles of procedural law see R Kolb, 'General Principles of Procedural Law', in A Zimmermann, Ch Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 964; on the inherent power of international courts see Ch Brown, 'Inherent Powers in International Adjudication' in C P R Romano, K J Alter, Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 828.

<sup>6</sup> In its case law, the Court has addressed questions of interpretation of its Statute by explicitly applying the rules of interpretation codified in the Vienna Convention of the Law of Treaties. See eg *LaGrand (Germany v United States of America)* [2001] ICJ Rep 501.



the aim is also to shed light on possible dynamics – relating to the relationship between the Court and States, both as prospective clients and as parties to a case – that may influence the activity of the Court, acting as a limitation to its general freedom in this field (4).

## 2. *International procedural law-making: A largely unrestrained power of the Court?*

### 2.1. *The statutory power of the Court to adopt its own Rules*

Under Article 30(1) of the ICJ's Statute, '[t]he Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure'. The Statute leaves the Court free to decide the procedure for the adoption of its rules of procedure. The main limitation, a substantive one, is not spelled out explicitly: rules of procedure have to conform to the Statute. Yet, as already noted, the Statute is far from providing an over-detailed regulation. It leaves a considerable margin of flexibility to the Court. The perusal of the preparatory works shows that this was made on purpose. When the Advisory Committee of Jurists had addressed this issue, the president of the Committee, Baron Descamps, emphasized the need to leave some flexibility to the Court on procedural matters. According to him, 'the Committee should not draw up the procedure of the Court in too much detail. The Court itself ought to formulate these rules in its internal regulations. The rules of procedure which ought to be submitted for the States' approval must deal only with fundamental points'.<sup>7</sup> At the time of the drafting of the ICJ's Statute, the Informal Inter-Allied Committee took a similar view, namely that 'the procedure of the Court would best be left to be settled by the Court itself by Rules of the Court'.<sup>8</sup>

Questions of non-conformity to the Statute of the rules adopted by the Court have been rarely raised. The most famous precedent is probably that concerning the formation of *ad hoc* chambers under Article 26(2) of the Statute. In this regard, the main criticism came from within the

<sup>7</sup> PCIJ, *Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists* (Van Langenhuisen 1920) 248.

<sup>8</sup> For this citation, see HWA Thirlway, 'Article 30' in A Zimmermann, Ch Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 590.



Court and was expressed by Judge Shahabuddeen in his powerful dissenting opinion in *Land, Island and Maritime Frontier Dispute*.<sup>9</sup> In a few cases, States party indirectly raised the question of conformity of a certain rule to the Statute in order to support a particular interpretation of that rule. Italy did this when, in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, it argued that, since Article 62 of the Statute did not require, as a condition for intervention, the existence of a jurisdictional link between the intervening State and the parties, Article 81(2)(c) of the Rules could not be interpreted as requiring such condition.<sup>10</sup> Yet, despite some occasional criticism, the Court's activity in this field has been largely perceived as unproblematic. Among commentators, while some have stressed 'the great deal of latitude' that the Court has permitted itself in exercising the rule-making power conferred by the Statute,<sup>11</sup> others have stressed its 'excessive conservatism'.<sup>12</sup> The overall impression, on balance, is that the Court has exercised a reasonable measure of restraint in interpreting its procedural power under the Statute. The Court's restraint can be explained having regard primarily to the context in which it operates – a point to which I will revert later. While there is no effective mechanism for reviewing the validity of the procedural rules enacted by the Court, the Court's lack of compulsory jurisdiction is a powerful deterrent against 'creative' solutions, particularly when these solutions may have the effect of restricting the parties' control over the procedure.

Rather than dealing with the content of procedural innovations brought about by the Court, however, it is on the processes governing the Court's adoption of procedural rules and on the variety of pertinent instruments that the next paragraphs will focus.

<sup>9</sup> ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* [1990] ICJ Rep 55.

<sup>10</sup> ICJ, *Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (ICJ Pleadings, vol II, Oral Arguments, Documents 1980) 542. I am indebted to Makane Mbengue from drawing my attention on this precedent.

<sup>11</sup> HWA Thirlway, 'Article 30' (n 8) 405.

<sup>12</sup> Sh Rosenne, *The Law and Practice of the International Court, 1920-2005* (Martinus Nijhoff 2006) 238.



