# Article 43

**(1) The procedure shall consist of two parts: written and oral.**

**(2) The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.**

**(3) These communications shall be made through the Registrar, in the order and within the time fixed by the Court.**

**(4) A certified copy of every document produced by one party shall be communicated to the other party.**

**(5) The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.**

**(1) La procédure a deux phases: l'une écrite, l'autre orale.**

**(2) La procédure écrite comprend la communication à juge et à partie des mémoires, des contre-mémoires et, éventuellement, des répliques, ainsi que de toute pièce et document à l'appui.**

**(3) La communication se fait par l'entremise du Greffier dans l'ordre et les délais déterminés par la Cour.**

**(4) Toute pièce produite par l'une des parties doit être communiquée à l'autre en copie certifiée conforme.**

**(5) La procédure orale consiste dans l'audition par la Cour des témoins, experts, agents, conseils et avocats.**

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## A. Introduction

**1** Article 43 is the central provision in the Statute governing the procedure before the Court in contentious cases. Its first paragraph sets out the general scheme of the Court's procedure by dividing it into two indispensable parts: written and oral. The Statute places the two stages on a procedurally equal footing, thus blending the key features of the continental and common law systems.[1] In its remaining paragraphs, the article lays down the mandatory requirements of both written and oral proceedings. The remainder of Chapter III of the Statute, to which Article 43 also belongs, contains further essential procedural rules. Beyond those basic constraints, the details are regulated by the Rules of Court, the Court's Practice Directions, and its actual practice. Additionally, the parties are free to propose special rules applicable to their particular case. However, such rules must be approved and authorized by the Court.[2]

[1] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. III, p. 1328; *cf.* also Quintana, *ICJ Litigation*, p. 186; Thirlway, *ICJ*, p. 92; Statement of President Schwebel to the 52nd session of the General Assembly in connection with the annual report of the ICJ: UN Doc. A/52/PV.36 (1997), p. 4. On the dichotomy of legal systems behind the Court's procedure *cf.* Lachs (1980), pp. 23–7.

[2] Art. 101 of the Rules. *Cf. e.g.*, *Certain Criminal Proceedings in France*, Order of 16 November 2009, ICJ Reports (2009), pp. 304, 306 (taking account of the parties' agreement and authorizing the submission of additional pleadings unforeseen by the Rules).

## B. Historical Development

### I. Arbitral Procedure

Article 43 is a broad codification of arbitral procedure as it had developed up to the First World War. The origins of the provision may be traced to the First International Peace Conference at The Hague.[3] The 1899 Convention for the Pacific Settlement of International Disputes, building on the earlier practice of inter-State arbitration, laid down in Chapter III basic rules on 'arbitral procedure'.[4] It provided: **2**

> Article 39: As a general rule the arbitral procedure comprises two distinct phases: preliminary examination and discussion.
>
> Preliminary examination consists in the communication by the respective agents to the members of the Tribunal and to the opposite party of all printed or written Acts and of all documents containing the arguments invoked in the case. This communication shall be made in the form and within the periods fixed by the Tribunal in accordance with Article 49.[5]
>
> Discussion consists in the oral development before the Tribunal of the arguments of the parties.
>
> Article 40: Every document produced by one party must be communicated to the other party …
>
> Article 45: The agents and counsel of the parties are authorised to present orally to the Tribunal all the arguments they may think expedient in defence of their case.

The Convention divided arbitral procedure into two distinct phases. But while the preliminary examination was regarded as indispensable, the discussion of the case before the Tribunal was merely seen as a necessary complement.

The Convention was revised at the Second International Peace Conference in 1907. The new Convention for the Pacific Settlement of International Disputes, which replaced the 1899 Convention as between the parties, contained similar provisions on 'arbitration procedure':[6] **3**

> Article 63: As a general rule, arbitration procedure comprises two distinct phases: pleadings and oral discussions. The pleadings consist in the communication by the respective agents to the members of the Tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the 'Compromis' … The discussions consist in the oral development before the Tribunal of the arguments of the parties.
>
> Article 64: A certified copy of every document produced by one party must be communicated to the other party.
>
> Article 70: The agents and the counsel of the parties are authorised to present orally to the Tribunal all the arguments they may consider expedient in defence of their case.

Despite the different terminology used ('pleadings' and 'oral discussions' in place of 'written proceedings' and 'oral proceedings') and the separation into three different articles, the contents of the provisions largely resemble that of Article 43. Some differences, however, are noteworthy: the two distinct phases were not seen as equally obligatory, the parties could communicate the pleadings directly to each other, and the order and time

[3] *Cf.* Guynat, *RGDIP* (1930), pp. 312–5.

[4] Hague Convention No. I for the Pacific Settlement of International Disputes, 29 July 1899, 1 Bevans 230, 187 CTS 410, Arts. 30 *et seq*.

[5] Art. 49 of the Convention corresponds to Art. 48 of the ICJ Statute.

[6] Hague Convention No. I for the Pacific Settlement of International Disputes, 18 October 1907, UKTS 6 (1907), 1 Bevans 577, 205 CTS 233, Arts. 51 *et seq*.

limits for these communications were fixed by the parties in the *compromis* and not by the arbitral tribunal.

## II. The Statute of the PCIJ

4 The text of Article 43 was in substance drafted in June and July 1920 by the Advisory Committee of Jurists established by the Council of the League of Nations. The Committee's 'draft scheme' dealt with the matter in three separate articles (Articles 41–43) and was based on two provisions (Articles 32 and 33) in a plan drawn up by five nations for the establishment of a Permanent International Court (Five-Power Plan),[7] which, in turn, had heavily drawn on Articles 39, 40, 45 and Articles 63, 64, 70 of the Hague Conventions of 1899 and 1907, respectively, and on Article 34 of the Prize Court Convention.[8]

5 In the Committee 'there was no difference of opinion on the principles, but simply on points of drafting'.[9] It was generally accepted that both parts of the procedure, written and oral, were 'equally necessary'.[10] The proposal of the Committee was accepted by the League of Nations without any alterations; only the text of the three articles was combined into one.[11] Article 43 of the PCIJ Statute was largely identical to today's Article 43. The only textual difference relates to para. 2, which read: 'The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases and, if necessary, Replies; also all papers and documents in support'.

6 Article 43 of the PCIJ Statute was complemented by the relevant provisions on the written and oral proceedings in contentious cases in the Rules of Court. For the 1922, 1926, 1927, and 1931 Rules these were Articles 32–34 (on general aspects), Articles 37–42 (on written proceedings), and Articles 43–56 (on oral proceedings). In the 1936 Rules the relevant provisions could be found in Articles 31, Articles 39–46, and Articles 47–60, respectively. Additionally, the PCIJ elaborated through its jurisprudence an 'important corpus of procedural law', which continues to inform and guide the present Court, as well.[12]

## III. The Statute of the ICJ

### *1. Drafting of the Statute*

7 At the San Francisco Conference Article 43 belonged to those articles which were at once adopted and which remained virtually unchanged.[13] The only modification to the English version concerned a change of terminology in para. 2: 'Court' was replaced with 'judges' and 'Cases' and 'Counter-Cases' became 'memorials' and 'counter-memorials', in order to reconcile the English text with the French.[14]

[7] For the text of the Five-Power Plan adopted on 27 February 1920 by Denmark, the Netherlands, Norway, Sweden and Switzerland *cf. Grotius Annuaire international pour les années 1919–1920* (1921), pp. 201, 211.

[8] 18 October 1907, 205 CTS 381. The International Prize Court never came into existence.

[9] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 341.

[10] *Ibid*., p. 737.

[11] League of Nations, Records of the First Assembly (Committees), vol. I (1920), pp. 370, 499, 535.

[12] *Cf.* Statement by President Tomka to the Sixth Committee of the General Assembly, 1 November 2013, pp. 3–4.

[13] *Cf.* the Report of the Rapporteur of Committee IV/1, UNCIO, vol. XIII, p. 387 and p. 170. *Cf.* also *ibid*., p. 440.

[14] UNCIO, vol. XIV, pp. 510, 813–14. The terms 'cases' and 'counter-cases' had already been substituted in the Rules in 1936; *cf.* PCIJ, Series D, third addendum to No. 2, p. 768. The main reason for the substitution given at the time was that the word 'case' was equivocal given that it was also used to refer to the proceedings themselves. *Ibid*.

### *2. Rules of Court*

The Rules of Court have been the main vehicle used to bring about changes to the Court's procedure within the broad framework set by Article 43. In 1946, the Court had adopted Rules which were essentially based on the 1936 Rules. Dissatisfaction with the length and cost of litigation in the Court led in the early 1970s to the view that the Court should exercise greater control over the proceedings—both written and oral—than had hitherto been the case. In 1970, the UN General Assembly called for 'enhancing the effectiveness of the Court'.[15] This led the Court to first adopt a number of amendments to its Rules in 1972, followed by a complete revision in 1978.[16] The changes were intended to increase the degree of control of the Court or its President over the scope and quantity of pleadings and the length of oral argument, with the broad objective of simplifying and speeding up the proceedings and reducing the cost for the parties. But, as Rosenne remarked, despite many changes of detail (some undoubtedly designed to prevent abuses of Court procedure that had crept in over the years), the essential characteristics of the procedure as it had evolved since 1922 remained.[17] **8**

On 5 December 2000, the Court again amended two of its Rules of Court (Article 79 relating to preliminary objections and Article 80 relating to counter-claims). The amendments were aimed at shortening the duration of certain incidental proceedings, the proliferation of which had encumbered many cases, at clarifying the rules in force, and at adapting them to reflect more closely the practice developed by the Court.[18] Additionally, on 14 April 2005, the Court amended Article 52 of the Rules by deleting its third paragraph, which concerned the procedure to be followed where the Registrar arranges for the printing of a pleading.[19] In the most recent amendment, on 29 September 2005, the Court added two new paragraphs to Article 43 of the Rules in order to establish an appropriate procedural framework for the notification of international organizations that may be parties to a convention whose construction is in question in the proceedings.[20] **9**

The relevant provisions on procedure can be found in Articles 44–72, 79 and 80 of the 1978 Rules of Court, as last amended on 29 September 2005. The provisions of the Rules are subordinated to those of the Statute; in case of a conflict between the text of any of the Rules and the Statute, the latter would prevail.[21] **10**

### *3. Notes to Parties and Practice Directions*

The major increase in the number of cases referred to the Court and the budgetary constraints the latter had faced as a result of the United Nations' financial crisis led the Court **11**

[15] GA Res. 2723 (XXV) (1970). *Cf.* also GA Res. 2818 (XXVI) (1971) and UN Doc. A/8382 and Add. 1–4 (1971).

[16] ICJ Press Release No. 78/3 of 26 June 1978.

[17] Rosenne, *ICJ Procedure*, p. 74; *cf.* also Thirlway, *ICJ*, p. 74.

[18] ICJ Press Release 2001/1 of 12 January 2001; *ICJ Yearbook* (2000–2001), pp. 3–4. On the amendments in general, *cf.* Rosenne, 'The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court', *Leiden JIL* 14 (2001), pp. 77–87; Prager, 'The 2001 Amendments to the Rules of Procedure of the International Court of Justice', *LPICT* 1 (2002), pp. 155–87.

[19] ICJ Press Release No. 2005/9 of 14 April 2005; *ICJ Yearbook* (2004–2005), pp. 3–4.

[20] ICJ Press Release No. 2005/19 of 29 September 2005.

[21] *Cf.* Art. 30, para. 1 of the Statute; *Land, Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, Diss. Op. Shahabuddeen, ICJ Reports (1990), pp. 18, 48; *Namibia*, Advisory Opinion, Diss. Op. Fitzmaurice, ICJ Reports (1971), pp. 220, 310; see further Thirlway on Art. 30 MN 23–38; Kolb, *ICJ*, pp. 101–104.

in the late 1990s to take further measures to improve its working methods and accelerate its procedure. In April 1998, the Court made public a 'Note containing recommendations to the parties to new cases', in which it sought increased cooperation from the parties in the functioning of justice by, *inter alia*, limiting the number of written pleadings exchanged, the volume of annexes to the pleadings, and the length of oral argument.[22] The Note was subsequently modified to expedite proceedings on preliminary objections even more.[23] The Note was handed to the representatives of parties to new cases at their first meeting with the Registrar.

**12** Additionally, the General Assembly endorsed the Court's suggestions for reform of its working methods and encouraged it to adopt additional measures aimed at expediting its proceedings.[24] In October 2001, for the first time, the Court adopted with immediate effect six 'Practice Directions' for use by the States appearing before it. These Directions indicate something that the Court requires the parties to do, not that it requests them to do.[25] As a result of the Practice Directions, the Court reissued and amended its 'Note containing recommendations to the parties to new cases' and renamed it 'Note containing important information for parties to new cases'.[26]

**13** In April 2002, the Court having determined that, in order to deal with its present caseload, it must take additional steps to enable it to increase the number of decisions it renders each year, amended the original Practice Directions and promulgated three further Directions.[27] Additional amendments to the Practice Directions were made in July 2004 when the Court modified Practice Direction V and promulgated new Practice Directions X, XI, and XII.[28] Moreover, it sought better compliance by States with its previous decisions aimed at accelerating the procedure and announced that it intended to apply those 'more strictly'.[29] The Court also put in place a mechanism for reviewing these directions at regular intervals.[30]

**14** In December 2006 and January 2009, as part of the ongoing review of its procedure and working methods, the Court revised Practice Directions III, VI, IX, and XI and adopted new Practice Directions IX*bis*, IX*ter*, and XIII.[31] Most recently, on 21 March 2013, the Court adopted a new Practice Direction IX*quater* concerning the presentation of audio-visual or photographic material at the hearings.[32]

**15** Similarly to the Rules of Court, the Practice Directions derive their authority from Article 30 of the Statute.[33] The Rules themselves do not mention the Practice Directions

[22] ICJ Press Release No. 98/14 of 6 April 1998, Annex; and *ICJ Yearbook* (1997–1998), pp. 284–6.

[23] ICJ Press Release No. 2001/1 of 12 January 2001; *ICJ Yearbook* (2000–2001), p. 196.

[24] GA Res. 54/108 (1999), para. 2.

[25] Higgins, *ICLQ* (2001), p. 124; but see *ILC Yearbook* (2002), vol. I, p. 190, para. 29 (recording President Guillaume as stating that 'practice directions were in the nature of recommendations. If the parties failed to heed those recommendations, they were entitled to do so').

[26] ICJ Press Release No. 2001/32 of 31 October 2001, Annex.

[27] ICJ Press Release No. 2002/12 of 4 April 2002. *Cf.* also Rosenne, *LPICT* (2002), pp. 223–45; Watts, 'New Practice Directions of the International Court of Justice', *LPICT* 1 (2002), pp. 247–56.

[28] *ICJ Yearbook* (2003–2004), pp. 3–4.

[29] ICJ Press Release No. 2004/30 of 30 July 2004. *Cf.* also Watts, 'The ICJ's Practice Directions of 30 July 2004', *LPICT* 3 (2004), pp. 385–94.

[30] *Cf.* Speech by President Guillaume to the UN General Assembly, UN Doc. A/56/PV.32 (2001), p. 8.

[31] *Cf.* ICJ Press Releases No. 2006/43 of 16 December 2006 and No. 2009/8 of 30 January 2009. *Cf.* also Rosenne, *LPICT* (2009), pp. 171–80. For a suggestion to integrate the Rules, Notes and Practice Directions in one document, *cf.* Yee, 'Notes on the International Court of Justice (Part 3)', *Chinese JIL* 8 (2009), pp. 681–94.

[32] ICJ Press Release 2013/6 of 11 April 2013. See further *infra*, MN 129–131.

[33] See Thirlway on Art. 30 MN 11; *cf.* also Kolb, *ICJ*, p. 104.

and the legal relationship between the two sources has been the subject of some controversy.[34] It has been argued that in cases of inconsistency between the Rules and a Practice Direction, the Direction 'might be taken to express the more recent will of the Court', suggesting that the newer Direction ought to prevail.[35] However, it is submitted that it is more accurate to view the Practice Directions as subordinate to the Rules. Notably, at the time the first six Practice Directions were announced, the Court expressly noted that they 'involve no alteration to the Rules of Court, but are additional thereto'.[36] Indeed, if the Court wished to issue a Practice Direction that was incompatible with the Rules, it should alter the Rules first.[37] Where no amendment has been made, the Practice Directions should be interpreted to the maximum extent possible in such a manner so that any construction that would result in an incompatibility with the Rules is avoided.

## C. Procedure in the Principal Proceedings on the Merits

### I. Introduction

Article 43, para. 1 prescribes that the procedure before the Court consists of 'two parts: written and oral'. Both parts are mandatory and cannot be dispensed with by the Court, whether acting *proprio motu* or with the consent of the parties. Admittedly, each part has its relative advantages, which may make one or the other more attractive to the parties in a given case. To name a few, while the written stage allows the States to present their argument in great detail, the oral proceedings provide them with their 'day in court' and a chance to produce evidence through witnesses and experts.[38] In view of that, the parties are certainly free to lay greater emphasis on one of the two stages if they wish to do so.[39] However, even assuming that both parties would agree to dispense with one of the procedural stages, doing so would involve a breach of an express statutory requirement, and thus could not be implemented even on the basis of the exceptional procedure foreseen by Article 101 of the Rules.[40] Accordingly, suggestions to that effect by the parties have not been acted upon by the Court.[41] In sum, in order to give the Court more flexibility in this regard, it would be necessary to amend the Statute.[42] **16**

However, Article 43 only applies to the principal proceedings on the merits before the full Court.[43] According to the Rules of Court and the Court's practice, oral proceedings **17**

[34] *Cf.* Watts, *supra*, fn. 27, p. 255; Pellet, *LPICT* (2006), p. 178; Rosenne, 'International Court of Justice', *Max Planck EPIL*, MN 76; Kolb, *ICJ*, p. 105; Thirlway, *ICJ*, p. 73.

[35] Thirlway, *ICJ*, p. 73.

[36] ICJ Press Release No. 2001/32 of 31 October 2001.

[37] *Cf.* Kolb, *ICJ*, p. 105. The relationship between the sources can thus be described as a 'triple hierarchy [ … ]: Statute – Rules—Practice Directions.' (*Ibid.*).

[38] *Cf.* Jennings, *BYIL* (1997), p. 14; Watts, *Max Planck UNYB* (2001), pp. 25–9; Quintana, *ICJ Litigation*, p. 185; Shaw, *Rosenne's Law and Practice*, vol. III, p. 1325.