## 2.2. *The procedure for the adoption of the Rules: issues of transparency and participation*

As said before, the Statute does not regulate the procedure by which the Court adopts its Rules. It simply recognizes that the power to enact the Rules belongs to the Court. At the time of the 1972 and 1978 revisions of the Rules, the task of conducting the necessary preparatory works was assigned to an *ad hoc* committee composed of selected judges. Since 1979 the Court has established a standing Rules Committee, which ‘advises the Court on procedural issues and working methods’.<sup>13</sup> The reasons that lead the Court to start a process of revision may vary. When, in 1967, the Court decided to conduct a general revision of its Rules, it justified this initiative by referring to the fact that the Rules of 1946 no longer fully corresponded to the requirements of a modern international tribunal.<sup>14</sup> The point to be stressed here is that, as noted by Rosenne, the 1972 revision ‘was a spontaneous act on the part of the Court’, as there was ‘no clearly enunciated and widely backed political demand, based on a wide consensus, for any review of the Statute or of the Rules of the Court’.<sup>15</sup> More broadly, if one considers the practice so far followed by the present Court when revising its Rules, the most striking aspect is that the Court has constantly treated the matter as an exclusively ‘internal’ one. The Court has generally avoided to put in place mechanisms or procedures that would allow some form of external participation or control. By so doing, it seems to have maximized its freedom of maneuver in designing the rules governing its procedure and limited possible checks on judicial authority by States and other actors. Two aspects appear to be particularly noteworthy.

The first one concerns the role of States in the procedure for the Rules’ revision, in particular the possibility that States be given a say about the proposals put forward by the Court. While Article 30 of the Statute leaves to the Court the final decision as to whether and how to

<sup>13</sup> See <[www.icj-cij.org/en/chambers-and-committees](http://www.icj-cij.org/en/chambers-and-committees)>.

<sup>14</sup> (1967-1968) ICJ YB 86.

<sup>15</sup> Sh Rosenne, *Procedure in the International Court* (Martinus Nijhoff 1983) 237-8, who also observed that ‘the revision of the Rules thus appears... not as meeting any clearly formulated objective set for it by the States which created it for their service, and to which it owes its continued existence’.



revise the Rules, it certainly does not preclude the possibility of establishing a mechanism for consulting the States parties. In some circumstances, the Court has put in place informal mechanisms aimed at receiving external inputs, in particular from experienced authorities on the work of the Court. At the time of the 1972 revision, as reported by a judge,<sup>16</sup> ‘former judges of the Court, former judges *ad hoc*, and those international lawyers who had pleaded at least three cases were asked for their opinions on the revision of the Rules of the Court’. In 2016, a seminar was held at the ICJ in order to encourage a discussion ‘between Members and staff of the Court, counsel, commentators and members of the diplomatic corps, as to how the Court should respond to the challenges it faces in the dynamic and increasingly populated landscape of international justice’; on that occasion, a number of proposals were made ‘for reform of the Court’s rules or procedures’.<sup>17</sup> It is not clear what could be the impact of these initiatives on the work of the Court. In any case, their aim is to stimulate a general discussion on possible future revisions rather than to establish a consultation on specific proposals.

It has been suggested that the Court should give notice of any proposed new rules or revisions and allow States and other actors to present comments.<sup>18</sup> No doubt, this proposal deserves consideration. By consulting States the Court may have a better perception of the different needs and sensibilities of its prospective clients. However, there are also downsides, that may render any procedure of prior consultation or preliminary comments more troublesome than beneficial to the Court. If States are given the possibility to comment, the Court will inevitably be asked to take these comments into account. This may end up in a sort of negotiation between the Court and States (or a group of States) that risks undermining the authority and the exclusive power of the Court in this field. The experience of other international tribunals, where the dialogue between the judicial body and States on the revision of the rules of procedure has proved to be rather complex and where a highly politicized en-

<sup>16</sup> E Jiménez de Aréchaga, ‘Amendments to the Rules of Procedure of the International Court of Justice’ (1972) 67 *AJIL* 1.

<sup>17</sup> J Crawford, A Keene, ‘Editorial’ (2016) 7 *J Intl Dispute Settlement* 225, 227.

<sup>18</sup> S Yee, ‘Notes on the International Court of Justice (Part 3): Rule-making at the Court - Integration, Uniformization, Keeping Existing Article Numbers and Giving Public Notice’ (2009) 8 *Chinese J Intl L* 681, 692.



vironment has rendered it difficult to reach a consensus over very technical issues,<sup>19</sup> provides a warning against the risks associated with the opening up of the procedure to States.

The other point concerns the transparency of the process leading to the adoption of new rules. Unlike the Permanent Court, the present Court has not made publicly available the records of meetings devoted to the revision of the Rules.<sup>20</sup> The Court limits itself to provide few synthetic information about the reasons that led to the revision and its implications. Should the Court publish the minutes of the debates leading to the revision of the Rules? No doubt, confidentiality has some advantages. In principle, it should favour a more open and frank discussion among judges; in this respect, it therefore provides greater protection to judicial independence. It also hides possible divisions within the Court, thereby permitting to present the new rules as the result of a collegiate decision. On balance, however, greater transparency would be preferable.<sup>21</sup> It stands as a mild and largely acceptable form of check on the Court's exercise of its law-making function, as it allows States, practitioners and all those who have an interest in the work of the Court to better grasp the reasons which prompted a certain revision, as well as the interpretation of the Statute upon which the new rule relies.

### 2.3. *Procedural soft law at the ICJ: Practice Directions*

Since 2001, in addition to the Rules, the Court has regulated the procedure before it through the adoption of Practice Directions. So far, the total number of them is 16. Neither the Statute nor the Rules mention this instrument. The power of the Court to adopt them can easily be justified by referring to the same legal basis which provides the Court with the power to adopt its Rules, namely Article 30 of the Statute.<sup>22</sup> As to the

<sup>19</sup> See eg the case of the International Criminal Court. S Fernández de Gurmendi, 'Enhancing the Court's Efficiency. From the Drafting of the Procedural Provisions by States to their Revision by Judges' (2018) 16 *J Intl Criminal Justice* 341, 349.

<sup>20</sup> On this issue, see also HWA Thirlway, *The International Court of Justice* (OUP 2016) 73 n 2.

<sup>21</sup> For this view, see also S Yee, 'Notes on the International Court of Justice (Part 1): Arguments for the Publication of the Rule-making Materials' (2008) 7 *Chinese J Intl L* 691.

<sup>22</sup> HWA Thirlway, 'Article 30' (n 8) 593.



relationship between Rules and Practice Directions, the latter should not derogate from the former. When adopting a new Practice Direction, the Court constantly makes it clear that ‘Practice directions involve no alteration to the Rules of Court, but are additional thereto’.<sup>23</sup>

Practice Directions represent a remarkable development in the Court’s approach to procedural law-making. The Court has not explained why, instead of amending its Rules, it preferred to introduce a new set of procedural rules. This proliferation of governing texts is not uncommon before international tribunals. However, this phenomenon is frequently due to the fact that the different texts are adopted by different bodies<sup>24</sup> or deal with partially distinct procedural issues. This is not the case here: it is the Court that adopts both the Rules and Practice Directions, and the two sets of rules cover substantially the same issues.

A possible explanation may be found in practical reasons. The procedure for the adoption of Practice Directions appears to be less burdensome and time-consuming than that for the revision of the Rules. In this respect, recourse to this instrument would respond essentially to a practical need to regulate matters of procedure in a less formal way.<sup>25</sup> This aspect cannot be underestimated since nowadays the Court, because of its current workload, has less time at its disposal to dedicate to the revision of its Rules.<sup>26</sup>

Yet, there seems to be another reason which may explain recourse to Practice Directions in order to regulate procedural issues. To capture this point, one has to focus on the different ways in which Rules and Practice Directions are formulated. Rules have generally a prescriptive content; they ask the parties to undertake a certain course of conduct. No doubt, there are elements of flexibility, in particular because of the importance which is frequently given to the agreement of the parties as a condition

<sup>23</sup> See eg Press release No. 2013/6, <[www.icj-cij.org/files/press-releases/6/17296.pdf](http://www.icj-cij.org/files/press-releases/6/17296.pdf)>. However, according to HWA Thirlway, *The International Court* (n 20) 73, ‘since the Rules and the Practice Directions are both made by the Court, if there were any inconsistency the Direction might be taken to express the more recent will of the Court’.