[39] *Cf.* Quintana, *ICJ Litigation*, pp. 184–5.

[40] *Cf. Free Zones*, Order of 19 August 1929, PCIJ, Series A, No. 22, pp. 5, 12 ('in contradistinction to that which is permitted by the Rules (Art. 32 [now Art. 101]), the Court cannot, on the proposal of the Parties, depart from the terms of the Statute'). *Cf.* also Scerni (1938), pp. 561, 597–9; Dubisson, *CIJ*, p. 219. *Contra* Hudson, *PCIJ*, p. 552; Thirlway, *ICJ*, pp. 74–5.

[41] *Cf. e.g.*, *Haya de la Torre*, Pleadings, p. 210. For further examples *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, p. 1330, fn. 13; Quintana, *ICJ Litigation*, pp. 184–5.

[42] *Cf.* Kolb, *ICJ*, pp. 972–3.

[43] *Cf.* Rosenne, *AJIL* (2000), pp. 307–17.

are not required in proceedings before a Chamber;[44] in incidental proceedings concerning the indication of provisional measures *proprio motu*,[45] preliminary objections,[46] the admissibility of counter-claims,[47] the question whether the Court or a Chamber should decide on an application for permission to intervene,[48] and, with some qualification, applications for permission to intervene or declarations of intervention;[49] in proceedings determining the amount of compensation;[50] in proceedings on the revision or interpretation of a judgment;[51] or in advisory proceedings.[52] As these examples demonstrate, the principle of *audiatur et altera pars* can be complied with by the Court not just by holding oral proceedings but also by giving the parties an opportunity to present their views to the Court in writing or, in exceptional cases, orally in meetings with the President.[53]

## II. Written Proceedings

### *1. Organization of Written Proceedings*

**18** The primary function of the written proceedings is to lay all the relevant facts and law before the Court together with all the supporting evidence.[54] They are regulated in broad lines in

[44] Art. 92, para. 3 of the Rules. *Cf. Treaty of Neuilly*, *Article 179*, *Annex*, *Paragraph 4*, Judgment, PCIJ, Series A, No. 3, pp. 5 *et seq*.

[45] Art. 75, para. 1 of the Rules. *Cf. LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 14, para. 21. But *cf.* also *ibid*., Sep. Op. Schwebel, ICJ Reports (1999), p. 21 (expressing reservations about this practice). *Cf.* further Oellers-Frahm/Zimmermann on Art. 41 MN 60–61.

[46] Art. 79, para. 6 of the Rules.

[47] Art. 80, para. 3 of the Rules. *Cf. Jurisdictional Immunities of the State*, Order of 6 July 2010, ICJ Reports (2010), pp. 310, 313, para. 7, but *cf.* also *ibid*., Diss. Op. Cançado Trindade, pp. 329, 389, para. 154; *ibid*., Decl. Judge *ad hoc* Gaja, p. 398 (both arguing for a public hearing); *Armed Activities* (DRC v. Uganda), Order of 29 November 2001, ICJ Reports (2001), pp. 660, 676, para. 26; *Oil Platforms*, Counter-Claim, ICJ Reports (1998), pp. 190, 203, para. 31; but *cf.* also *ibid*., Sep. Op. Oda, pp. 208, 215 (questioning the practice of not having oral hearings); *Bosnian Genocide*, Counter-Claims, ICJ Reports (1997), pp. 243, 256, para. 25; but *cf.* also *ibid*., Decl. Kreća, pp. 262, 267; *ibid*., Sep. Op. Koroma, pp. 272, 276; *ibid*., Sep. Op. Lauterpacht, pp. 278, 278–80.

[48] *Land*, *Island and Maritime Frontier Dispute*, Application for Permission to Intervene, Order of 28 February 1990, ICJ Reports (1990), pp. 3, 4. *Cf.* also Zimmermann, 'Bemerkungen zum Verhältnis von ad hoc Kammern des Internationalen Gerichtshofes und Intervention—Die Entscheidung im Streitfall vor dem IGH zwischen El Salvador und Honduras (Land, Island and Maritime Frontier Dispute)', *ZaöRV* 50 (1990), pp. 646–60.

[49] Art. 84, para. 2 of the Rules. *Cf. Jurisdictional Immunities of the State*, Application for Permission to Intervene, ICJ Reports (2011), pp. 494, 496, para. 6; *Nicaragua*, Declaration of Intervention of the Republic of El Salvador, ICJ Reports (1984), pp. 215, 216. But *cf. ibid*., Sep. Op. Ruda, Mosler, Ago, Jennings, de Lacharrière, ICJ Reports (1984), p. 219, para. 4; *ibid*., Sep. Op. Oda, ICJ Reports (1984), p. 220; *ibid*., Diss. Op. Schwebel, Reports (1984), pp. 223, 231 who all criticized the Court for not holding a hearing. *Cf.* also the separate opinion of Judge Lachs who, retrospectively, considered the denial of a hearing to El Salvador a 'judicial error' (*Nicaragua*, Merits, Sep. Op. Lachs, ICJ Reports (1986), pp. 158, 170–1).

[50] *Cf. Diallo*, Merits, ICJ Reports (2010), pp. 639, 691–2, para. 164; *Certain Activities Carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665, 717–8, para. 142. However, oral hearings were held on the question of compensation in the *Corfu Channel* case: Judgment, ICJ Reports (1949), pp. 244, 246.

[51] Art. 98, para. 4 and Art. 99, para. 4 of the Rules. *Cf. Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281, 288–7, para. 7; *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 6, para. 8; *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31, 33, para. 5. But *cf.* also *ibid*., Diss. Op. Ajibola, ICJ Reports (1999), pp. 54–6. See further Shaw, *Rosenne's Law and Practice*, vol. III, p. 1680.

[52] *Cf.* Art. 68 of the Statute; *cf.* also *e.g.*, *ILO Administrative Tribunal Judgment No. 2867*, Advisory Opinion, ICJ Reports (2012), pp. 10, 30, para. 45; *cf.* further Thirlway, *ICJ*, pp. 74–5.

[53] *Cf. LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 13, para. 12.

[54] Rosenne, *LPICT* (2009), p. 177; Lauterpacht, *Rec. des Cours* (2009), p. 517.

Article 43, paras. 2, 3, and 4 of the Statute, and, in detail, in Articles 44–53 of the Rules of Court and in Practice Directions I–IV, IX, IX*bis*, and XII.

**a) Beginning of Written Proceedings**

**19** In contrast to the oral part of the procedure before the Court, the Rules do not expressly provide for a formal opening of the written proceedings.[55] Therefore, the written part of the procedure in contentious cases commences when the Court, having consulted with the parties in accordance with Article 31 of the Rules, makes the first order in the case, normally fixing the time limit for the submission of the first pleadings.[56] The moment of the beginning of the written proceedings should be distinguished from the act instituting the proceedings.[57] When an instrument instituting the proceedings (whether an application or a special agreement) is filed with the Court, the Court becomes thereby formally 'seised' of the case.[58] However, this document is not yet part of the written proceedings.[59] Conversely, all communications between the Court, the parties to the case, and, on occasion, other subjects, inclusive of and following the Court's first order in the case form part and parcel of the written part of the procedure until the moment of its closure.

**b) Closure of Written Proceedings**

**20** The closure of the written proceedings is an important break in the procedure.[60] The Rules of Court contain several provisions which establish the 'closure of the written proceedings' as the point after which certain actions are precluded;[61] and the case is thereafter considered ready for hearing (*en état*).[62] The Court, as a rule, does not formally declare the closure of the written proceedings in an Order.[63] As pointed out by Judge Weeramantry: 'Closure of written proceedings is thus a *de facto* situation that arises when the written proceedings are for practical purposes understood to be closed.'[64] The written proceedings come to a close for all 'practical purposes' when it is clear that there will be no further rounds of pleadings,[65] *i.e.*, with the filing of the last pleading within the time limit prescribed by the Court, or after the expiration of the time limit, if the Court decides that the filing shall be considered as valid.[66] If no pleading is filed by a party because

[55] *Cf.* Art. 54, para. 1 of the Rules.

[56] *Cf.* Kolb, *ICJ*, p. 958; Quintana, *ICJ Litigation*, p. 298.

[57] *Cf.* also Yee on Art. 40 MN 19.

[58] Kolb, *ICJ*, p. 179.

[59] This is reflected in the structure of the Rules, which contain a separate subsection entitled 'Institution of Proceedings' immediately preceding the subsection dedicated to 'The Written Proceedings'. *Cf.* Part III, Section C, Subsections 1 and 2 of the Rules. In practice, the Court also distinguishes between the instrument instituting proceedings and the written proceedings that follow: *cf. e.g.*, *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 24–5, paras. 49–50.

[60] On the closure of the written proceedings, see Quintana, *ICJ Litigation*, pp. 324–7; Quintana, *LPICT* (2008), pp. 193–203.

[61] *Cf.* Art. 9, para. 1, Art. 17, para. 1, Art. 37, para. 3, Art. 43, para. 3, Art. 56, para. 1, Art. 69, para. 2, Art. 81, para. 1 of the Rules.

[62] Art. 54, para. 1 of the Rules; *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, p. 1304.

[63] But *cf.* ICJ Press Release 2012/18 of 18 May 2012 (noting that because the Court had decided that another round of pleadings was not necessary, '[t]he written proceedings in the case are accordingly closed').

[64] *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Sep. Op. Weeramantry, ICJ Reports (2001), pp. 630, 650, para. 42.

[65] Quintana, *ICJ Litigation*, p. 327.

[66] *ICJ Yearbook* (1971–1972), p. 113. *Cf.* also PCIJ, Series D, third addendum to No. 2, pp. 117, 613–15.

it declines to take part in the proceedings, the written proceedings come to a close with the expiration of the time limit fixed for the filing of that party's (last) pleading.[67] The same applies if the Court does not accept a party's plea of *force majeure* as justifying its abstention from presenting a pleading.[68]

**21** If a special agreement provides for the number and order of pleadings to be exchanged but, in addition, includes a provision for a possible further exchange of pleadings (if authorized or directed by the Court), the date of the closure of the written proceedings remains to be finally determined by a decision of the Court after ascertaining the views of the parties.[69] The same is true in cases instituted by application, where the Court authorizes or directs the filing of a first, second, or third round of pleadings but 'reserves the subsequent procedure for further decision'. This decision will not normally be rendered in the form of an order of the Court,[70] unless a new time limit for a further pleading is fixed, or the Court, contrary to the wishes of one or both parties, decides not to authorize the filing of further written pleadings.[71] In the latter case, the Order of the Court marks the closure of the written proceedings.[72]

**22** After the closure of the written proceedings, the judges may hold a deliberation, at which they exchange views concerning the case, and decide on any point with respect to which they consider it may be necessary to call for explanations during the oral proceedings.[73] This deliberation effectively enables the Court to identify any issue on which it would like additional explanation or clarification in the next part of the procedure. Therefore, once it has completed its deliberation, the Court communicates its queries to the parties, in order to guide their oral presentations towards providing the further information needed by the Court at the hearings.[74] As noted by President Tomka in October 2014, the Court has made increasing use of this procedure, which may be 'particularly useful' in cases with a complex factual background or those with a high scientific content.[75]

[67] *Cf. Corfu Channel*, Judgment, ICJ Reports (1949), pp. 244, 246; *Fisheries Jurisdiction* (UK v. Iceland), Jurisdiction, ICJ Reports (1973), pp. 3, 5, para. 5; *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 255, para. 6 and pp. 457, 459, para. 6; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 5, para. 7; *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 5, para. 5.

[68] *Cf. The Electricity Company of Sofia and Bulgaria*, Order of 26 February 1940, PCIJ, Series A/B, No. 80, pp. 4, 8–9; and Sixteenth Report, PCIJ, Series E, No. 16, p. 181.

[69] *Gabčíkovo–Nagymaros*, Judgment, ICJ Reports (1997), pp. 7, 13, para. 6; *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 98, para. 12; *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 7, para. 5; *Continental Shelf* (Libya/Malta), Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 6, para. 5; *Frontier Dispute* (Burkina Faso/Republic of Mali), Judgment, ICJ Reports (1986), pp. 554, 559, para. 11.

[70] *Cf. Pedra Branca*, CR 2007/20, 6 November 2007, p. 14, where the Vice-President summarizing the principal steps of the procedure stated that the Court, having regard to the views of the parties, 'decided that no further written pleadings were necessary and that the written proceedings in the case were thus closed'.

[71] *Cf. Fisheries Jurisdiction* (Spain v. Canada), Order of 8 May 1996, ICJ Reports (1996), pp. 58, 58–9.

[72] *Cf. ibid.*, Jurisdiction, ICJ Reports (1998), pp. 432, 436, para. 6; *cf.* also Quintana, *ICJ Litigation*, p. 327.

[73] Art. 1 (i) of the Resolution Concerning the Internal Judicial Practice of the Court (Rules of Court, Article 19), adopted on 12 April 1976.

[74] *Cf.* Speech by President Tomka to the Sixty-Ninth Session of the General Assembly, 30 October 2014, p. 7.

[75] *Ibid*. Recent cases, in which the Court held such a deliberation, include the *Whaling in the Antarctic* case and the *Aerial Herbicide Spraying* case.

## *2. The Pleadings*

### a) Meaning

The term 'pleadings' used in Article 39, para. 2 of the Statute includes both written and oral pleadings. In the Rules of Court the term refers to the written arguments of the parties presented to the Court.[76] The term 'written pleadings' is used in the Rules of Court only once.[77] However, the Practice Directions distinguish between 'written pleadings' and 'oral pleadings'.[78] As it is used in the scope of the written proceedings before the Court, the term 'pleadings' refers to the parties' submissions of fact and law made in writing.[79] The pleadings in the principal proceedings include the initial pleadings (memorial and counter-memorial), the further pleadings (reply and rejoinder), and the additional pleadings. Parties in the same interest may file common pleadings.[80] **23**

The pleadings of the parties must be distinguished from the 'written statement' of the intervening State and the 'written observations on that statement' by the parties[81] as well as from the 'observations in writing' that may be submitted by an international governmental organization under Article 69, para. 3 of the Rules of Court.[82] **24**

### b) Types of Pleadings

#### *aa) Memorial*

The memorial is the first pleading submitted in the written proceedings. It is filed by the applicant or, in cases begun by notification of a special agreement, by both parties.[83] When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it must also do so in the form of a memorial.[84] The fact that a party chooses to call its application, or parts thereof, a 'Memorial' cannot change its legal character as application.[85] **25**

The Rules of Court and the Court's Practice Directions indicate to the parties what to include in the different pleadings. A memorial shall contain: **26**

(1) a statement of the relevant facts on which the claim is based;
(2) a statement of law;

[76] Art. 26, para. 1 (d) (i), Art. 44, para. 1, Art. 45, paras. 1, 2, Art. 46, paras. 1, 2, Art. 49, para. 4, Arts. 50, 51, 52, 53, para. 2, Art. 60, para. 1, Art. 79, paras. 1, 3, 7, Art. 80, para. 1, Art. 85, paras. 1, 2, Art. 86, para. 1, Art. 92, paras. 1, 2 of the Rules.

[77] Art. 80, para. 2 of the Rules.

[78] *Cf.* Practice Directions II, III, IX*bis*, IX*ter* ('written pleadings') and VI, XI ('oral pleadings'). Up to 25 September 2007, when the Court launched its new website, the Court's website also distinguished between 'written pleadings' and 'oral pleadings'. Today, the distinction is between 'written proceedings' and 'oral proceedings'.

[79] *Cf.* also Kolb, *ICJ*, p. 959.

[80] *Cf. North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), ICJ Pleadings, vol. I, pp. 453–580, where Denmark and the Netherlands filed a common rejoinder. *Cf.* also *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 287, para. 19, where the respondent States jointly filed a single bundle of further documents without prejudice to the separate identity of each case and the respondents' position that they were not parties in the same interest.

[81] *Cf.* Art. 85, para. 1 and Art. 86, para. 1 of the Rules.

[82] Observations were submitted, *e.g.*, by the ICAO in *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. United States of America), Order of 22 February 1996, ICJ Reports (1996), pp. 9, 10. For further information on 'observations in writing' by international organizations *cf.* Dupuy/Hoss on Art. 34 MN 10–17.

[83] *Cf.* Arts. 45, para. 1 and 46, para. 2 of the Rules.

[84] Art. 69, para. 2 of the Rules.

[85] *Cf. Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 585–6, para. 1, and Merits, ICJ Reports (2010), pp. 639, 645, para. 1.

(3) a short summary of the reasoning (in case of a single pleading by each party);[86]
(4) a statement of the party's submissions;
(5) a signed list of every document in support of the arguments set forth: these documents shall be attached to the memorial.[87]

The memorial gives the party's version of the facts and law in narrative form and need not offer any evidence in support of the facts stated.[88] This becomes clear from the fact that the other party may, in its counter-memorial, admit or deny the facts stated. Only facts denied will have to be proved by the party relying on them,[89] and even this does not seem to be an absolute rule.[90] The Court does not engage in fact-finding 'as an end in itself'.[91]

**27** The memorial is of considerable importance, not just because it expounds the applicant's arguments but also because it specifies the submissions.[92] The submissions, a concept borrowed from civil law systems, are a concise statement of what precisely the party is asking the Court to adjudge and declare, *i.e.*, a complete formal statement of the desired operative part of the judgment (*petitum*). They should not contain any reasoning or abstract propositions of law.[93] Alternative and subsidiary submissions may be presented.[94] The submissions of the memorial, though they may elucidate the terms of the application, must not go beyond the limits of the claim as developed therein.[95] The submissions set out in the memorial are not final and may be modified by the party up to the end of the oral proceedings (without, however, extending or transforming the subject-matter of the dispute).[96] Changes in the submissions through the written and oral proceedings may be of importance in interpreting the party's 'final submissions'. The submissions define the scope of the claim and the framework within which the Court must reach its decision.[97] It is 'the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those

[86] *Cf.* Practice Direction II, para. 2. *Cf.* also ICJ Press Release No. 98/14 of 6 April 1998, Annex, para. 3(B): 'any summary of the reasoning of the parties at the conclusion of the written proceedings would be welcome'.

[87] *Cf.* Art. 49, paras. 1 and 4, Art. 50 of the Rules; and Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 1.

[88] Lauterpacht, *Rec. des Cours* (2009), pp. 517–8. But *cf.* the French argument in the *Legality of Use of Force* case (Serbia and Montenegro v. France), Preliminary Objections of the French Republic, 5 July 2000, p. 3, para. 18.

[89] *Cf. e.g.*, *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 71, para. 162.

[90] *Cf. Diallo*, Merits, ICJ Reports (2010), pp. 639, 660–1, paras. 54–6; *Pulp Mills*, Judgment, ICJ Reports (2010) pp. 14, 71, para. 163. On the burden of proof in general, *cf.* Mawdsley, in Macdonald (1994), pp. 537–9; Benzing, Evidentiary Issues, MN 34–50.

[91] Shaw, *Rosenne's Law and Practice*, vol. III, p. 1375.

[92] *Cf. Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 443–4, para. 90.

[93] Fitzmaurice, *Law and Procedure*, vol. II, pp. 579–81. On the submissions in general, *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1262–9.

[94] *Cf. e.g.*, *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 152, paras. 516–9, where both alternative and subsidiary submissions were presented by the respondent in the counter-claim.

[95] *Cf. Diallo*, Merits, ICJ Reports (2010), pp. 639, 656, para. 39.

[96] *Cf. Croatian Genocide*, Merits, ICJ Reports (2015), pp. 3, 54–5, para. 109; *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 664–5, paras. 108–11; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659, 695, para. 108; *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 265–7, paras. 63–71; *Norwegian Loans*, Preliminary Objections, Diss. Op. Read, ICJ Reports (1957), pp. 9, 80–1; *Socobel*, Judgment, PCIJ, Series A/B, No. 78, pp. 160, 173.

[97] *Cf.* Quintana, *ICJ Litigation*, pp. 312–3.

submissions'.[98] While the Court is not entitled to decide upon questions not asked of it, the *non ultra petita* rule cannot preclude it from addressing certain legal points in its reasoning[99] or from interpreting the submissions of the parties.[100] However, the Court has not always stayed within the parameters of the submissions.[101] Although this indicates that the Court has considerable leeway in this regard, in any event it may not overstep the scope of the instrument on which its jurisdiction is based.[102]

*bb) Counter-Memorial*

**28** The counter-memorial is the second pleading presented in the written proceedings. It is filed by the respondent or, in cases begun by notification of a special agreement, by both parties.[103] When drawing up its counter-memorial, a party has to bear in mind that this pleading is intended not only to respond to the arguments and submissions of the other party, but also, and above all, to present clearly its own arguments and submissions.[104] A counter-memorial shall contain:

(1) the admission or denial of the facts stated in the memorial;
(2) a statement of additional facts, if any;
(3) observations concerning the other party's statement of law and a statement of law in answer thereto;
(4) a statement of law concerning counter-claims, if any;
(5) a short summary of the reasoning (in case of a single pleading by each party);
(6) a statement of the party's submissions, including any counter-claims;
(7) a signed list of documents in support of the arguments set forth: these documents shall be attached to the counter-memorial.[105]

*cc) Reply and Rejoinder*

**29** The 'further pleadings'[106] presented in the written proceedings are the reply and rejoinder. They shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them.[107] With respect to their substance, the reply and the rejoinder are considered subordinate to the memorial and the counter-memorial, respectively.[108] They shall contain:

(1) the admission or denial of the facts stated in other party's preceding pleading;
(2) a statement of additional facts, if any;

[98] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 402. But see *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 28 (a submission that is not reproduced in the final submissions may nonetheless 'thr[o]w light upon the intention of the [other submissions]').

[99] *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 18–9, para. 43.

[100] *Cf. e.g.*, *Nuclear Tests* (Australia v. France; New Zealand v. France), Merits, ICJ Reports (1974), pp. 253, 262–3, para. 29 and pp. 457, 466–7, para. 30. *Cf.* also Quintana, *ICJ Litigation*, pp. 369–70.

[101] *Cf. e.g.*, *Kasikili/Sedudu Island*, Judgment, ICJ Reports (1999), pp. 1045, 1108, para. 104 (the third operative paragraph of the judgment was neither contained in the submissions of the parties nor addressed during oral argument); *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 218, para. 125 (the Court's finding on 'the international use of force' in the first operative paragraph was not contained in Iran's submissions).

[102] Thirlway, *ICJ*, p. 85.

[103] *Cf.* Art. 45, para. 1 and Art. 46, para. 2 of the Rules.

[104] *Cf.* Practice Direction II, para. 1. *Cf.* also ICJ Press Release No. 98/14 of 6 April 1998, Annex, para. 3(B).

[105] *Cf.* Art. 49, para. 2, Art. 50, Art. 80, para. 2 of the Rules.

[106] *Cf.* Art. 92, para. 2 and Art. 80, para. 2 of the Rules.

[107] Art. 49, para. 3 of the Rules. *Cf.* also ICJ Press Release No. 2002/12 of 4 April 2002.

[108] *Cf.* Quintana, *ICJ Litigation*, p. 302.

(3) observations concerning the other party's statement of law (including the statement concerning any counter-claims) and a statement of law in answer thereto;
(4) a short summary of the reasoning;
(5) a statement of the party's submissions or a confirmation of the submissions previously made;
(6) a signed list of documents in support of the arguments set forth: these documents shall be attached to the reply or rejoinder.[109]

*dd) Additional Pleadings*

**30** If the Court entertains a counter-claim made by a party in its counter-memorial, the other party is entitled to present, 'within a reasonable period of time',[110] its views in writing on the counter-claim in an additional pleading, irrespective of whether the Court authorized or directed that there shall be a reply by the applicant and a rejoinder by the respondent dealing with the claims of both parties.[111] An additional pleading is necessary 'in order to ensure the strict equality between the Parties'.[112] A counter-claim is more than a mere defence on the merits; it pursues objectives beyond the dismissal of the principal claim and to this extent it constitutes a separate claim.[113] It must, however, be 'sufficiently connected to the principal claim' both from a factual and legal perspective.[114] The respondent to the counter-claim, *i.e.*, the original applicant, would in general have only one opportunity (in its reply) to state its position on the counter-claim, whereas the respondent to the principal claim had the opportunity to address that claim both in its counter-memorial and in its rejoinder. Accordingly, Article 80, para. 2 of the Rules provides for the right of the respondent to the counter-claim to file an additional pleading.

**31** Any additional pleading must be strictly limited to presenting the party's views on the counter-claims, and must not serve as a vehicle for presenting additional material or argument concerning its own claims. The additional pleading must also include a short summary of the reasoning and submissions distinct from the arguments presented.[115]

**32** Although not expressly foreseen in either the Statute or the Rules, other 'additional pleadings' (apart from those necessitated by counter-claims) are not, in principle, excluded. Article 43 of the Statute simply speaks of 'replies', thereby leaving open the possibility of the Court authorizing or directing the submission of an additional round of pleadings after the filing by the parties of replies and rejoinders. The parties may also

[109] Art. 49, paras. 2 and 3 of the Rules and Practice Direction II, para. 2.

[110] *Land and Maritime Boundary*, Order of 30 June 1999, ICJ Reports (1999), pp. 983, 986. This requirement seems necessary in order not to prolong proceedings unduly. On the 'question of delay', *cf.* Thirlway, *Leiden JIL* (1999), pp. 197–229, 223–4.

[111] An additional pleading was filed in the *Land and Maritime Boundary*, *Oil Platforms*, *Armed Activities* (DRC v. Uganda) and *Croatian Genocide* cases.

[112] *Cf. Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), pp. 243, 260, para. 42; *Land and Maritime Boundary*, Order of 30 June 1999, ICJ Reports (1999), pp. 983, 986; *Oil Platforms*, Judgment, ICJ Reports (1998), pp. 190, 206, para. 45; *Armed Activities* (DRC v. Uganda), Order of 29 November 2001, ICJ Reports (2001), pp. 660, 681–2, para. 50.

[113] *Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), pp. 243, 256, para. 27. For an analysis of the Court's practice regarding counter-claims *cf.* Murphy, Counter-Claims, *passim*.

[114] *Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), pp. 243, 258, para. 33; *Certain Activities carried out by Nicaragua in the Border Area*, Order of 18 April 2013, Decl. Guillaume, ICJ Reports (2013), p. 217, para. 4. For recent examples of application of the 'direct connection' test, see, *e.g.*, *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 59–60, paras. 120–3; *Caribbean Sea*, Counter-Claims, Order of 15 November 2017, paras. 22–55.

[115] *Cf.* Practice Direction II, para. 2.

agree on the submission of such additional pleadings.[116] In case of consecutive pleadings, these additional pleadings would constitute the third round; in case of simultaneous pleadings, they would constitute the fifth round. In exceptional circumstances, such as the lapse of several years between the filing of the last written pleadings and the opening of the oral proceedings or the occurrence of major new developments, such additional pleadings may serve a useful purpose to update the Court on these developments and to present new material and documents.[117] This may ultimately contribute to making the oral proceedings more effective and less time-consuming.

**c) Content of Pleadings**

33 The Statute of the Court contains little guidance with respect to the content and structure of pleadings.[118] The content of the pleadings is normally a very subjective matter, determined by the claims and relevant facts advanced, and the objections raised by the parties. The whole purpose of the pleadings is to make available to the Court all the information on fact and law that the Court needs to decide the case. Although the Court knows, or is supposed to know, the law (*jura novit curia*), a substantial part of the pleadings will nevertheless usually refer to the rules of international law that, in the view of the parties, apply to the particular case.[119] The Court may, taking account of the views of the parties, decide on the content of particular pleadings.[120] It has also reminded the parties that it is necessary for the Court to be informed in the pleadings of all the contentions and evidence of fact and law on which they want to rely.[121] Generally, pleadings should not merely be reactive in the sense that they reply to the submissions and arguments of the other party, but they should set out in a clear, positive, and proactive way the party's own submissions and arguments.[122] It has been suggested that the Court should play a more active role in the interlocutory phase of a case and give an indication to the parties, as early as the second round of the written pleadings, of what it considers at that stage to have been adequately argued and on what points it would like to have further argument.[123] There is, however, a danger that such interlocutory indications would be seen by the parties as prejudging the outcome of the case.

**d) Formal Requirements of Pleadings**

*aa) Language and formatting*

34 The Rules of Court are silent on the formal requirements of pleadings apart from specifying that all pleadings shall be dated.[124] Instead, a footnote to Article 52 provides that

[116] *Cf.* Art. 101 of the Rules. *Cf.* also *Certain Criminal Proceedings in France*, Order of 16 November 2009, ICJ Reports (2009), pp. 304, 306.

[117] *Ibid. Cf.* also *Pulau Ligitan* case, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 579–80, para. 4, where the Court speaks of a 'fourth pleading'; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 47–8, para. 24, where the Court did not dismiss outright the possibility of additional pleadings. But *cf.* also the *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 56, para. 35, where the Court decided not to authorize the filing of further written pleadings.

[118] *Cf.* Rosenne, *LPICT* (2009), p. 173.

[119] *Cf.* Mawdsley, in Macdonald (1994), p. 537; Thirlway, *ICJ*, pp. 32–3.

[120] *Cf. Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 300 (deciding that the written pleadings first be addressed to the question of jurisdiction).

[121] *Cf. Armed Activities* (DRC v. Rwanda), Order of 21 October 1999, ICJ Reports (1999), pp. 1025, 1026.

[122] *Cf.* Practice Direction II, para. 1.

[123] *Cf.* Rosenne, *LPICT* (2009), pp. 171, 178–9.

[124] Art. 52, para. 2 of the Rules.

the agents of the parties are requested to ascertain from the Registry the usual format of the pleadings.[125] In order to ensure the uniformity in the presentation of the pleadings, both printed and electronic, the pleadings must be readily legible, easy to handle, and presented in the 19 cm × 26 cm format.[126] Further formal requirements for pleadings submitted in printed form are set out in a detailed, twenty-one-page document entitled 'Rules for the Preparation of Typed and Printed Texts'. These specify, *inter alia*, the size of type, typeface, the kind and colour of paper and cover, the layout, headings and subheadings, quotations, footnotes, references, italics, abbreviations, numbers and dates, spelling, divisions, and the use of capitals.

**35** Article 43, para. 3 of the Statute requires that all communications between the parties, including the pleadings, 'shall be made through the Registrar'.[127] The pleadings (and annexed documents) must be submitted in one of the Court's two official languages, either French or English, or in a combination thereof.[128] Where a party has a full or partial translation of its own pleadings or of those of the other party in the other official language of the Court, these translations should as a matter of course be passed to the Registry of the Court.[129] If the parties agree that the written proceedings shall be conducted wholly in one of the two official languages, the pleadings must be submitted only in that language.[130] If the Court has, at the request of a party, authorized a language other than French or English to be used by that party, a translation into French or English certified as accurate by the party submitting it, shall be attached to the original of each pleading.[131] All translations provided by the parties are subject to examination by the Registry.

**36** It is the Registrar's task to ensure compliance with the formal requirements of the pleadings. Any formal defects in a pleading are brought by the Registrar to the notice of the party from whom it emanates.[132] The Court tends to 'take a broad view' on matters of form.[133] It has been held that the 'Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law'.[134] If the pleadings filed are incomplete or do not meet the formal requirements, the Court, after giving the other party an opportunity to state its views, usually allows the party to rectify the pleadings.[135]

[125] Art. 52 of the Rules (and note 1 thereto).

[126] Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 5.

[127] *Cf.* also PCIJ, Series D, third addendum to No. 2, p. 825, noting that this formula was chosen 'to provide a buffer between the parties'.

[128] *Cf.* Art. 39, para. 1 of the Statute and further Kohen on Art. 39 MN 24–27.

[129] Practice Direction IV. *Cf.* also ICJ Press Release No. 98/14 of 6 April 1998, Annex, para. 3(D).

[130] *E.g.*, in the *Asylum* case, the *Frontier Dispute* cases (Burkina Faso/Republic of Mali), (Benin/Niger) and (Burkina Faso/Niger) the language chosen was French, in the *Kasikili/Sedudu Island* case the language chosen was English. For further information on the choice of one specific language by agreement of the parties *cf.* Kohen on Art. 39 MN 29–31.

[131] Art. 51, paras. 1 and 2 of the Rules. *Cf.* further Kohen on Art. 39 MN 36–40.

[132] *Cf.* Art. 12 of the Instructions for the Registry (as drawn by the Registrar and approved by the Court on 20 March 2012).

[133] *Cf. Socobel*, Judgment, PCIJ, Series A/B, No. 78, p. 160, 173.

[134] *Cf. The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 34; repeated, *inter alia*, in *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27–8; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 613–4, para. 26.

[135] *Cf. ICJ Yearbook* (2001–2002), p. 296. *Cf.* also the Ninth Annual Report, PCIJ, Series E, No. 9, p. 167.

*bb) Length*

In complex cases a lengthy treatment of the facts and law is necessary. But in the ICJ the length of presentation often seems to be perceived by the parties as a virtue in itself.[136] The average memorial, counter-memorial, reply, and rejoinder runs between 150 and 300 pages. Pleadings of less than fifty pages are a rare exception.[137] More likely, pleadings are several hundred pages long. There have even been single pleadings of 1,000 pages and more.[138] On average, judges have to work their way through roughly 1,000 pages of pleadings per case (excluding any annexes). However, there have been several cases where the Court faced more than 2,500 pages of pleadings alone (as well as several thousand pages of annexes).[139] It is thus not surprising that there have been calls to limit the volume of pleadings.[140] In January 2009, the Court included a new paragraph in its Practice Direction III urging the parties strongly 'to keep the written pleadings as concise as possible, in a manner compatible with the full presentation of their position'.[141] As only the party itself can assess and determine what the *full* presentation of its position requires,[142] this still leaves the parties with almost unfettered discretion.[143] It is questionable whether this Direction has actually effected any change in the practice of the parties.[144] **37**

**e) Copies of Pleadings**

The party filing a pleading must, in the first instance, supply 127 copies of the pleading: the original, a certified copy, and 125 additional copies. Pleadings must include the documents annexed and any translations. All these copies of the pleadings are to be filed in the Registry for transmission to the Court and the other party or parties, as well as to other States (in accordance with Article 52, para. 1 of the Rules of Court) and to international organizations (in accordance with Article 34, para. 3 of the Statute). **38**

*aa) Original Pleading*

The original of every pleading must be signed by the agent.[145] It must be accompanied by certified copies of any relevant documents or necessary extracts thereof adduced in **39**

[136] *Cf.* Lauterpacht, *Rec. des Cours* (2009), p. 521; Kolb, *ICJ*, p. 962.

[137] *Cf. e.g.*, *Diallo*, Counter-Memorial of the Democratic Republic of the Congo, 27 March 2008 (33 pages) and Rejoinder of the Democratic Republic of the Congo, 5 June 2009 (27 pages), both in response to a memorial and reply that were more than 100 pages long.

[138] *Cf. e.g.*, *Bosnian Genocide*, Counter-Memorial of the Federal Republic of Yugoslavia, 22 July 1997 (1,154 pages) and Reply of the Government of Bosnia and Herzegovina, 23 April 1998 (1,002 pages); *Land, Island and Maritime Frontier Dispute*, Reply of the Government of the Republic of Honduras, 12 January 1990 (1,098 pages).

[139] *Cf. e.g.*, *Bosnian Genocide*; *Land and Maritime Boundary*; *Territorial Dispute*; and *Land, Island and Maritime Frontier Dispute* cases.

[140] *Cf.* Kolb, *ICJ*, p. 962; Miron, *JIDS* (2016), pp. 383–4.

[141] ICJ Press Release No. 2009/8 of 30 January 2009.

[142] Rosenne, *LPICT* (2009), p. 172.

[143] *Cf. Marshall Islands v. Pakistan*, Counter-Memorial of Pakistan, 1 December 2015, p. 15, para. 5.2 (complaining that the memorial submitted by the applicant did not meet the requirements of Practice Direction III because it was *too short*).

[144] *Cf.* Quintana, *ICJ Litigation*, p. 314 (arguing that it is difficult for the parties to comply with this direction in practice due to their ordinary desire to be thorough in the presentation of their case). Pleadings submitted by the parties since the Direction was adopted have ranged from 22 pages (Memorial of Marshall Islands of 16 December 2014 in *Marshall Islands v. India*) to 484 pages (Memorial of Georgia of 2 September 2009 in the *Georgia v. Russia* case).