<sup>24</sup> See eg the case of the Rules of procedure and evidence of the International Criminal Court. S Fernández de Gurmendi, H Friman, ‘The Rules of Procedure and Evidence of the International Criminal Court’ (2000) 3 *YB Intl Humanitarian L* 289-336.

<sup>25</sup> See HWA Thirlway, *The International Court* (n 20) 73.

<sup>26</sup> R Higgins, Ph Webb, D Akande, S Sivakumaran, J Sloan, *Oppenheim’s International Law* (OUP 2017) 1246.





for their application.<sup>27</sup> It remains, however, that the Rules are formulated in a way that indicates clearly the course of conduct that the parties are required to take. By contrast, Practice Directions are formulated as recommendations to the parties. The Court does not require a certain course of conduct; the Court ‘will expect the parties’ (Practice Direction I) or ‘will find it very helpful if the parties’ behave in a certain way (Practice Direction VI). Correspondingly, parties are not under a duty; they ‘are strongly urged’ (Practice Direction III), or ‘should refrain’ from doing something (Practice Directions VII, VIII, IX). In the light of their content, Practice Directions may thus be regarded as a sort of *soft procedural law*.<sup>28</sup> Here, probably, lies another explanation justifying the Court’s recourse to this instrument. The use of a ‘soft’ regulation allows the Court to request a certain conduct of the parties even if the Statute is silent on the matter or does not impose particular limitations to the parties’ freedom. In other words, by using a recommendatory language, the Court can more easily go beyond a rigid interpretation of the Statute; it can introduce new solutions with the expectations that, with the passing of time, they would become a generally accepted practice. In the end, Practice Directions, with their soft content, appear to be an additional instrument by which the Court can enlarge its freedom of maneuver in regulating procedural matters.

Is this new practice to be welcomed? The duplication of texts governing the Court’s procedure – Rules and Practice Directions – has been criticized because it is regarded as a possible source of confusion for States.<sup>29</sup> Yet, the problem with Practice Directions lies not so much in the duplication of the texts as in the use of recommendatory language to govern procedural matters. Procedural law is an area where certainty about what the parties can do and what they cannot appears particularly important. The use of a soft regulation renders uncertain what the Court can really require from the parties and what the parties can regard as falling within their discretion. As many commentators have pointed out, it is not clear what are the consequences if a party decides not to follow the

<sup>27</sup> S Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?* (Springer 2014) 25.

<sup>28</sup> For this expression see A Pellet, ‘Values and Power Relations – The “Disillusionment” of International Law?’, KFG Working Paper Series No 34, 1, 8.

<sup>29</sup> S Yee, ‘Notes on the International’ (n 18) 682.



Court's recommendation.<sup>30</sup> In short, the softness of Practice Directions risks to generate more confusion than contribute to an orderly regulation of the parties' conduct and of the whole procedure before the Court.

3. *Enforcing respect of procedural rules: How far can the Court go in 'punishing' non-complying parties?*

3.1. *Sanctioning disobedient parties: few instruments and a scant practice*

In assessing questions of compliance with the Court's decisions, the main focus is generally on the post-adjudicative phase: whether the parties complied with the final judgment and what means of enforcement are available to ensure effective compliance. By contrast, parties' non-compliance with procedural obligations and Court's decisions during the proceedings, as well as the power of the ICJ to sanction such non-compliance, are issues that have not attracted much attention so far. Different factors may explain this state of affairs. First, the Court's practice does not offer much on the subject; as noted by Rosenne, 'on the whole, few difficulties arise in practice concerning compliance with interlocutory decisions'.<sup>31</sup> This is so also because many procedural decisions of the Court, such as those concerning the admissibility of a certain request, do not require a particular conduct of the parties for their implementation: they are 'self-executing, so that the question of compliance with [them] does not arise'.<sup>32</sup> More fundamentally, most of the sanctions that the Court might impose against the non-complying party go substantially unnoticed. They take the form of minor procedural disadvantages that do not give rise to particular problems. And even in this regard, the Court is generally very prudent before taking the step of imposing procedural disadvantages. Thus, it has been noted that, while in principle pleadings submitted out of time should not be included in the case-file, '[t]here

<sup>30</sup> A Pellet, 'Remarks on Proceedings before the International Court of Justice', in A Del Vecchio (ed), *New International Tribunals and New International Proceedings* (Giuffr  2006), 99, 114; A Watts, 'New Practice Directions of the International Court of Justice' (2002) 1 *L and Practice of Intl Courts and Tribunals* 247, 255.