[145] Arts. 52, para. 1, and 40, para. l of the Rules. For comment on the role and function of the agent *cf.* Berman/Hernández on Art. 42 MN 6–11.

support of the contentions contained in the pleading.[146] If only extracts are annexed, a certified copy of the whole document must also be supplied, unless it has been published and is readily available.[147] Copies are certified by the agent. The agent, however, only certifies that the copy of a document is a true copy of the original, not that the original is authentic or genuine or that its contents are true.[148] It is customary for the agent to certify all the annexed documents *en bloc*. Such certification is transmitted for information to the agent of the opposite party. Any document annexed to the pleading which is not in English or French must be accompanied by a certified translation into one of those languages.[149] Translations are to be certified as accurate by the agent.[150] For practical convenience, it is acceptable for such a translation to constitute the relevant annex to the pleading; but where this is the case, a certified copy of the original-language text of the document must be filed with the original pleading. The original of every pleading must be accompanied by a list signed by the agent of all documents annexed to the pleading.[151] The original of every pleading is kept by the Registry in the archives of the Court.[152]

*bb) Certified Copy*

**40** The Registry has a preference for the filing of two original copies of the pleading.[153] Where only one original copy is filed, it must be accompanied by a certified copy of the pleading, all documents annexed, any translations, a certified copy of the original-language text of any translated document (in case only the translation is annexed to the pleading), and a certified copy of the complete text of any document of which only extracts are annexed, unless it has been published and is readily available.[154] Certification is made by the agent.[155] The certified copy, including all documents, is communicated by the Registry to the other party in accordance with Article 43, para. 4 of the Statute.[156] Exceptionally, the parties may agree on a direct exchange of documents between themselves;[157] however, they must nonetheless also deliver the documents in question to the Court.[158]

*cc) Additional Copies*

**41** The parties must also submit the number of additional copies of the pleadings, including annexes, required by the Registry, but without prejudice to an increase in that number should the need arise later.[159] Such a need may arise if one of the parties requires more

[146] For the various types of documentary evidence annexed to the pleadings, see *infra*, MN 65–66.

[147] Art. 50, paras. 1 and 2 of the Rules. On the interpretation of Art. 50, para. 1 *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1281–2. *Cf.* also Practice Direction IX*bis*, para. 2.

[148] *Cf. Peter Pázmány University*, Judgment, PCIJ, Series A/B, No. 61, pp. 208, 215.

[149] Art. 51, para. 2 of the Rules. This requirement was seized upon by France in the *Legality of Use of Force* case, where Yugoslavia had submitted documents in Serbo-Croat and German for which either no translation was furnished or for which the translation was not certified; *cf. Legality of Use of Force* (Serbia and Montenegro v. France), Preliminary Objections of the French Republic, 5 July 2000, p. 4, para. 22.

[150] Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 3.

[151] Art. 50, para. 3 of the Rules. *Cf.* also Note for the Parties concerning the Preparation of Pleadings, 1 June 2010, para. 1; *Pulau Ligitan*, Application by the Philippines, for Permission to Intervene, ICJ Reports (2001), pp. 575, 587, para. 29.

[152] Art. 26, para. 1(n) of the Rules.

[153] *Cf.* Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 1.

[154] *Cf.* Art. 50, para. 2 of the Rules.

[155] Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 2.

[156] Art. 52, para. 1 of the Rules.

[157] *Cf. e.g.*, *Eastern Greenland*, PCIJ, Series C, No. 67, p. 4114.

[158] Kolb, *ICJ*, p. 967.

[159] Art. 52, para. 1 of the Rules.

than the customary number of copies placed at the disposal of the parties.[160] The currently required number of additional copies is 125.[161] The parties may choose to file all of them in paper form or seventy-five copies in paper form and fifty electronic copies.[162] If a party chooses to file all 125 copies of a pleading in paper format, it should nevertheless provide the Registry with an electronic version of that pleading.[163] Although there is nothing in the Statute or the Rules that would prevent the Court from moving completely to 'paperless pleadings' (as some national courts have done), so far it has resisted doing so.

42 The additional copies must include all annexes. If the reproduction in large numbers of a particular annex (*e.g.*, a large map, satellite photos, video tapes) presents technical problems, the matter is to be raised with the Registrar at the earliest opportunity, so that other arrangements can be made.[164] In practice, a copy of these documents will be deposited with the Registry where it may be consulted by the parties.[165]

43 The additional copies need neither be signed nor certified. Although no longer expressly required by the Rules of Court, they usually bear the signature of the agent in print.[166] The additional copies are remitted to the Distribution Division of the Court, which distributes them internally to all judges involved in the case (including judges *ad hoc*), the Registrar, the Deputy-Registrar, the Legal Department, the Linguistic Department, the Information Department, and any other department the Registrar may consider necessary. They are also distributed to experts appointed by the Court and to international organizations, and are used if the Court decides that the pleadings shall be made available to a State entitled to appear before it which has asked to be furnished with such copies. Remaining copies are remitted to the Archives of the Court.

*dd) Electronic Copy*

44 Since the establishment of the Court's website in 1997, the Court has required pleadings and documents to be provided in electronic form,[167] formatted so as to facilitate their placing on the Court's website as well as their entry into its internal electronic document management system (EDMS), which provides immediate access to case files and archive documentation to the members of the Court and its staff.[168] However, the filing of electronic copies does not suffice to meet time limits fixed for the filing of a pleading.[169]

[160] In practice, the Registry usually supplies the parties with some 20 copies. For cases where the parties were required to supply additional copies, *cf.* Eighth Annual Report, PCIJ, Series E, No. 8, p. 259 (200 more); Ninth Annual Report, PCIJ, Series E, No. 9, pp. 167–8 (50 more). In case of additional copies, these may be transmitted directly (without passing through the Registry); *cf.* Ninth Annual Report, PCIJ, Series E, No. 9, p. 169.

[161] Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 4.

[162] *Ibid*.

[163] *Ibid*.

[164] *Cf.* Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 2.

[165] *Cf. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Memorial Submitted by the State of Qatar (Merits), vol. I, 30 September 1996, p. 8 fn. 19, p. 50 fn. 3, p. 51 fn. 6, p. 70 fn. 59, p. 71 fn. 66.

[166] *Cf.* Art. 40, para. 1 of the 1936 Rules, PCIJ, Series D, No. 1, 4th edn., pp. 31, 46.

[167] See, *e.g.*, Higgins, *ICLQ* (2001), p. 124.

[168] *Cf.* Consequences that the increase in the volume of cases before the ICJ has on the operation of the Court, Report of the Secretary-General, UN Doc. A/53/326 (1998), p. 5, para. 27.

[169] *Cf. Avena*, Judgment, ICJ Reports (2004), pp. 12, 18, para. 6.

**f) Number and Order of Pleadings**

**45** Article 43, para. 2 provides that the written proceedings shall consist of 'memorials and counter-memorials and, *if necessary*, replies'.[170] The words 'if necessary' were initially interpreted subjectively to mean that the parties could always decide to dispense with replies but that each party should have the right to file an equal number of pleadings; the Court was to have little say in the matter.[171] With the amendment of the Rules of Court in 1972 this has changed: whether replies are necessary is now a question for the Court to decide.[172] What has remained unchanged over the years is the principle that each party has the right to file an equal number of pleadings. The proviso 'if necessary' implies that memorials and counter-memorials are the norm and that replies are envisaged as an exception only.[173] However, this is not always borne out in practice and may be particularly difficult to achieve in proceedings instituted by special agreement.[174]

**46** The President of the Court meets the agents as soon as possible after their appointment in order to ascertain the views of the parties with regard to questions of procedure.[175] In the light of the information thus obtained, the Court or, if the Court is not sitting, the President makes the necessary order to determine the number and the order of filing of the pleadings. In making this order, any agreement between the parties which does not cause unjustified delay shall be taken into account.[176] Usually, the Court will not lightly change an arrangement that appears to be convenient and acceptable to both parties.[177] However, the Court is not bound by such an agreement. In case of persistent disagreement between the parties over the number of pleadings, it is for the Court (not the President) to decide the question.[178] The danger of a proliferation of interlocutory proceedings or 'mini-trials' on the necessity for replies so far has not materialized.[179]

*aa) Cases Begun by the Notification of a Special Agreement*

**47** Where a case is brought before the Court by the notification of a special agreement, the parties themselves usually determine questions of procedure in the special agreement. Article 46, para. 1 of the Rules of Court provides that in this case the number and order of pleadings shall be governed by the provisions of the agreement, unless the Court, after ascertaining the views of the parties, decides otherwise. A typical provision in a special agreement provides:

> Without prejudice to any question as to the burden of proof and having regard to Article 46 of the Rules of Court, the written pleadings should consist of:

[170] Emphasis added.

[171] *Cf.* Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, pp. 75, 77 and Modification of the Rules, PCIJ, Series D, second addendum to No. 2, p. 95; Eighth Annual Report, PCIJ, Series E, No. 8, p. 261.

[172] Compare Art. 41 of the 1946 Rules of Court and Arts. 44, 45 of the 1972 Rules of Court.

[173] *ICJ Yearbook* (1971–1972), p. 106; *ICJ Yearbook* (1973–1974), p. 102; *ICJ Yearbook* (1977–1978), p. 103.

[174] *Cf.* Higgins, *ICLQ* (2001), p. 126 (noting that in such cases, 'the first round is often air punching, with each side making assumptions about the legal position of the other, which then turns out to be wide of the mark').

[175] *Cf.* Art. 31 of the Rules and Practice Direction XIII.

[176] Art. 44, paras. 1 and 2 of the Rules.

[177] Jennings, *BYIL* (1997), p. 10.

[178] Art. 44, para. 4 *in fine* of the Rules.

[179] But *cf.* Rosenne, *ICJ Procedure*, pp. 103, 112. For the only case in which the Court had to make such a decision, *cf. Fisheries Jurisdiction* (Spain v. Canada), Order of 8 May 1996, ICJ Reports (1996), pp. 58, 58–9.

(a) a Memorial presented simultaneously by each of the Parties not later than 12 months after the notification of this Special Agreement to the Registry of the Court;
(b) a Counter-Memorial presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Memorial of the other Party;
(c) a Reply presented by each of the Parties not later than 4 months after the date on which each has received the certified copy of the Counter-Memorial of the other Party; and
(d) a Rejoinder, if the Parties so agree or if the Court decides ex officio or at the request of one of the Parties that this part of the proceedings is necessary and the Court authorises or prescribes the presentation of a Rejoinder.[180]

In order to avoid one party gaining an advantage, the special agreement usually also provides that: 'The written pleadings submitted to the Registrar shall not be communicated to the other Party until the corresponding pleading of that Party has been received by the Registrar.'[181] Even where the special agreement does not contain such a provision, in case of simultaneous filing of pleadings it is the practice of the Court not to communicate a pleading until the corresponding pleading has been received.[182]

If the special agreement contains no such provisions, and if the parties have not subsequently agreed on the number and order of pleadings, Article 46, para. 2 of the Rules of Court provides that they shall each file a memorial and counter-memorial, within the same time limits. The Court shall not authorize the presentation of Replies unless it finds them to be necessary. Therefore, the parties may want to provide expressly for the additional rounds in the special agreement if they wish to ensure that they will be able to go deep into the presentation of their cases without the need to seek further authorization.[183] Filing of the pleadings 'within the same time-limits' does not necessarily mean they need to be filed simultaneously, although that is how the provision is often interpreted today.[184] When the Court in April 1998 announced measures for improving its working methods and accelerating its procedures it pointed out that, in case of simultaneous filing of pleadings, the parties had occasionally tended to wait until they had known the other party's arguments before fully revealing their own.[185] This had possibly resulted in a proliferation of pleadings and delay in the compilation of case files. In fact, in most cases introduced by special agreement the Court was faced with three rounds of pleadings, bringing the number of pleadings in a case to six.[186] The Court therefore pointed out that the simultaneous filing by parties of their written pleadings was not an absolute rule in such circumstances and that it 'would see nothing but advantages' if the parties agreed to file their pleadings alternately in accordance with Article 46, para. 2 of the Rules.[187] 48

[180] *Cf. e.g.*, Art. 3, para. 2 of the Special Agreement between Indonesia and Malaysia in the *Pulau Ligitan* case, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 579, para. 1.

[181] *Cf. e.g.*, Art. VI, para. 3 of the Special Agreement between Canada and the United States in the case *Gulf of Maine*, Judgment, ICJ Reports (1984), pp. 246, 255; Art. 3 para. 2 of the Special Agreement between Burkina Faso and Niger in the *Frontier Dispute* case, Judgment, ICJ Reports (2013), pp. 44, 49.

[182] PCIJ, Series D, third addendum to No. 2, p. 99.

[183] *Cf.* Quintana, *ICJ Litigation*, p. 307.

[184] *Cf.* ICJ Press Release No. 98/14 of 6 April 1998, p. 2; Pellet, *LPICT* (2006), p. 178; Quintana, *ICJ Litigation*, p. 310; Shaw, *Rosenne's Law and Practice*, vol. III, p. 1295; but see Kolb, *ICJ*, p. 965. *Cf.* also PCIJ, Series D, third addendum to No. 2, pp. 98–9, recording that when adopting the predecessor of the present article, the Court deliberately rejected the expression 'simultaneously', while endorsing a formulation understood as permitting successive but identical time limits.

[185] ICJ Press Release No. 98/14 of 6 April 1998, Annex, para. 3(A).

[186] *Cf.* Bedjaoui, *Pace YIL* 3 (1991), pp. 29, 35–6.

[187] ICJ Press Release No. 98/14 of 6 April 1998, Annex, para. 3(A).

**49** In its Practice Direction I, adopted in October 2001,[188] the Court expressly discouraged the practice of simultaneous deposit of pleadings in cases brought by special agreement, and made known its expectation that future special agreements should contain provisions as to the number and order of pleadings, in accordance with Article 46, para. 1 of the Rules of Court. Such provisions shall be without prejudice to any issue in the case, including the issue of burden of proof. If the Special Agreement contains no provisions on the number and order of pleadings, the Court expects the parties to reach agreement to that effect, in accordance with Article 46, para. 2 of the Rules of Court.[189] However, the adoption of this Practice Direction has not changed the previous practice[190] of parties favouring the simultaneous filing of pleadings.[191] This approach is to avoid either side being denominated 'applicant' or 'respondent', and to avoid the public perception that one side is hauled before the ICJ at the instance of the other.[192] Given that Article 46, para. 2 is ordinarily understood to provide for simultaneous pleadings as a residual rule,[193] it is probably indeed 'a little unrealistic' to expect parties to switch easily to a system of successive pleadings.[194] If the Court were to bring about a change in the practice of States it would have to insert the concept of consecutive pleadings in cases submitted by special agreement in the Rules themselves, rather than in a mere Practice Direction.[195]

*bb) Cases Instituted by a Written Application*

**50** In cases instituted by means of an application the parties shall file pleadings in the following order: a memorial by the applicant; a counter-memorial by the respondent.[196] According to Article 45, para. 2 of the Rules, the Court 'may authorize or direct' the filing of a reply by the applicant and a rejoinder by the respondent if the parties are so agreed, or if the Court decides, *proprio motu* or at the request of one of the parties, that these pleadings are necessary.[197] The modal verb 'may' in the phrase quoted above confirms that it is within the Court's discretion to dispense with a second round of pleadings.[198] Indeed, if the Court considers itself to be 'sufficiently informed … of the contentions of fact and law

[188] ICJ Press Release No. 2001/32 of 31 October 2001, Annex. Practice Direction I is based on a suggestion made by Bowett *et al.*, *ICJ*, p. 36.

[189] Practice Direction I.

[190] *Cf.* Tomka, 'The Special Agreement', in *Liber Amicorum Judge Shigeru Oda* (Ando *et al.*, eds., 2002), vol. I, pp. 553–65, 562 (pointing out that the practice of simultaneous pleadings has been followed since the *Continental Shelf* case (Tunisia/Libya) in 1978).

[191] *Cf.* Art. 3 of the Special Agreements in *Frontier Dispute* (Benin/Niger), Order of 27 November 2002, ICJ Reports (2002), pp. 613 *et seq.*; and *Frontier Dispute* (Burkina Faso/Niger), Order of 14 September 2010, ICJ Reports (2010), pp. 631, 632; and Art. 4 of the Special Agreement between Malaysia and Singapore in the *Pedra Branca* case, Order of 1 September 2003, ICJ Reports (2003), pp. 146 *et seq*.

[192] *Cf.* Lauterpacht, *Rec. des Cours* (2009), p. 517; ICJ Registry (2006), pp. 18–20.

[193] *Cf. supra*, text accompanying fn. 184.

[194] Quintana, *ICJ Litigation*, p. 310.

[195] *Cf.* Pellet, *LPICT* (2006), p. 178; Quintana, *ICJ Litigation*, p. 310. On the question of simultaneous versus consecutive pleadings, *cf.* also ICJ Registry (2006), pp. 18–9.

[196] Art. 45, para. 1 of the Rules. But see *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 45–7, paras. 8, 13, 17, 19, 23, where the Court ordered the parties to file simultaneous pleadings, although the case was initiated by means of an application.

[197] For an example of the Court directing the parties to file a reply and rejoinder where only one of the parties considered a second round of written pleadings necessary, *cf. Aerial Herbicide Spraying*, Order of 25 June 2010, ICJ Reports (2010), pp. 307 *et seq*.

[198] *Cf.* Bordin, 'Procedural Developments at the International Court of Justice', *LPICT* 13 (2014), pp. 223–60, 238.

on which the Parties rely', it will not authorize the filing of further pleadings.[199] By contrast, in exceptional circumstances, the Court may, on the proposal of the parties and based on Article 101 of the Rules of Court, authorize the filing of a third round of pleadings.[200]

51 In April 2002, as part of its drive to expedite the examination of cases, the Court decided that 'a single round of written pleadings is to be considered the norm in cases begun by means of an application. A second round of written pleadings will be directed or authorised only where this is necessary in the circumstances of the case'.[201] As noted by Judge Greenwood: 'A State should never hold part of its case—whether argument or evidence—in reserve for a second round.'[202] In practice, however, the second round of written pleadings is still more common than not in cases on the merits.[203] In fact, since April 2002, there have been only seven cases on the merits submitted by application in which a single round of pleadings took place.[204] This is because it can always be argued that there are new developments in the case since the filing of the first round of pleadings, that new information needs to be presented to the Court,[205] or that certain points which are still in dispute between the parties need further elaboration.[206] In this regard, the Court is more likely to accede to a request made by the Applicant in order not to leave it without the opportunity to respond to evidence or argument raised by the Respondent.[207]

### g) Time Limits for the Filing of Pleadings

#### *aa) Fixing of Time Limits by the Court*

52 The Court makes the necessary orders to determine the time limits within which the pleadings must be filed.[208] Time limits may be fixed by the Court or, if the Court is not sitting, the President in an order dealing exclusively with the question of time limits. They may also be fixed in orders of the Court indicating provisional measures[209] or ruling on

[199] *Fisheries Jurisdiction* (Spain v. Canada), Order of 8 May 1996, ICJ Reports (1996), pp. 58, 58–9; *ibid*., Jurisdiction, ICJ Reports (1998), pp. 432, 436, para. 6. But *cf. ibid*., Diss. Op. Torres Bernárdez, ICJ Reports (1998), pp. 582, 587; Higgins, *ICLQ* (2001), p. 125. *Cf.* also *Diallo*, Merits, ICJ Reports (2010), pp. 639, 687, para. 146; and *ibid*., Order of 20 September 2011, ICJ Reports (2011), pp. 635–6.

[200] *Cf. Certain Criminal Proceedings in France*, Order of 16 November 2009, ICJ Reports (2009), pp. 304, 306, where the Court for the first time, in a case submitted by means of application, authorized the filing of a third round of pleadings.

[201] ICJ Press Release No. 2002/12 of 4 April 2002, Measure No. 1.

[202] *Whaling in the Antarctic*, Judgment, Sep. Op. Greenwood, ICJ Reports (2014), pp. 405, 418, para. 35.

[203] In proceedings concerning jurisdiction and admissibility, a single round of pleadings is the rule, the only exception being so far the *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Order of 26 June 1992, ICJ Reports (1992), pp. 237, 238.

[204] *Avena*; *Certain Questions of Mutual Assistance in Criminal Matters*; *Questions relating to the Obligation to Prosecute or Extradite*; *Whaling in the Antarctic*; *Certain Documents and Data*; *Caribbean Sea Delimitation*; and *Isla Portillos* (the proceedings in the two last mentioned cases were joined by the Court in 2017). *Cf.* further Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment', in *Whaling in the Antarctic* (Fitzmaurice/Tamada, eds., 2016), pp. 193–217, 210–15; Miron, *JIDS* (2016), pp. 384–6.

[205] See, *e.g.*, *Whaling in the Antarctic* case, Judgment, Sep. Op. Greenwood, ICJ Reports (2014), pp. 405, 418, para. 34.

[206] See, *e.g.*, *Certain Activities carried out by Nicaragua in the Border Area*, Order of 18 July 2017, (authorizing a second round of written pleadings to allow the Parties to address the fact that they each 'h[e]ld different views as to the methodology for the assessment of environmental harm').

[207] *Whaling in the Antarctic*, Judgment, Sep. Op. Greenwood, ICJ Reports (2014), pp. 405, 418–9, para. 36.

[208] Art. 44, para. 1 of the Rules. For further information *cf.* Torres Bernárdez/Moïse Mbengue on Art. 48 MN 29–33.

[209] *Cf. e.g.*, *Nuclear Tests* (New Zealand v. France), Order of 22 June 1973, ICJ Reports (1973), pp. 135, 142, para. 35.

the admissibility of counter-claims.[210] Time limits have also been fixed in judgments on preliminary objections.[211] The Court may fix provisional or conditional time limits.[212] It need not fix the time limits for all pleadings at once; it may limit itself to fixing the time limits for the filing of the first round or parts of the second round of pleadings.[213] In such a case the Court reserves the subsequent procedure for further decision. Any time limit may be fixed by assigning a specified period, but must always indicate definite end dates.[214]

**53** The Court makes the order fixing the time limits in the light of the views of the parties with regard to questions of procedure, obtained by the President at an initial personal meeting with the agents.[215] Subsequently, the views of the parties with regard to time limits may also, should they agree, be ascertained by means of a video- or telephone conference.[216] It is generally not permissible for the Court to fix time limits before the views of the parties have been ascertained. However, the refusal by a party to appoint an agent, the non-appearance of the agent at a meeting with the President, or undue delays by a party in replying to requests by the Court to make its views known do not prevent the Court from fixing the time limits for the filing of the pleadings. It is sufficient that the party has been given the opportunity to state its views.[217] If the agent of the respondent is temporarily unable to attend a meeting, video or telephone conference with the President, the Court may fix the time limit for the filing of the memorial of the applicant and reserve the fixing of the time limit for the filing by the respondent of its counter-memorial.[218]

**54** Time limits shall be as short as the character of the case permits.[219] Unless there are special circumstances, the Court usually gives the parties nine months for the first round of pleadings and six months for the second round.[220] Even where relatively long time limits are asked for, it is difficult for the Court not to take account of the wishes expressed by the parties, who are concerned to set forth their case at proper length and with due and proper care.[221] When fixing time limits, the Court is usually guided by the nature of the case, the history of the dispute, the exigencies of the Court's work as a whole, public

[210] *Cf. e.g.*, *Jurisdictional Immunities of the State*, Counter-Claim, ICJ Reports (2010), pp. 310 *et seq*; *Caribbean Sea*, Counter-Claims, Order of 15 November 2017, para. 82(B).

[211] *Cf. e.g.*, *Nottebohm*, Preliminary Objection, ICJ Reports (1953), pp. 111, 124; *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 153.

[212] *Cf. e.g.*, *Prince von Pless Administration*, Order of 4 July 1933, PCIJ, Series A/B, No. 57, pp. 167, 169.

[213] *Cf. e.g.*, *ICJ Yearbook* (2002–2003), p. 221.

[214] Art. 48 of the Rules.

[215] Art. 44, para. 1 and Art. 31 of the Rules.

[216] *Cf.* Practice Direction XIII.

[217] *Cf. Arbitral Award of 3 October 1899* (Guyana v. Venezuela), Order of 19 June 2018; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Order of 28 April 1995, ICJ Reports (1995), pp. 83, 85; *Tehran Hostages*, Order of 24 December 1979, ICJ Reports (1979), pp. 23, 24; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient*, Order of 18 June 1959, ICJ Reports (1959), pp. 260, 261–2; *Aerial Incident of 27 July 1955* (United States of America v. Bulgaria), Order of 19 May 1958, ICJ Reports (1958), pp. 22, 23.

[218] *Cf. e.g.*, *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Order of 27 January 1957, ICJ Reports (1957), pp. 182, 184; Order of 27 January 1958, ICJ Reports (1958), pp. 7 *et seq*.

[219] Art. 48 of the Rules.

[220] *Cf.* Quintana, *ICJ Litigation*, p. 301; but see Tomka, *supra*, fn. 190, p. 562 (noting that on occasion, the time limits have ranged up to 18 months for memorials and up to ten months for counter-memorials).

[221] On the relatively long periods of time requested by the parties to prepare their pleadings, *cf.* Watts, *Max Planck UNYB* (2001), pp. 32–5.

holidays customary at the seat of Court, and the state of its calendar. In recent years, the Court seems to have become less accommodating to what it may consider overly long time limits, in particular, when the parties did not agree on the time limits.[222] In those cases, the Court has opted for a compromise somewhere in between, but not necessarily in the middle of the two time limits proposed.[223] Time limits for the filing of pleadings are, as a rule, the same for both parties; there have, however, been notable exceptions to this rule.[224] If a party, at the meeting with the President, indicates its intention not to participate in the case, the Court may fix a 'token time limit' for the party's pleading 'with liberty … to apply for reconsideration of such time limit'.[225]

The Court is free to determine not only the period of time allocated to each party for the preparation of its pleading but also the date from which that period of time is going to run. The starting point chosen is, as a rule, the date on which the decision on the time limit is made. Alternatively, the Court may choose the date of its seisin (*i.e.*, the date on which the application has been filed or the special agreement notified) or the date of the filing of the previous pleading. As the decision of the Court fixing the time limit usually takes place several months after these events, a situation can arise where, in cases with consecutive filing of pleadings, one of the parties has considerably more time than the other to prepare its pleading.[226] The parties may therefore request the Court to determine that the period for the filing of the pleadings should run 'from the filing of the Application'.[227] In the *Jurisdictional Immunities of the State* case, the Court, in the light of the divergent positions of the parties with regard to the time limits for the filing of their pleadings, considered it 'appropriate to fix consecutive identical time-limits of six months from the date of the filing of the Application'.[228] 55

When determining the time limits for the filing of reply and rejoinder after deciding on the admissibility of a counter-claim the Court 'must not, for all that, lose sight of the interest of the Applicant to have its claims decided within a reasonable time-period'.[229] It must take into account the lapse of time since the filing of the counter-memorial. The time period for the filing of the reply, as a rule, is to run from the date of the filing of the counter-memorial, *i.e.*, the date from which the applicant could study it, and not from 56

[222] See also Higgins, *ICLQ* (2001), p. 127 ('The third, current practice, is to take a somewhat tougher line, and decide time limits to be set on the basis of what seems reasonable in all the circumstances.').

[223] *Cf. e.g.*, *ICSFT and CERD* case, Order of 12 May 2017; *Jadhav Case*, Order of 13 June 2017; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Order of 8 December 2017; *Maritime Delimitation in the Indian Ocean*, Order of 2 February 2018.

[224] *Cf. e.g.*, *Interhandel*, Provisional Measures, ICJ Reports (1957), pp. 105 *et seq*. (Switzerland: ninety-nine days; United States: thirty-one days). This discrepancy may be explained by the fact that the United States had indicated that it intended to raise preliminary objections. *Cf.* also *Continental Shelf* (Tunisia/Libya), Order of 3 June 1980, ICJ Reports (1980), pp. 70, 71 (Tunisia: six months; Libya: eight months).

[225] *Cf. e.g.*, *Tehran Hostages*, Order of 24 December 1979, ICJ Reports (1979), pp. 23, 24.

[226] *Cf. e.g.*, *Land and Maritime Boundary*, where the application was filed on 29 March 1994. By Order of 16 June 1994, Cameroon was given until 16 March 1995 to file its memorial, and Nigeria was given until 18 December 1995. This meant that Cameroon had almost 12 months to prepare its memorial, while Nigeria had only 9 months to prepare its counter-memorial.

[227] *Cf. Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Order of 4 February 2010, ICJ Reports (2010), pp. 8, 9.

[228] *Cf. Jurisdictional Immunities of the State*, Order of 29 April 2009, ICJ Reports (2009), pp. 136, 137. *Cf.* also Quintana, 'Procedural Developments at the International Court of Justice', *LPICT* 9 (2010), pp. 327–400, 350.

[229] *Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), pp. 243, 259–60, para. 40; *Oil Platforms*, Order of 10 March 1998, ICJ Reports (1998), pp. 190, 205, para. 43.

the date of the order fixing the time limit for the reply.[230] In order to ensure strict equality between the parties, the respondent must be given the same period of time for the preparation of its rejoinder as lies between the filing of the counter-memorial and the time limit for the filing of the reply,[231] unless the parties agree otherwise.[232]

57 In proceedings before a Chamber, the time limits for the filing of the first (and in principle only)[233] pleading by each party are fixed by the full Court, or its President if the Court is not sitting, in consultation with the Chamber concerned if it has already been constituted.[234] Any extension of the time limits for the filing of the first pleading by each party is made by the Chamber, or by the Chamber's President if the Chamber is not sitting.[235] The same is true for the fixing of the time limits for any further pleading.[236]

*bb) Agreement upon Time Limits by the Parties*

58 According to Article 48, para. 2 of the Rules of Court 'any agreement between the parties which does not cause unjustified delay shall be taken into account' by the Court in making the order fixing the time limits.[237] However, the Court is not bound by any agreement between the parties in regard to the time limits.[238] Article 43, para. 3, which provides that 'communications shall be made … *within the time fixed by the Court*' (emphasis added) gives the Court the right to modify time limits agreed upon by the parties even if they are fixed in a special agreement. If the Court adopts time limits agreed upon by the parties in the special agreement which are expressed in days, weeks, or months, the starting date from which the time limit is calculated will be the date of the order determining the time limit and not the date of the special agreement or the date of its notification to the Court, unless expressly provided otherwise by the parties.[239]

[230] But see, *e.g.*, *Caribbean Sea*, Counter-Claims, Order of 15 November 2017, para. 82(B) (fixing the time limit of six months, running from the date of the order, for the filing of the reply, and another six months for the filing of the rejoinder).

[231] *Cf. Oil Platforms*, Order of 10 March 1998, ICJ Reports (1998), pp. 190, 205–6, para. 44, and 206–7, para. 46 (the United States filed its counter-memorial containing a counter-claim on 23 June 1997; on 10 March 1998, after deciding on the admissibility of the counter-claim, the Court fixed 10 September 1998 as the time limit for the reply by Iran and 23 November 1999 as the time limit for the rejoinder of the United States. The time-period for the reply, running from 23 June 1997, was thus 14 months and 17 days and the time-period for rejoinder, running from the filing of the reply, was 14 months and 13 days).

[232] *Cf. e.g.*, *Jurisdictional Immunities of the State*, Order of 6 July 2010, ICJ Reports (2010), pp. 310, 321–2, paras. 34–5.

[233] *Cf.* Palchetti on Art. 26 MN 18.

[234] Art. 92, para. 1 of the Rules. *Cf. e.g.*, *Frontier Dispute* (Burkina Faso/Republic of Mali), Order of 12 April 1985, ICJ Reports (1985), pp. 10 *et seq.*; *Land*, *Island and Maritime Frontier Dispute*, Order of 27 May 1987, ICJ Reports (1987), pp. 15 *et seq.*; and further Palchetti on Art. 26 MN 18–19.

[235] *Cf. Gulf of Maine*, Order of 28 July 1982, ICJ Reports (1982), pp. 557 *et seq*.

[236] Art. 92, para. 2 of the Rules.

[237] For recent examples, *cf. Obligation to Negotiate Access to the Pacific Ocean*, Order of 18 June 2013, ICJ Reports (2013), pp. 223, 224; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Order of 9 December 2013, ICJ Reports (2013), pp. 395, 396; *Marshall Islands v. UK*, Order of 16 June 2014, ICJ Reports (2014), pp. 468, 469.

[238] *Cf. e.g.*, *Interhandel*, Order of 26 June 1958, ICJ Reports (1958), pp. 31, 32. *Cf.* also Modification of the Rules, PCIJ, Series D, second addendum to No. 2, pp. 165–71, 175–6 and Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, pp. 129, 198; Seventh Annual Report, PCIJ, Series E, No. 7, p. 295. *Cf.* further CPJI, *Actes et Documents Relatifs à l'Organisation de la Cour* (1922), pp. 64–7.

[239] *Cf. e.g.*, *Frontier Dispute* (Burkina Faso/Niger), ICJ Reports (2013), pp. 44, 51, where the parties had agreed that the nine-month period was to run from the 'seising of the Court'.

*cc) Requests for the Extension of Time Limits*

The Court is frequently requested by one of the parties or by the parties jointly to extend the time limit for the filing of pleadings. Requests for the extension of time limits have ranged from several days[240] to—in the case of successive requests—two years.[241] The request must be received before the expiry of the time limit; although the Court may decide upon the request after the expiry of the time limit.[242] The Court usually accedes to these requests as it does not want to impose limitations on the parties in the preparation and presentation of the arguments and evidence which they consider necessary.[243] Decisions on the extension of time limits are made by the Court or the President, if the Court is not sitting, in an order.[244] Before deciding on the request of a party for the extension of a time limit, the Court must give the other party an opportunity to state its views.[245] The Court, however, is not bound by the views of the parties and has not attached any conditions to the extension of time limits as proposed by a party.[246] It may reject a request or accede to it only in part in the interest of a sound administration of justice even if the other party has no objection,[247] or it may make an extension even though the other party objects.[248] If the request of a party is opposed by the other party or the length of the extension is questioned, the Court usually adopts a compromise.[249] If the time limit for the filing of a pleading by one party is extended, the other party will usually receive a similar extension for the filing of its pleading,[250] unless agreed otherwise by the parties[251] or unless the extension concerns the time limit for the filing of the final pleading in the case. **59**

[240] *Cf. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 48, para. 25 (time limit extended by five days); *Armed Activities* (DRC v. Uganda), Order of 7 November 2002, ICJ Reports (2002), pp. 604, 605 (time limit extended by seven days). *Cf.* also the table on deferment requests in Gross, 'The Time Element in the Contentious Proceedings in the International Court of Justice', *AJIL* 63 (1969), pp. 74–85.

[241] *Cf. e.g.*, *Certain Criminal Proceedings in France*, Order of 16 November 2009, ICJ Reports (2009), pp. 304, 305; *Legality of Use of Force* (Serbia and Montenegro v. UK), Order of 21 February 2001, ICJ Reports (2001), pp. 34, 35 and Order of 20 March 2002, ICJ Reports (2002), pp. 213, 214. For an overview of the longest running cases, *cf.* Singh, *ICJ*, p. 242.

[242] *Cf. Oil Platforms*, Order of 3 June 1993, ICJ Reports (1993), pp. 35, 36.

[243] *Cf. Barcelona Traction*, Judgment, ICJ Reports (1970), pp. 3, 30–1, para. 27.

[244] This has been the practice of the Court since 1928.

[245] Art. 44, para. 3 of the Rules.

[246] *Certain Criminal Proceedings in France*, Order of 11 January 2006, ICJ Reports (2006), pp. 3, 4; *Fisheries*, Order of 29 March 1950, ICJ Reports (1950), pp. 62–3; *Right of Passage over Indian Territory*, Order of 28 August 1958, ICJ Reports (1958), p. 40–1.

[247] *Cf. e.g.*, *Asylum*, Order of 17 December 1949, ICJ Reports (1949), pp. 267, 268.

[248] *Cf. e.g.*, *Bosnian Genocide*, Order of 21 March 1995, ICJ Reports (1995), pp. 80, 81; and *ibid.*, Order of 11 December 1998, ICJ Reports (1998), pp. 743, 744; *Asylum*, Order of 9 May 1950, ICJ Reports (1950), pp. 125, 126.

[249] *Armed Activities* (DRC v. Uganda), Order of 11 April 2016, ICJ Reports (2016), pp. 222, 223 (ten months requested, five months granted); *Diallo*, Order of 8 September 2000, ICJ Reports (2000), pp. 146, 147 (nine months requested, six months and 12 days granted); *Bosnian Genocide*, Order of 11 December 1998, ICJ Reports (1998), pp. 743, 744 (three months requested, one month granted); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Order of 1 February 1996, ICJ Reports (1996), pp. 6, 7 (nine months requested, seven months granted); and Eighth Annual Report, PCIJ, Series E, No. 8, p. 258 (six weeks requested, three weeks granted).