<sup>31</sup> Sh Rosenne, *The Law and Practice* (n 12) 206.

<sup>32</sup> HWA Thirlway, *The International Court* (n 20) 134 n 6.



seems to be no instances where delay has gone so far'.<sup>33</sup> In sum, the Court's approach towards problems of compliance with procedural obligations differs considerably from that of domestic courts. The Court retains a wide degree of flexibility in assessing a party's compliance and the possible consequences in case of non-compliance. As an influential former President of the Court put it, rules of procedure 'do not constitute a straitjacket, either for the Court or for the parties appearing before it'.<sup>34</sup> This flexibility has been generally used with extreme caution, also to avoid to give rise to potentially confrontational situations with the parties.

The Statute itself does not endow the Court with particular instruments for dealing with cases of non-compliance. A case in point is provided by Article 49 of the Statute. According to this provision, '[t]he Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal'. Taking 'formal note' is hardly an effective sanction. The Court could add teeth to this measure by drawing adverse inferences from a party's refusal to produce a document. International courts, including the Iran-US Claims Tribunal and investments tribunals, have followed this approach. The ICJ has so far refrained from recognizing explicitly its power to draw adverse inference from the party's refusal to produce the document.<sup>35</sup> The Court's reluctance, in this respect, may be partly explained by the fact that, under Article 49, the Court does not appear to have the power to impose upon the parties a binding obligation to produce documents.<sup>36</sup>

In principle, the Court could also rely on general principles of procedural law in order to sanction the parties' conduct, particularly when a party attempts to exploit the procedure to obstruct the administration of justice. Abuse of process – that is, 'the use of procedural instruments or rights by one or more parties for purposes that are alien to those for

<sup>33</sup> *ibid.* Thirlway adds that 'the Court would certainly be very reluctant to ignore a document actually submitted merely on the ground that it was out of time'.

<sup>34</sup> M Lachs, 'The Revised Procedure of the International Court of Justice', in F Kalshoven, PJ Kuijper, J G Lammers (eds), *Essays on the Development of the International Legal Order in Memory of H F van Panhuys* (Sijthoff and Noordhoff 1980) 21, 49.

<sup>35</sup> See M Benzing, 'Evidentiary Issues', in A Zimmermann, Ch Tams (eds), *The Statute* (n 5) 1371, 1388; Ch Brown (n 2) 108-109.

<sup>36</sup> Ch Tams, J Devaney, 'Article 49', in A Zimmermann, Ch Tams (eds), *The Statute* (n 5) 1424-25.



which the procedural rights were invoked<sup>37</sup> – has been frequently invoked before the Court. Unlike other international tribunals, and in particular investment tribunals,<sup>38</sup> the Court, while not excluding its power to sanction an abuse of procedure, has never recognized that the conditions for its application were met. Its approach has been rather strict. Most recently, it has stated that ‘[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process’.<sup>39</sup>

### 3.2. *A special case: non-compliance with provisional measures*

Nowadays, the power of sanction of the Court is mainly discussed in relation to a party’s non-compliance with provisional measures.<sup>40</sup> The importance attached to this issue is a direct consequence of the Court’s explicit recognition that provisional measures have binding effects. The point here is not to discuss the well-foundedness of the Court’s interpretation of Article 41 of the Statute. The point is that of assessing the implications stemming from the fact that, in the Court’s view, the parties are under a legal obligation to comply with an order under Article 41. It is submitted that compliance with provisional measures cannot be considered as a purely ‘private’ matter that pertains exclusively to the relationship between the parties; there is also a ‘public’ or ‘public order’ dimension which concerns the position the parties vis-à-vis the Court.<sup>41</sup> To put it otherwise, lack of compliance with provisional measures does affect exclusively the rights and interests of the contending parties and is not absorbed entirely by the interstate dynamic based on the general regime

<sup>37</sup> R Kolb (n 5) 998.