[250] *Cf. e.g.*, *Oil Platforms*, Order of 3 June 1993, ICJ Reports (1993), pp. 35, 36; *Bosnian Genocide*, Order of 22 January 1998, ICJ Reports (1998), pp. 3 *et seq.*; *Croatian Genocide*, Order of 10 March 2000, ICJ Reports (2000), pp. 3, 4; and *ibid.*, Order of 27 June 2000, ICJ Reports (2000), pp. 108, 109. *Cf.* also Eighth Annual Report, PCIJ, Series E, No. 8, p. 258.

[251] *Cf. e.g.*, *Breard*, Order of 8 June 1998, ICJ Reports (1998), pp. 272 *et seq.*

**60** The Court must be satisfied that there is 'adequate justification' for the request. If the parties agree on the extension of the time limit, the Court usually does not deal with the adequacy of the justification for the request in its order.[252] The justifications most commonly advanced are new developments, the complexity of the case or the novel character of the legal questions involved, the wealth of the materials to be dealt with, the difficulty of assembling documents and evidence spread over various countries and in various languages, the time necessary to obtain documents under a foreign country's freedom of information act, the delay in printing and proofing due to the holiday season, or, simply, technical reasons. The Court has refused requests on the basis that the pleading filed by the other party was not a bulky document and raised no new issues, and also because of the urgent nature of the case, as evidenced by the fact that the other party had waived its right to file a further pleading.[253] A request for the interpretation of a judgment on preliminary objections 'cannot in itself suffice to justify the extension of a time-limit' for the delivery of a counter-memorial.[254]

**61** The Statute and the Rules of Court do not foresee a stay of the proceedings. Joint requests for an (extensive) extension of the time limit for the filing of a pleading may be used as a substitute for the stay of proceedings in order to allow the parties to reach a negotiated settlement of their dispute.[255]

*dd) Non-Observance of Time Limits*

**62** The time limit for the filing of a pleading applies to all the copies of the pleading.[256] When a pleading has to be filed by a certain date, it is the date of the receipt of the pleading in the Registry (and not the date printed on the pleading or the date of despatch) which is regarded by the Court as the material date.[257] The date of receipt is marked on the document itself and the pleading is registered in the Court's IT system by the Registry, thus ensuring that this date may be readily verified if necessary.[258] If a pleading is not filed within the time limit, or if the pleading filed is incomplete because not all documents adduced in support of the contentions contained in the pleading are annexed,[259] the Court may, at the request of the party concerned, nonetheless decide that any step taken after the expiration of the time limit shall be considered as valid, if it is satisfied that there is adequate justification for the request. The other party shall be given an opportunity to state its views.[260] While belated filing of pleadings was common before the PCIJ, it is much less so before the ICJ. Yet, in no case has the Court punished a party for not filing its pleading within the time limit (as distinct from not filing its pleadings at all).[261]

[252] For a recent example, see *e.g.*, *Silala Waters*, Order of 23 May 2018.

[253] *Cf.* Ninth Annual Report, PCIJ, Series E, No. 9, p. 166.

[254] *Land and Maritime Boundary*, Order of 3 March 1999, ICJ Reports (1999), pp. 24, 26. However, given the circumstances of the case, the Court considered that it should nevertheless grant Nigeria an extension of the time limit for the filing of its counter-memorial.

[255] *Cf. Legality of Use of Force* (Serbia and Montenegro v. UK), Order of 21 February 2001, ICJ Reports (2001), pp. 34, 35.

[256] *Cf.* Art. 52, para. 3 of the Rules. *Cf.* also the Sixteenth Report, PCIJ, Series E, No. 16, p. 178.

[257] Art. 52, para. 2 of the Rules. *Cf.* also Kolb, *ICJ*, p. 966 (noting that this is an application of a general principle of law prioritizing the date of receipt for reasons of certainty and practicality).

[258] *Cf.* Art. 26, para. 1(a) of the Rules; Arts. 11 and 73, para. 1 of the Instructions for the Registry (as drawn up by the Registrar and approved by the Court on 20 March 2012).

[259] *Cf. e.g.*, *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 50–1, para. 9, where Bosnia and Herzegovina had not annexed to its memorial all the documents to which it referred therein.

[260] Art. 44, para. 3 of the Rules.

[261] For pleadings considered as valid despite being filed several days late *cf. Avena*, Judgment, ICJ Reports (2004), pp. 12, 18, para. 6 (three days); *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 93, para. 5 (four days).

The belated filing of a pleading must be distinguished from the mere correction of a slip or error in a pleading. The latter may be made at any time with the consent of the other party or by leave of the President. Any correction so effected must be notified to the other party in the same manner as the pleading to which it relates.[262] The Court refused to permit a party to correct an (alleged) error in its pleading on the ground that the other party had already filed its observations on that particular point. However, an explanatory footnote was inserted at the appropriate place in the Court's volume of Pleadings.[263] **63**

### *3. Papers and Documents in Support*

#### a) Meaning

In addition to the various types of pleadings, Article 43, para. 2 of the Statute prescribes that the written proceedings shall also consist of 'all papers and documents in support'. Neither the Statute nor the Rules provide a definition of these terms. In the litigation before the Court, the term 'papers' is practically never used.[264] Similarly, the Rules of Court refer exclusively to 'documents'.[265] Although there is no authoritative definition of what constitutes a 'document', the notion includes a wide range of documentation submitted in evidence in support of the parties' arguments contained in the pleadings.[266] It includes both documents relied on and documents cited.[267] **64**

Specifically, the term 'documents in support' relates to documentary evidence such as maps and map-related materials, plans, sketches, photographs, satellite images, published and unpublished (secret or confidential) diplomatic correspondence and notes, letters, memoranda, treaties,[268] Security Council and General Assembly resolutions, UN documents as well as documents of other international organizations, parliamentary records, domestic legislation, decrees, by-laws, national court decisions, notarial records, commercial contracts, films, video recordings, minutes of meetings, transcripts of hearings of oral evidence before joint commissions, legal and expert opinions, written witness statements or affidavits, articles and reports from newspapers, and extracts from specialist books and journals.[269] It does not normally include reference works or international law textbooks or the decisions of the Court as these are considered to be in the public domain and known to the Court.[270] **65**

[262] Art. 52, para. 4 of the Rules.

[263] *Cf. Corfu Channel*, Pleadings, vol. III, p. 204; *ibid*., vol. V, pp. 206–7 and *ICJ Yearbook* (1948–1949), p. 77; *ICJ Yearbook* (1956–1957), p. 108. *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1290.

[264] *Cf.* Quintana, *ICJ Litigation*, p. 297, fn. 1; but *cf. Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 270, para. 138, 271, paras. 143–4, and 291, para. 219 (using the term 'paper(s)' to refer to purportedly scientific analyses submitted by one of the parties during the proceedings).

[265] *Cf. e.g.*, Arts. 26, para. 1, 50, paras. 1–3, 51, para. 3, 52, para. 1, 53, paras. 1–2, 56, paras. 1–4, 57, and 79, paras. 4–5 of the Rules.

[266] *Cf.* Kolb, *ICJ*, p. 961.

[267] *Cf.* PCIJ, Series D, third addendum to No. 2, pp. 101–2; Eighth Annual Report, PCIJ, Series E, No. 8, p. 261.

[268] *Cf.* Art. 102, para. 2 of the UN Charter, according to which treaties entered into by any Member State of the UN may not be invoked before any organ of the UN unless they have been duly registered with the UN Secretariat. See further Martens, in Simma, *UN Charter*, Art. 102 MN 43–57. For a recent argument that an international treaty may not be invoked before the Court because of a failure to comply with the registration requirement, *cf. Jadhav Case*, CR 2017/5, 15 May 2017, p. 17, para. 16 (Sharma); *ibid*., p. 34, para. 66(b) (Salve).

[269] For the types of documentary evidence, *cf.* in detail Riddell/Plant (2009), pp. 235–305.

[270] *Cf.* Kolb, *ICJ*, p. 962.

**66** In factually complex cases, the parties may choose to submit written witness statements or affidavits in support of their arguments.[271] Although the Statute and the Rules are silent as to the form of such statements, it is advisable that they contain the same basic information as what is required from witnesses who will appear in Court: the person's name, nationality, residence, and a declaration that the testimony is the truth.[272] In addition, they should contain the signature of the witness and the date and place where the document was signed.[273] Given the potential for parties' reliance on such statements in future cases, it would be desirable for the Court to clarify the attendant formal requirements in a new Practice Direction.[274]

**b) Types of Documents**

*aa) Documents Annexed to the Pleadings*

**67** Any relevant documents adduced in support of the contentions contained in a pleading must be annexed to the pleading.[275] This requirement has been enforced by the Court when raised by the opposite party.[276] If only parts of a document are relevant, only such extracts as are necessary for the purpose of the pleading in question need be annexed. In that event, however, at least two certified copies of the whole document must be deposited with the pleading, unless it has been published and is readily available.[277] A signed list of all documents annexed to a pleading must be furnished at the time the pleading is filed.[278] This is usually done in a letter by the agent to the Registrar.[279]

**68** The scope and quantity of documents annexed to the pleadings has grown dramatically since the first days of the PCIJ.[280] In many cases before the Court, the documents annexed to the pleadings have extended to between 5,000 and 7,000 printed pages.[281] Only a selection of the documents are printed, which means that the number of pages of the original pleadings is considerably higher. The all-time record is still held by the *Barcelona*

[271] On admissibility of such statements, see Benzing, Evidentiary Issues, MN 74–75. *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1287–8; ICJ Registry (2006), p. 29; Devaney (2016), pp. 245–7.

[272] Arts. 57 and 64 of the Rules; *cf.* also *Croatian Genocide*, Judgment, Decl. Donoghue, ICJ Reports (2015), pp. 390, 391. para. 4.

[273] *Cf. Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 76–8, paras. 192–8; *ibid.*, Decl. Donoghue, ICJ Reports (2015), pp. 390, 391, para. 4; International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, 29 May 2010, Art. 4, para. 5, available at <http://www.ibanet.org>; but see *Croatian Genocide*, Judgment, Diss. Op. Trindade, ICJ Reports (2015), pp. 202, 356, para. 455.

[274] *Cf. Croatian Genocide*, Judgment, Decl. Donoghue, ICJ Reports (2015), pp. 390, 391, para. 6 (noting that an enumeration of minimum requirements for the form and content of written witness statements by the Court would provide more precise guidance to parties); *cf.* also Malintoppi, 'Fact Finding and Evidence Before the International Court of Justice (Notably in Scientific-Related Disputes)', *JIDS* 7 (2016), pp. 421–44, 442–3.

[275] *Cf.* Art. 50, para. 1 of the Rules.

[276] *Cf. e.g.*, *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 50–1, para. 9. But the Court or the Registry will not do so at its own initiative, *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1283–4.

[277] Art. 50, para. 2 of the Rules. For the conditions used to determine whether a document should be considered as being published and readily available, see MN *infra*, 120–121. *Cf.* also Mani, *International Adjudication: Procedural Aspects* (1980), p. 221.

[278] Art. 50, para. 3 of the Rules; Note for the Parties Concerning the Preparation of Pleadings, 1 June 2010, para. 1; *cf.* also *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 587, para. 29.

[279] *Cf. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Memorial Submitted by the State of Qatar (Merits), vol. I, 30 September 1996, p. 11, para. I.28 and Counter-Memorial Submitted by the State of Qatar (Merits), vol. I, 31 December 1997, p. 12, para. 1.42.

[280] *Cf.* Highet, *AJIL* (1987), pp. 16–7.

[281] *Cf. e.g.*, *Bosnian Genocide*; *Land and Maritime Boundary*; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*; *Gabčíkovo–Nagymaros*; *Nicaragua*; *Gulf of Maine*; *Continental Shelf* (Tunisia/Libya); *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa).

*Traction* case, whose documentation amounted to some printed 18,000 pages.[282] At least two-thirds of the documentation usually consists of annexes. This proliferation of documents may be explained by counsels' thoroughness coupled with technological advances and the ease of document reproduction. There is a natural, and understandable, tendency not to leave any stone unturned, or any potentially relevant document milked of its evidentiary possibilities. A court of fifteen or more judges may be impressed, sometimes unpredictably, by a spectrum of different arguments and approaches.[283]

**69** However, the voluminous annexes place a considerable burden on the Court's translation services and on its budget, and seriously impair the effective working of the Court. Because each member of the Court has the right to choose to work in either English or French, so as to assure equality on the Bench, all pleadings and documents must be translated from one to the other language (except in the rare cases where parties can file pleadings in both).[284] A case cannot be heard until its pleadings and documents are ready in both official languages.[285] The backlog in translating pleadings and documents has at times prevented the Court from getting more cases ready for hearing.[286] The Court recently noted the 'excessive tendency towards the proliferation and protraction of annexes to written pleadings' and strongly urged parties to append to their pleadings 'only strictly selected documents' and to provide it with any available translation (even a partial one only) of its own annexes or those of the other party into the other official language of the Court. These translations are examined by the Registry and communicated to the other party.[287]

**70** It is suggested that in order to alleviate the burden of translation, the parties should be required to submit their pleadings and the documents annexed in both official languages (as any proposition to have only one official language—English *or* French—is wholly unrealistic).[288] This would offer the parties the additional advantage of being able to control their own pleadings in both official languages. The prior translation of annexes could also have the collateral benefit of reducing a priori the number of documents that the parties consider essential to submit. Any additional costs for translating pleadings and documents could, in the case of developing States, be met by the Secretary-General's Trust Fund.[289] All these suggestions should not, however, distract from the general problem

[282] *ICJ Yearbook* (1968–1969), p. 100. *Cf.* also Pellet, *LPICT* (2008), p. 280 and Bedjaoui, *Pace YIL* (1991), pp. 36–7, who reports that the original pleadings weighed 25 kilograms and amounted to 66,776 pages in all, including the annexes.

[283] *Cf.* Statement by President Schwebel to the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/52/SR.17 (1997), p. 3. *Cf.* also Bedjaoui, *Pace YIL* (1991), pp. 38–9.

[284] This is a practice which has been followed since 1955; before then, annexes were only translated at the request of a judge (a request, however, almost always made); *cf. ICJ Yearbook* (1968–1969), p. 93; *ICJ Yearbook* (1971–1972), p. 106. The provision in Art. 42, para. 4 of the 1972 Rules of Court that 'the Registrar is under no obligation to make translations of the pleadings or any documents annexed thereto' was deleted in 1978.

[285] But *cf.* Pellet, *LPICT* (2008), p. 277 (suggesting that the Registry has refused to translate the entirety of annexes submitted by the parties).

[286] *Cf.* ICJ Registry (2006), p. 19.

[287] Practice Directions III, para. 2, and IV. *Cf.* also ICJ Press Release No. 98/14 of 6 April 1998, Annex, para. 3(D).

[288] This is, of course, not an original idea; *cf.* Art. 23 of the Conclusions reached at the second meeting of the Committee on Procedure: CPJI, *Actes et Documents*, *supra*, fn. 238, pp. 298–9; as well as Highet, 'Presentation', in Peck/Lee (1997), pp. 127–47, 133–4. Canada, for internal political reasons, submitted its counter-memorial in the *Fisheries Jurisdiction* case in both languages, *cf. Fisheries Jurisdiction* (Spain v. Canada), Pleadings, pp. 209 and 301.

[289] On the Secretary-General's Trust Fund, *cf.* Espósito on Art. 64 MN 10–17; Bekker, 'International Legal Aid in Practice: The ICJ Trust Fund', *AJIL* 87 (1993), pp. 659–68; Jennings, 'The United Nations at Fifty: The International Court of Justice after Fifty Years', *AJIL* 89 (1995), pp. 493–505, 500–1.

that the number and length of annexes is often excessive and unjustified. Parties should bear in mind that too many annexes may, at the end of the day, be counterproductive. Judges may get weary and no longer read the annexed document at all.[290]

*bb) Additional Documents*

71 The submission of additional documents, *i.e.*, documents not appended to the pleadings but presented to the Court prior to the closure of the written proceedings, does not require the consent of the other party or the authorization of the Court. This conclusion follows *a contrario* from Article 56, para. 1 of the Rules of Court, which expressly requires such consent or authorization only for documents submitted 'after the closure of the written proceedings'. Such documents must be filed in the Registry in the same form and number of copies as documents annexed to the pleadings, namely two certified copies (one for the Court to be appended to the original pleading and one for transmission to the other party) and 125 additional copies.

72 The Court has, however, limited the admissibility of documents as 'Additional Annexes' to a specific pleading (*e.g.*, a counter-memorial) to such documents which 'were established in the original language, on or before the date' fixed by the Order of the Court for the filing of that pleading. The Court has decided that any such documents established after that date could be submitted as an Annex only to the next pleading, if the party so wished.[291]

73 Parties have also submitted single copies of documents which were part of a publication readily available (such as UN documents) prior to the closure of the written proceedings stating that they would refer to them in the further proceedings of the case.[292]

*cc) Supplemental Documents*

74 The Court may authorize the parties to file, within a certain time limit, 'supplemental documents' accompanied by a brief commentary on each document.[293] Such commentary is limited to placing the document in question in the context of the written pleadings. The filing of such supplemental documents with commentary *de facto* replaces a further round of written pleadings.[294] Supplemental documents must be filed in the Registry in the same form and number of copies as documents annexed to the pleadings, namely two certified copies (one for the Court to be appended to the original pleading and one for transmission to the other party) and 125 additional copies.