<sup>38</sup> See H Ascensio, ‘Abuse of Process in International Investment Arbitration’ (2014) 13 *Chinese J Intl L* 763.

<sup>39</sup> ICJ, *Immunities and criminal proceedings (Equatorial Guinea v France)* (Judgment, 6 June 2018) [2018] ICJ Rep para 150.

<sup>40</sup> For an early discussion of the problem see T Stein, ‘Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt’ (1982) 76 *AJIL*, 528.

<sup>41</sup> On this ‘public order’ aspect see M Mendelson, ‘State Responsibility for Breach of Interim Protection Orders of the International Court of Justice’, in M Fitzmaurice, D Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004) 42. For a (slightly different) distinction between rules concerning the organization and internal administration of the Court and rules concerning the rights of the parties, and for the implication of this distinction as regards the sanctions attaching to these rules, see *The Law and Practice* (n 12) 1026.



of responsibility for an international wrongful act. The Court itself has its own interest in ensuring respect for provisional measures. Failure to comply with obligations laid down in provisional measures not only offends against the authority of the Court; it undermines the effective administration of justice in a particular case. The problem then becomes that of determining what the Court can and should do in order to react to a breach of provisional measures.

A number of issues can be raised in this regard. A first question is whether the Court may determine by its own initiative – irrespective of the claims of the parties – whether provisional measures have been complied with, possibly also in the absence of jurisdiction on the merits of the dispute.<sup>42</sup> More interesting, for the present purposes, is to assess whether the Court, irrespective of the invocation of responsibility by the injured party, can impose distinct sanctions on the non-complying party.

As already noted, the Statute offers little in terms of measures available to the Court to sanction a non-complying party. A variety of measures has been suggested by commentators. Some of these measures, such as levying penalties or awarding punitive damages, are to be ruled out, precisely because they do not seem to have a basis in the Statute.<sup>43</sup> Others, such as withholding the judgment,<sup>44</sup> do not seem to offer an appropriate remedy, as they end up in diverting the Court from its primary function, namely, to decide the dispute in accordance with international law.

A form of sanction that could be envisaged in response to lack of compliance with provisional measures is the imposition of costs, or part of costs, relating to the proceedings. The Statute does not rule out the possibility of using the award of costs as a form of sanction against the

<sup>42</sup> On this issue see P Palchetti, 'Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect of the Judicial Function' (2017) 100 *Rivista di Diritto Internazionale* 5, 8.

<sup>43</sup> See M Mendelson (n 41) 42. However, according to O Schachter, 'International Law in Theory and Practice: General Course in Public International Law' (1982) 178 *Recueil des Cours* 223, the Court has the authority to levy damages against the non-complying State. See also T Stein (n 40) 527. According to R Kolb, *The International Court of Justice* (Hart 2013) 649, '[f]rom the legal point of view, it [the Court] would even have the right to require reparation to be made to the Court itself'.

<sup>44</sup> O Schachter (n 43) 223.



non-complying party.<sup>45</sup> The fact that levying costs against the non-complying party benefits the other party does not deprive this measure of its preeminently punitive character and deterrent purpose. The imposition of the costs on the non-complying party has been raised before the Court in the joint cases *Certain activities carried out by Nicaragua in the border area* and *Construction of a road in Costa Rica along the San Juan river*. '[T]aking into account the overall circumstances of the case', the Court found that 'an award of costs ... would not be appropriate.'<sup>46</sup>

So far, the Court has been cautious in dealing with situations of non-compliance with provisional measures. In the Court's case law after *LaGrand*, the ordinary remedy for breaches of provisional measures has taken the form of a finding of non-compliance recorded in the operative part of the judgment. A finding of non-compliance performs primarily a form of reparation, by way of satisfaction, for the injury caused to the other party. However, it also expresses the Court's censure for the non-complying conduct. In this respect, it may be regarded as a form of sanction for the harm caused to the judicial process, a sanction that – it is submitted – the Court would be empowered to adopt irrespective of any specific request by the injured party aimed at obtaining a finding of non-compliance. The effectiveness of this sanction should not be underestimated, as it inflicts significant reputational costs on the responsible party.<sup>47</sup> It remains that in certain cases this may appear an excessively mild response.