*dd) Further Documents*

75 All documents submitted after the closure of the written proceedings, including during (or after[295]) the oral proceedings, are to be treated in accordance with Article 56 of the Rules of Court,[296] irrespective of whether they are labelled as 'additional documents'[297]

[290] *Cf.* Pellet, *LPICT* (2008), p. 280.
[291] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 51–2, para. 15.
[292] *Cf. ibid.*, ICJ Reports (2007), pp. 43, 51, para. 11 and the Letter of the Agent of the Federal Republic of Yugoslavia, dated 2 February 2006.
[293] *Cf. e.g.*, *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 47–8, para. 24.
[294] *Ibid.*, paras. 24–5.
[295] *Cf.* Quintana, *ICJ Litigation*, p. 379.
[296] *Cf.* Practice Direction IX, para. 2.
[297] *Cf. ICJ Yearbook* (2001–2002), p. 296 ('additional Annex No. 130').

or as 'supplemental documents'.[298] Article 56, para. 1 provides that after the closure of the written proceedings, no further documents (whether published or unpublished) may be submitted to the Court by either party except with the 'consent' of the other party. Consent may be expressed either *ad hoc* or in the form of an agreement.[299] The party desiring to produce a new document must file 2 certified copies and 125 additional copies in the Registry,[300] which is responsible for communicating the document to the other party and informing the Court. Depending on the circumstances, not all 125 copies have to be filed at the same time.[301] The other party will be held to have given its consent if it does not expressly object to the production of the document. Silence is treated as consent:[302] *qui tacet*, *consentire videtur*.[303] In case the parties agree, or one consents (either expressly or implicitly) to the submission of the new document by the other, there is no room for the Court 'authorizing' its production as a comparison of the wording of paras. 1 and 2 of Article 56 of the Rules shows.[304]

In case of an objection, the Court, after hearing the parties, may, if it considers the **76**
document necessary, overrule the objection and authorize the document's production.[305] Prior to the opening of the oral proceedings, 'hearing the parties' usually means giving them an opportunity to present their views in writing.[306] The views of the parties may, however, also be ascertained by means of a video or telephone conference, if they so agree.[307] After the filing of the new document by one party and the objection by the other, the parties are invited by the Court to submit further observations on the matter. The onus is on the party wishing to submit new documents. Any new document attached by a party to these observations is itself admissible only if authorized by the Court.[308] The authorization of new documents may be subject to certain conditions.[309] In the case of a party producing a new document, the other party must be given an opportunity to comment upon it and to submit documents in support of its comments.[310] As a matter of procedural fairness, the party producing the new document may, if it wishes to do so, submit its observations in turn upon those comments.[311]

[298] *Cf. Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 280, para. 12; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 18, para. 12; and *ibid.*, Pleadings, vol. V, pp. 416–17 ('Supplemental Annexes' to the memorial were treated as new documents to which Art. 56 of the Rules applied).

[299] *Cf. Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 26, para. 15, noting that the parties 'had come to an agreement for the purpose of producing new documents'. *Cf.* also Quintana, *supra*, fn. 228, pp. 355–9.

[300] *Cf. Preah Vihear*, Pleadings, vol. II, pp. 750–1 (No. 99).

[301] In the *Land and Maritime Boundary* case, after consultations with the Registry, Nigeria on 2 February 1998 filed only 50 copies of a volume of 'Supplemental Documents', the remaining 75 copies to be filed prior to the opening of the oral proceedings in March 1998.

[302] *Cf. Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 18, para. 12. *Cf.* also PCIJ, Series D, third addendum to No. 2, p. 823.

[303] *Cf.* Kolb, *ICJ*, p. 963.

[304] But *cf. Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 26, para. 15, where the Registrar informed the parties that the Court had decided to 'authorize' them to proceed as they had agreed.

[305] Art. 56, para. 2 of the Rules. *Cf.* also *e.g.*, *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 470–1, para. 6. *Cf.* further *ICJ Yearbook* (1954–1955), p. 96; as well as Tams on Art. 52 MN 15–21 for further comment.

[306] But *cf.* Thirlway, *Leiden JIL* (1999), pp. 224–7.

[307] *Cf.* Practice Direction XIII.

[308] *Land*, *Island and Maritime Frontier Dispute (Revision)*, Judgment, ICJ Reports (2003), pp. 392, 395, para. 9.

[309] *Cf. Gabčíkovo–Nagymaros*, Judgment, ICJ Reports (1997), pp. 7, 13, para. 7; *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 8–9.

[310] Art. 56, para. 3 of the Rules. *Cf. e.g.*, *Land*, *Island and Maritime Frontier Dispute (Revision)*, Judgment, ICJ Reports (2003), pp. 392, 395, para. 9; *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 315, para. 22.

[311] *Cf. Gabčíkovo–Nagymaros*, Judgment, ICJ Reports (1997), pp. 7, 13, para. 7.

77 The parties have frequently submitted new documents to the Court after the closure of the written proceedings.[312] Therefore, in its Practice Direction IX of 4 April 2002, the Court adopted new measures 'aimed at limiting the late filing of documents in accordance with Article 56 of the Rules of Court'.[313] The Court expressly called upon parties 'to refrain from submitting new documents after the closure of the written proceedings'.[314] A party nevertheless desiring to do so must explain (i) why it considers it necessary to include the document in the case file, and (ii) must indicate the reasons preventing the production of the document at an earlier stage. It is for the party wishing to produce the new documents to identify any exceptional circumstances which may justify their production at this stage in the proceedings and to make its case as to why the documents are necessary within the meaning of Article 56, para. 2 of the Rules.[315] In case of doubt, the Court may request the party to provide further explanation as to why the Court should regard the document as necessary.[316] It is submitted that, as a rule, new documents should not be allowed to be produced if they could and should have been produced before the closure of the written proceedings.

78 The Court has stated that, in the absence of consent of the other party, it will authorize the production of new documents only in exceptional circumstances, if it considers it necessary and if the production of the document at this stage of the proceedings appears justified to the Court.[317] In practice, the Court has indeed adopted a somewhat more restrictive position, deciding on several occasions not to authorize the production of new documents.[318] However, even if the Court ultimately denies the production of a given document, it nonetheless has to acquaint itself with the document's contents while considering the objection.[319] Although it may go too far to therefore describe any objection as 'pointless',[320] this appears to be a procedural flaw, which may necessitate an amendment of Article 56, para. 1 of the Rules.[321]

79 The Court has also fixed time limits for the filing of any new documents which were to be dealt with as provided for in Article 56 of the Rules of Court.[322] Such a time limit or deadline is, however, not foreseen in Article 56 of the Rules and seems artificial. There is no reason

[312] *E.g.*, in the *Corfu Channel* case the United Kingdom submitted 77 and Albania six new documents; *cf.* ICJ Reports (1949), pp. 4, 133–8, 139. For further examples, *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1307–18.

[313] Speech by President Shi Jiuyong to the General Assembly of the United Nations, UN Doc. A/58/PV.50 (2003), p. 5.

[314] Practice Direction IX, para. 1.

[315] *Cf. Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 27, para. 19; *ibid.*, CR 2009/20, 28 September 2009, p. 12. *Cf.* also Riddell/Plant (2009), pp. 176–7.

[316] *Cf. Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports (2009), pp. 61, 65, para. 7.

[317] Practice Direction IX, para. 3.

[318] *Cf. e.g.*, *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 632, para. 13; *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 27, para. 19; *Dispute regarding Navigational and Related Rights*, Judgment, ICJ Reports (2009), pp. 213, 220, para. 8; but see, *e.g.*, *Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports (2009), pp. 61, 65, para. 7 (deciding to authorize the production of a document submitted by the applicant notwithstanding an objection raised by the respondent). *Cf.* also Quintana, *ICJ Litigation*, pp. 334–5; Speech by President Tomka to the Sixth Committee of the General Assembly, 31 October 2014, pp. 2–3.

[319] *Cf.* Art. 56, para. 1 of the Rules (requiring that the full original or a certified copy of the late document be filed with the Registry, which will then communicate it to the other party and inform the Court); *cf.* also Rosenne, *LPICT* (2002), p. 244; Quintana, *ICJ Litigation*, p. 339; Thirlway, *ICJ*, p. 99.

[320] Thirlway, *ICJ*, p. 99.

[321] *Cf.* Rosenne, *LPICT* (2002), pp. 244–5; Quintana, *ICJ Litigation*, p. 339.

[322] *Cf. e.g.*, *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 287, para. 18.

why the parties should not be able to submit any new documents after the deadline if they so agree, or if these documents are necessary for the conduct of the case and, due to exceptional circumstances, the parties have been prevented from producing them at an earlier stage.

**c) Authenticity of Documents**

The authenticity of every document must be duly established if it is to be accepted by the Court as part of the evidence, no matter how slight its importance may be.[323] The certification by the agent of the copies of the documents annexed to the pleadings does not create a presumption of their authenticity which must be rebutted by the party challenging it.[324] Instead, in the event that a party challenges the authenticity of a document, it is for the party producing the document to satisfy the Court by such evidence as is deemed appropriate. Any challenge must, however, be a reasoned one. **80**

Challenges to the authenticity of documents before the Court are quite rare[325] and there is accordingly no prescribed procedure. The first step will usually be to investigate whether a suspicious document, or any reference to it, can be found in any archive that is likely to house it, or in any historical or other book on the region or subject-matter in question. As a second step, the party may employ experts in the field, as well as forensic document examiners, to carry out an independent scientific evaluation of the documents.[326] Such investigations may initially use the photocopies of the documents reproduced in the pleadings. However, in order for a party to be able to successfully challenge the authenticity of a document, it may request that the original of the document be made available to it at the Peace Palace for a non-destructive examination. The party may take photographic images of the document or capture the document on film, including any specific details which are visible only on the original such as seals, indented lines, inks, holes, and paper edges. A report on the examination of the document, including any documentary evidence, is to be submitted to the Court which will give the party submitting the documents the opportunity to comment on the report.[327] **81**

Any challenge to the authenticity of a document is closely linked to the merits of the case and must therefore be considered and determined within the framework of the merits of the case. Neither the Statute nor the Rules of Court provide for incidental proceedings in such a case; they do not address preliminary objections to the authenticity of documents. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the Court asked the parties to address the question of authenticity in their regular pleadings on the merits, provided that the party that produced the disputed documents would submit an interim report on their authenticity six months prior to the submission of these pleadings.[328] Eventually, the party in question declared it would not **82**

[323] *Lighthouses Case between France and Greece*, PCIJ, Series C, No. 74, p. 220. *Cf.* also *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 8; and *ibid.*, Pleadings, vol. IV, pp. 608–9.

[324] *Contra* Sandifer (1975), pp. 282–4.

[325] *Cf. Arbitral Award made by the King of Spain on 23 December 1906*, Pleadings, vol. II, pp. 164–5; *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, p. 231; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 46–7, paras. 15–23. See further Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1286–7.

[326] *Cf. Right of Passage over Indian Territory* case, Pleadings, vol. V, p. 358.

[327] *Cf.* Fachiri, *The Permanent Court of International Justice* (2nd edn., 1932), p. 119. For details of such an examination *cf.* Olsen (ed.), *The Forensics of a Forgery: Bahrain's Submissions to the International Court of Justice in re: Qatar v. Bahrain* (2003), 6 vols.

[328] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Order of 30 March 1998, ICJ Reports (1998), pp. 243, 245–6.

rely on the said documents,[329] but the incident raised questions concerning whether the Court ought to have an 'ancillary duty to police the honesty of States and their representatives';[330] and if so, how this could be implemented.[331]

**83** The fact that the authenticity of a document cannot be proven, or that a challenged document has been withdrawn, does not mean that it will be removed from the printed pleadings of the case. If the document in question has been referred to or read at the public hearing, it cannot be omitted from the verbatim record as this must be a faithful record of what has taken place.[332]

### *4. Confidentiality of Pleadings and Documents*

**84** The pleadings and documents annexed thereto are treated as confidential until the case is terminated. The confidentiality of the pleadings is an important aspect for States submitting to the Court's jurisdiction; it is binding on both the Court and the parties.[333] Thus, the Court has objected to the publication by the parties, more particularly in the press, of the text, in whole or in part, of the documents of the written proceedings. To release any such document, an agreement between the parties, duly notified to the Court, would be required.[334] However, the Rules of Court provide several important exceptions to the requirement of confidentiality.

#### a) Availability of Pleadings to Third States

**85** Cases before the Court often attract the attention of third States. States entitled to appear before the Court have frequently asked to be furnished with copies of the pleadings and documents annexed.[335] No justification or special interest in the case is required for such a request.[336] The Court, or its President if the Court is not sitting, may at any time decide, after ascertaining the views of the parties, to accede to the request.[337] The parties have, save in exceptional circumstances, a right to be informed of the name of the State asking for the pleadings.[338] The Court approaches the parties with regard to each separate request; the consent given to the communication of the pleadings to a given State is not considered as covering the communication to any

[329] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 47, para. 20; *cf.* also Interim Report of the State of Qatar, 30 September 1998, and Torres Bernárdez/Moïse Mbengue on Art. 48 MN 37–42 for further details.

[330] Reisman/Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law* (2014), p. 199.

[331] *Cf.* Thirlway, *ICJ*, p. 100.

[332] *Cf.* Fourteenth Annual Report, PCIJ, Series E, No. 14, p. 148.

[333] A party may not publish the pleadings without the consent of the other party (*cf. ICJ Yearbook* (1951–1952), p. 97). The requirement of confidentiality, however, does not preclude a party from placing its own pleadings at the disposal of another State or of other branches of its own government (Sixteenth Report, PCIJ, Series E, No. 16, p. 184).

[334] PCIJ, Series D, third addendum to No. 2, p. 822. *Cf.* also *Fisheries*, Pleadings, vol. IV, p. 628 (No. 21) and *Aerial Incident of 27 July 1955* (United States of America v. Bulgaria), Pleadings, p. 615 (No. 65).

[335] *E.g.*, in the *North Sea Continental Shelf* cases 14 States asked for the pleadings: *ICJ Yearbook* (1968–1969), p. 111; and in *Territorial and Maritime Dispute* seven States asked for the pleadings: Judgment, ICJ Reports (2012), pp. 624, 631–2, para. 9.

[336] *Cf. e.g.*, *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 5, para. 4, where Malta, the United States, Canada, the Netherlands, Argentina, and Venezuela had asked for the pleadings. *Contra* Fachiri, *supra*, fn. 327, p. 115.

[337] Art. 53, para. 1 of the Rules.

[338] *Cf.* Sixteenth Report, PCIJ, Series E, No. 16, pp. 184–5. Since 1937 it has been the practice to inform the parties of the source of the request.

other State.[339] If a party, on being approached by the Court, declines to express an opinion on the question (*e.g.*, because it disputes the jurisdiction of the Court), the Court makes available the pleadings.[340] If the pleadings in a case are made available to a State, which has given as the reason for its request a dispute pending at the time between it and another State, the Registrar has to inform the other State in the dispute that the pleadings are also at its disposal.[341] A State receiving the pleadings must maintain their confidential character until they are made generally available.

In the majority of cases the parties have raised no objection to the pleadings and documents annexed being made available to third States.[342] Whenever one or both parties have objected to the request, the Court has decided that the pleadings in the case and documents annexed would not, for the present, be made available to the requesting States.[343] President Abraham has recently described this approach as the 'established practice' of the Court.[344] However, the consent of the parties is not a formal condition. On the contrary, the Court is entitled to decide that copies of the pleadings and documents annexed be made available to a State, even if the parties' view was unfavourable.[345] If a request is, for the present, refused, the Court will inform the requesting State as soon as a different decision is taken. When the Court subsequently decides, in accordance with Article 53, **86**

[339] PCIJ, Series D, third addendum to No. 2, p. 822.

[340] *Cf. e.g.*, *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports (1974), pp. 253, 255–6, para. 9.

[341] *Cf.* Ninth Annual Report, PCIJ, Series E, No. 9, p. 169.

[342] In recent cases, requests were granted in: *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 235, para. 7 (request by New Zealand); *Maritime Dispute*, Judgment, ICJ Reports (2014), pp. 3, 11, para. 9 (requests by Colombia, Ecuador and Bolivia); *Obligation to Negotiate Access to the Pacific Ocean*, Preliminary Objections, ICJ Reports (2015), pp. 592, 597, para. 5 (request by Peru and Colombia); *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, Judgment, ICJ Reports (2016), pp. 100, 107, para. 7 (request by Chile); *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 11, para. 7 (request by Chile); *ibid.*, Counter-Claims, Order of 15 November 2017, para. 7 (requests by Chile and Panama: granted in part, with the exception of several annexes to the Counter-Memorial of Colombia due to 'reasons of national security' adduced by the Agent of Colombia); *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 260, para. 6 (request by the United Kingdom); *Marshall Islands v. UK*, Preliminary Objections, ICJ Reports (2016), pp. 833, 838, para. 7 (request by India); *Caribbean Sea Delimitation* and *Isla Portillos*, Judgment of 2 February 2018, para. 7 (requests by Colombia and Panama).

[343] Requests were denied in: *Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3, 5, para. 4 (request by Malta and five other States); *Continental Shelf* (Libya/Malta), Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3, 5, para. 4 (request by Italy); *Gulf of Maine*, Judgment, ICJ Reports (1984), pp. 246, 256, para. 11 (request by the United Kingdom and Bangladesh); *ELSI*, Pleadings, vol. III, pp. 398–9 and 404 (request by Nicaragua); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, *ICJ Yearbook* (1996–1997), p. 200 (request by two States); *Kasikili/Sedudu Island*, *ICJ Yearbook* (1996–1997), p. 200 (request by one State); *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 580, para. 6 (request by the Philippines); *Certain Property*, *ICJ Yearbook* (2001–2002), p. 297 (request by one State); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659, 665, paras. 9 and 11 (two requests by El Salvador); *Dispute regarding Navigational and Related Rights*, Judgment, ICJ Reports (2013), pp. 213, 220, para. 6 (request by Ecuador and Colombia); *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 556–7, para. 6 (request by the United Kingdom and India); *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, Judgment of 2 February 2017, para. 7 (request by Colombia).

[344] Speech by President Abraham to the Sixth Committee of the General Assembly, 27 October 2017, p. 5 ('In accordance with its established practice, the Court will generally decide to communicate pleadings to a third State if the Parties to the case are in agreement, but on the contrary refuse to do so if one of the Parties objects.').

[345] *Cf.* Ninth Annual Report PCIJ, Series E, No. 9, p. 169; PCIJ, Series D, third addendum to No. 2, p. 822.

para. 2 of the Rules of Court, to make the pleadings and annexed documents accessible to the public, it will send a set of the pleadings and annexes concerned to the requesting State in order to satisfy the initial request.[346]

87 The request for pleadings and documents has an added dimension in cases of a third State, which contemplates the possibility of intervening in the proceedings under Article 62 of the Statute.[347] A State applying for permission to intervene must identify and show that it has 'an interest of a legal nature which may be affected by the decision in the case'.[348] This is difficult to do if the pleadings and annexed documents of the case are not made available to it.[349] It would not know precisely how its interests might be engaged by the case nor would it be able to responsively advance particular claims.[350] It has been said that such a State is in a 'dark room' with regard to the contentions of the parties.[351] All States that have applied for permission to intervene in a case had previously requested that the pleadings and documents annexed be made available to them. Yet, the Court has held that there is no support for 'the view that there exists an inextricable link between the two procedures'.[352] Practice shows, however, that in all cases in which the pleadings were denied to a State its application to intervene was also unsuccessful.[353] This situation is unsatisfactory and has been widely criticized.[354] It is submitted that, on the grounds of procedural fairness as well as the sound administration of justice, the Court should make available the pleadings and annexed documents to a State that can establish a *prima facie* interest in the case,[355] even though the parties object, unless the parties can demonstrate overriding security or other interests.[356] As a further safeguard of the interests of the original parties, the putative intervener could be expressly required to use the materials on a confidential basis and solely for the purposes of intervention.[357]

**b) Furnishing of Pleadings to Intervening States**

88 If an application for permission to intervene under Article 62 is granted or if an intervention under Article 63 is admitted, copies of the pleadings and documents annexed are

[346] *Cf. e.g.*, *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 483–4 (No. 90); *Gulf of Maine*, Judgment, ICJ Reports (1984), pp. 246, 256, para. 11; *Continental Shelf* (Libya/Malta), Judgment, ICJ Reports (1985), pp. 13, 18, para. 10.