<sup>45</sup> Art 64 simply provides that that the general rule, according to which each party shall bear its own costs, is to be applied '[u]nless otherwise decided by'. In the past, the possibility of using the apportionment of costs as a form of sanction was advocated by G Barile, 'Osservazioni sulla indicazione di misure cautelari nei procedimenti davanti alla Corte internazionale di giustizia' (1952) 4 Comunicazioni e Studi 154.

<sup>46</sup> [2015] ICJ Rep 718. In a joint declaration, four judges held the view that the 'exceptional circumstances' of the case warranted the exercise by the Court of its power under art 64 of the Statute. In particular, they emphasized that the costs incurred by Costa Rica 'were a direct consequence of Nicaragua's breach of the obligations imposed by the 2011 Order'. Joint declaration of Judges Tomka, Greenwood, Sebutinde and Judge *ad hoc* Dugard, para 7.

<sup>47</sup> See T Stein (n 40) 524, who maintained that '[i]n a context where rectitude is the primary value at stake, censure by the Court is a significant sanction'. *Contra* G Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations' (2010) 23 *Leiden J Intl L* 581, who maintained that a finding of non-compliance 'does not seem to address properly the damage caused to the Court's own standing by a lack of compliance with its provisional measures orders'.



#### 4. *Conclusions*

This article started by recognizing the freedom enjoyed by the ICJ in procedural matters. It may now be appropriate, in order also to rebalance a bit the picture, to conclude this article on a different note, focusing instead on the factors which limit the freedom of action of the Court.

Unsurprisingly, the first factor to be mentioned is the Court's lack of compulsory jurisdiction. True, the willingness, or lack of willingness, of States to have recourse to the Court for the settlement of their disputes depends on a plurality of reasons and the procedure before the Court is not necessarily among the most important ones. Yet, it remains a relevant factor and the Court appears to be aware of it: several changes in the Rules – starting from the 1972 revision of the rules concerning the use of *ad hoc* chambers – were made with the aim of tempting more States to use the ICJ. In this respect, while States have in practice little possibility to directly interfere with the Court's rule-making activity, they can exercise a form of indirect check on it. The Court remains accountable to States insofar as it has necessarily to take into account their possible reactions to a change in the procedure. Lack of compulsory jurisdiction stands therefore as a deterrent against the possibility of a 'too creative' exercise by the Court of its rule-making power. The point, then, is whether the relevance inevitably attached to the States' viewpoint should not encourage the Court to introduce some changes in its internal procedure for the revision of its Rules. Among the possible change, greater transparency, particularly through the publication of the records of the preparatory works, would help States to have a better understanding of the reasons and implications of the revision, as well as of its conformity with the statute. Whether States should be directly involved in the procedure for revision, and what form that involvement should take, is a more problematic issue that has no straightforward answer.

Another factor to be taken into account is related to the Court's clientele. The Court settle disputes between States. The fact of dealing with States has an impact on the Court's approach to certain procedural issues. This becomes particularly evident when assessing the Court's power of sanction and helps to explain why this continues to be a largely underdeveloped area in the procedure before the Court. In an environment where the litigating parties are States and where judgments are not backed by an effective mechanism for enforcement, creating a climate

conducive to a smooth and mutually acceptable settlement of the dispute and minimizing the risk of confrontational situations are traditionally regarded as important priorities. While the Court may partly have moved away from ‘the culture of excessive deference to State sovereignty in a range of procedural issue’,<sup>48</sup> its approach to the problem of sanctioning lack of compliance with procedural rules still appears to be influenced by such considerations. This obviously does not mean that States are given an indiscriminate freedom of action. The consequence of this state of affair is rather that, in enforcing respect of procedural rules, the Court’s main worry appears to be that of preventing parties from obtaining any improper advantage within the process rather than that of vindicating its own authority. The focus is on the settlement of the dispute between the parties, and not in the ‘punishment’ of the disobedient party. As its general practice, and particularly that concerning lack of compliance with provisional measures, appears to show, the Court has been very cautious about claiming respect for its judicial authority as such. This aspect is probably destined to remain a distinctive feature of the Court’s judicial activity, being more in keeping with its function as an instrument for securing the settlement of dispute between States.

<sup>48</sup> R Higgins, ‘Respecting Sovereign States and Running a Tight Courtroom’ (2001) 50 *ICLQ* 121, 131.