[347] For further commentary, see Miron/Chinkin on Art. 62 MN 107–114.

[348] Art. 62, para. 1.

[349] *Cf.* Kolb, *ICJ*, p. 968.

[350] *Cf. Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, Sep. Op. Schwebel, ICJ Reports (1981), pp. 35 *et seq.* and the oral argument of the agent for Malta in the same case, *ibid.*, Pleadings, vol. III, pp. 283–4, 285. *Cf.* also the statement of the Italian agent in the *Continental Shelf* (Libya/Malta), Pleadings, vol. II, pp. 486–7.

[351] Quintana, *LPICT* (2008), p. 203.

[352] *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 585, para. 22.

[353] *Cf. Continental Shelf* (Tunisia/Libya), Application by Malta for Permission to Intervene, ICJ Reports (1981), pp. 3 *et seq.*; *Continental Shelf* (Libya/Malta), Application by Italy for Permission to Intervene, ICJ Reports (1984), pp. 3 *et seq.*; *Pulau Ligitan*, Application by the Philippines for Permission to Intervene, ICJ Reports (2001), pp. 575 *et seq*.

[354] *Cf.* Bowett *et al.*, *ICLQ* (1996), pp. S23–S24, para. 78; *Pulau Ligitan*, CR 2001/1, 25 June 2001 (Reisman); Shaw, *Rosenne's Law and Practice*, vol. III, p. 1292; Kolb, *ICJ*, pp. 968–9.

[355] *Cf.* Bowett *et al.*, *ICLQ* (1996), pp. S30, para. 104(2).

[356] Judge Oda has suggested an alternative route: if the pleadings are not made available to the intervening party, the burden should be on the parties to show that the intervening State's interest of a legal nature (other than in the subject-matter of the case itself) is not affected by the decision; *cf. Pulau Ligitan*, Application by the Philippines for Permission to Intervene, Diss. Op. Oda, ICJ Reports (2001), pp. 609, 618–20, paras. 13–7.

[357] *Cf.* Kolb, *ICJ*, p. 968.

supplied to the intervening State,[358] unless of course they have already been communicated to that State previously.[359] If, on the other hand, the State has been refused permission to intervene and a party has previously objected to the furnishing of pleadings, the situation remains unchanged in this respect.

**c) Communication of Pleadings to International Organizations**

Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar communicates to it copies of all the pleadings and documents annexed.[360] Given that the purpose of this communication is to allow the organization in question to present its observations on the matter to the Court,[361] the Registrar will refrain from doing so if the organization indicates in advance that it does not intend to submit such observations.[362] Neither the Statute nor the Rules of Court say anything about the timing of the communication of the written proceedings. Pleadings may either be communicated to the organization successively, when they are filed in the Registry, or they may be communicated together. In any case, they must be communicated to the organization in sufficient time to allow it to furnish any information it may see fit before the closure of the written proceedings.[363] **89**

**d) Placing of Pleadings at the Disposal of Technical Experts**

The Court may also place the pleadings and annexed documents in a case at the disposal of experts appointed to assist it in respect of technical matters. The technical experts must treat them as confidential so long as they have not been made accessible to the public.[364] **90**

**e) Accessibility of Pleadings to the Public**

Article 53, para. 2 of the Rules of Court provides that 'the Court [not the President] may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings'. The Court usually makes the pleadings accessible to the public as from the opening of the oral proceedings. There have, however, been some notable exceptions where copies of the pleadings and annexed documents were made accessible to the public only half-way through the oral proceedings,[365] or even after the closure of the oral **91**

[358] Arts. 85, para. 1 and 86, para. 1 of the Rules. *Cf. e.g.*, *Land and Maritime Boundary*, Order of 21 October 1999, ICJ Reports (1999), pp. 1029, 1035, para. 17; *Jurisdictional Immunities of the State*, Application by the Hellenic Republic for Permission to Intervene, ICJ Reports (2011), pp. 494, 503, para. 33.

[359] *Cf. Whaling in the Antarctic*, Declaration of Intervention of New Zealand, ICJ Reports (2013), pp. 3, 9, para. 22.

[360] Art. 34, para. 3 of the Statute. *Cf.* also Art. 9 of the Instructions for the Registry (as drawn up by the Registrar and approved by the Court on 20 March 2012); and Dupuy/Hoss on Art. 34 MN 10–17 for further details on the Court's practice under Art. 34, para. 3.

[361] *Cf.* Art. 69, para. 3 of the Rules.

[362] *Cf. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 107, para. 6.

[363] *Cf.* Art. 69, para. 2 of the Rules. *Cf.* also *Lockerbie* (Libya v. UK), Preliminary Objections, ICJ Reports (1998), pp. 9, 12, para. 8 and *ibid.*, CR 97/16, 13 October 1997.

[364] *Gulf of Maine*, Order of 30 March 1984, ICJ Reports (1984), pp. 165, 167, para. 3 and *ICJ Yearbook* (1983–1984), pp. 143–4; *Corfu Channel*, Order of 17 December 1948, ICJ Reports (1948), pp. 124, 126; *ibid.*, Order of 19 November 1949, ICJ Reports (1949), pp. 237, 238.

[365] *Cf. Diallo*, CR 2010/4, 26 April 2010, p. 8. The delay in making the pleadings accessible to the public in this case was a consequence of the late arrival of Congo's delegation due to the difficulties in the air transport sector following the volcanic eruption in Iceland.

proceedings.[366] The Court has also made it clear that it was willing to require the redaction of pleadings, or postpone or withhold their publication altogether, in case that their publication would pose a 'genuine security risk' for specified individuals.[367] 'Ascertaining the views of the parties' does not mean that the Court has to wait for a positive reaction from the parties. The Court must only afford the parties an opportunity of making their views known.[368] However, the Court has never made the pleadings or parts of the pleadings accessible to the public when one of the parties has expressly objected.[369] In this case, the public may only consult the application instituting the proceedings, the provisional and uncorrected verbatim records of the public hearings in the case, and any application for permission to intervene. Nevertheless, the implicit publicity in the litigation before the Court may become an incentive for States to resort instead to *ad hoc* arbitration in particularly delicate cases.[370]

**92** The public's access is not restricted to the pleadings on the merits and the documents annexed thereto. The Court also makes accessible to the public: pleadings on jurisdiction and admissibility;[371] the preliminary objections and the written statements concerning the observations and submissions on the objections, as well as the documents annexed thereto;[372] written statements on the admissibility of counter-claims and the written observations of the other party; written statements of the intervening States and the written observations on these statements by the parties, as well as supporting documents;[373] and requests for provisional measures.[374] All additional, supplemental, and further documents, as well as any communications addressed to the Court, including any documents and reports annexed thereto, concerning the authenticity of documents are also made accessible to the public.[375]

**93** The pleadings and other documents are deposited in the Press Room and in the reference room of the Carnegie Library in the Peace Palace, at the International Press Centre of The Hague, and in the libraries and information centres of the United Nations in various cities around the world. Since 1997[376] it has also been the practice of the Court to post the pleadings (without any documents annexed to them) on its website <http://www.icj-cij.org> at the opening of the oral proceedings or at a later stage, depending on the circumstances.[377] The accessibility of pleadings and other documentation to the public further improved after the relaunch of the Court's

[366] *Cf. Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 5, para. 7, and *ICJ Yearbook* (1979–1980), p. 127; *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 24, para. 48.

[367] *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 22–3, paras. 40–3.

[368] *Cf. Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 5, para. 7.

[369] *Cf. ICJ Yearbook* (1972–1973), p. 141; *ICJ Yearbook* (1973–1974), p. 126. *Cf.* also *Lockerbie* (Libya v. UK), Preliminary Objections, ICJ Reports (1998), pp. 9, 13, para. 11; *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 19–24, paras. 32–48.

[370] *Cf.* Quintana, *ICJ Litigation*, p. 340. For a more detailed comparison of *ad hoc* arbitration and institutionalized adjudication, see Kolb, General Principles of Procedural Law, MN 7.

[371] *Cf. e.g.*, *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 115, para. 10.

[372] *Cf. e.g.*, *Lockerbie* (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 119, para. 10.

[373] *Cf. Land, Island and Maritime Frontier Dispute*, C 4/CR 1990/1, 5 June 1990, p. 11; *Pulau Ligitan*, Application by the Phlippines for Permission to Intervene, ICJ Reports (2001), pp. 575, 581, para. 10.

[374] *Cf. ICJ Yearbook* (1972–1973), p. 141.

[375] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Merits, ICJ Reports (2001), pp. 40, 48, para. 27.

[376] *Cf.* ICJ Press Release No. 97/11 of 25 September 1997.

[377] *Cf.* further Thirlway, *ICJ*, p. 101.

website in 2017, which introduced new features and functionalities for navigation, search, and readability.[378]

## III. Oral Proceedings

### *1. Organization of Oral Proceedings*

Upon the closure of the written proceedings, the case is ready for the second part of the procedure: the oral proceedings.[379] The 'oral proceedings' must be distinguished from the 'oral pleadings', a term not found in the Statute and the Rules of Court but mentioned in the Practice Directions[380] and widely used by the Court, individual judges and the parties. The former is much broader in scope and, as Article 43, para. 5 shows, it includes the hearing of witnesses and experts as well as the oral observations by intervening States[381] and the oral presentation of information by international organizations.[382] By contrast, the term 'oral pleadings' is limited to the oral statements on behalf of the parties. **94**

The oral proceedings can sometimes be very lengthy. Although there is no such thing as 'an average case' at the Court, the hearings on the merits usually take between two and six weeks. The all-time record is still held by the second phase of the *South West Africa* cases, where the Court conducted 100 public sittings between 15 March and 29 November 1965.[383] The length of the oral arguments presented during hearings is also a factor that has led to a considerable increase in the length of procedure before the Court. In April 2002, the Court therefore stated that 'the length of oral argument in previous cases has frequently been longer than necessary. In future, dates for oral arguments in a case will be fixed having regard to what is reasonably required by the parties, in order to avoid unnecessarily protracted oral arguments'.[384] This announcement seems to have been implemented. Over the last fifteen years, the length of the oral proceedings has been reduced considerably, with more than twelve public sittings on the merits having become a rare exception.[385] **95**

The content of the oral proceedings is regulated in broad terms in Article 43, para. 5 of the Statute which indicates two distinct procedural actions: the presentation of oral arguments on behalf of the parties by agents, counsel, and advocates, and the production of oral evidence.[386] The details are set out in Articles 54–72 of the Rules of Court and in Practice Directions VI, IX, IX*bis*, IX*ter*, IX*quater*, and XII. **96**

[378] *Cf.* ICJ Press Release No. 2017/26 of 27 June 2017.

[379] On the oral proceedings, *cf.* Guynat, *RGDIP* (1930), pp. 312–23; Hudson, *PCIJ*, pp. 561 *et seq*; Jennings, *BYIL* (1997), pp. 13–9; Kolb, *ICJ*, pp. 970–8; Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1323–86.

[380] *Cf.* Practice Directions VI and XI.

[381] *Cf.* Art. 85, para. 3 and Art. 86, para. 2 of the Rules.

[382] *Cf.* Art. 69 of the Rules.

[383] Other cases with 50 or more public sittings include the *Land, Island and Maritime Frontier Dispute* and the *Barcelona Traction* cases.

[384] ICJ Press Release No. 2002/12 of 4 April 2002, Measure No. 3; *cf.* also Higgins, *ICLQ* (2001), p. 128.

[385] *Cf. e.g.*, *Croatian Genocide*, where 20 public sittings were held between 3 March and 1 April 2014; *Whaling in the Antarctic*, where 17 public sittings were held between 26 June and 16 July 2013; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, where 14 public sittings were held between 5 March and 23 March 2007; *Bosnian Genocide*, where 44 public sittings were held between 27 February and 9 May 2006.

[386] *Cf.* also Art. 58, para. 1 of the Rules which provides that '[t]he Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.'

**a) Opening of Oral Proceedings**

**97** In principle, cases are heard in the order in which they become ready for the hearing. However, applications for provisional measures always take priority, as do urgent requests for advisory opinions. The Court also has regard to any other special circumstances, including the urgency of a particular case.[387] There also seems to be a tendency to give jurisdictional cases some priority. If more than one case is ready for hearing at a time, the Court, as a rule, gives precedence to the case which has been registered first in the General List.[388]

**98** After ascertaining the views of the parties and, if applicable, the intervening State, the Court, or the President if the Court is not sitting, fixes the date and time for the opening of the oral proceedings.[389] On occasion, parties have proposed to the Court an agreed calendar for hearings. The Court, however, is not bound by any agreement of the parties on the opening of the oral proceedings. The Court's decision does not require the form of an order; an order has, in fact, only been made once, owing to the special circumstances of the case.[390] The date for the opening of the oral proceedings may be fixed even before the written proceedings have been concluded.[391]

**99** The period of time between the closure of the written and the opening of the oral proceedings has ranged from a month and a half to over seven years. Such excessive delays will usually be attributable to the parties.[392] The Court, or the President if the Court is not sitting, may also decide, if occasion should arise, that the opening or the continuance of the oral proceedings be postponed.[393] The Court has frequently been requested to do so sometimes only a few days, sometimes only hours, before the start of the hearings. When deciding upon a request to postpone the opening of the oral proceedings for a substantial period, the Court takes into account the views of the States concerned, the course of the proceedings since the filing of the initial application in the case, the timing of the request for postponement,[394] and the subject-matter of the hearings (jurisdiction and admissibility or merits),[395] as well as the interest of parties in other cases which might have to be advanced.[396] The reasons advanced for the postponement also play an important role: the Court has granted requests for the postponement of the opening of the oral proceedings because of 'unforeseen circumstances';[397] a new government assuming power in one of the States parties and the need of that government to study carefully the matters

[387] *Cf.* Art. 54, para. 2 and Art. 103 of the Rules.

[388] *Cf.* Sixteenth Report, PCIJ, Series E, No. 16, p. 186. For exceptions, *cf.* Guyomar, *Commentaire*, p. 356; Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1333–5.

[389] *Cf.* Art. 54, paras. 1 and 3 of the Rules.

[390] *Cf. Electricity Company of Sofia and Bulgaria*, Order of 26 February 1940, PCIJ, Series A/B, No. 80, pp. 4, 8–9, where the Court fixed the date for the commencement of the oral proceedings after declining to accept Bulgaria's argument that due to the outbreak of the Second World War it was prevented by *force majeure* from submitting its Rejoinder.

[391] The contrary view expressed in PCIJ, Series D, third addendum to No. 2, p. 821 has been overtaken by the Court's practice. *Cf. e.g.*, *Certain Criminal Proceedings in France*, Order of 16 November 2010, ICJ Reports (2010), pp. 635, 636.

[392] For examples, *cf.* Pellet, *LPICT* (2006), pp. 165–7.

[393] Art. 54, paras. 1 and 3 of the Rules.

[394] *Nottebohm*, Preliminary Objection, ICJ Reports (1953), pp. 111, 117 (a request by one of the parties transmitted to the Registry on the day before the opening of the hearing was declined).

[395] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 6, para. 9 and *ICJ Yearbook* (1978–1979), p. 118; *Right of Passage over Indian Territory*, Pleadings, vol. V, p. 293.

[396] PCIJ, Series D, third addendum to No. 2, p. 555.

[397] *Norwegian Loans*, Order of 29 May 1956, ICJ Reports (1956), pp. 20, 21.

pending before the Court;[398] in order to enable diplomatic negotiations ongoing between the parties to be conducted in an atmosphere of calm;[399] and to allow one of the parties additional time to analyse and respond to the other party's additional submissions.[400] It has been less inclined to do so if such a request was exclusively based on the personal convenience of agents and counsel.[401] In principle, *force majeure* may also qualify as a reason for the postponement of the opening of the oral proceedings.[402] The parties may request the Court to postpone the opening of the oral proceedings until a certain time or *sine die*. The latter may be the case if the parties have entered into negotiations that are expected to lead to a full and final settlement of the case.[403] Considering that the Court adopts its judicial calendar well in advance (currently the Court announces its schedule for up to three upcoming cases), any request at short notice to postpone the opening of the oral proceedings has disruptive consequences for the Court's carefully resourced schedule of work. The Court will not usually have another case which is fully translated and ready for hearing, and which can be brought forward at short notice. In view of the Court's present heavy caseload, parties requesting a postponement of the opening of the oral proceedings cannot expect to have their case heard at the next time convenient to them.[404]

**100** The Court has gone to some length to avoid having to postpone the opening of long-scheduled oral proceedings. In truly exceptional circumstances and with the agreement of the parties, it held the first two scheduled public sittings and heard the first round of oral argument by one of the parties even though the delegation of the other party could not be present at the hearing due to *force majeure*.[405] While neither the agents, nor counsel, nor advocates of the party were present, the Court nevertheless noted the presence at the hearing of 'representatives' of both parties.[406] Further public sittings were rescheduled to allow both parties to be represented by their delegations.[407] While such a procedure is highly unusual, it is not incompatible with either the Court's Statute or its Rules.[408]

**101** The 'opening of the oral proceedings' constitutes another break in the procedure.[409] With the opening of the oral proceedings, the composition of the Court in that case is 'frozen' until the delivery of judgment. If during this time there is a change in the composition of the Court, those members whose terms of office have ended continue to sit on

[398] *Cf. Nicaragua*, ICJ Press Release No. 90/12 of 29 June 1990.

[399] *Armed Activities* (DRC v. Uganda), ICJ Press Release No. 2003/39 of 7 November 2003 (the Court acceded to the DRC's request which was made five days before the oral proceedings were scheduled to open).

[400] *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665, 676–7, para. 31.

[401] Eighth Annual Report, PCIJ, Series E, No. 8, pp. 263–4.

[402] But *cf. Electricity Company of Sofia and Bulgaria*, Order of 26 February 1940, PCIJ, Series A/B, No. 80, pp. 4, 8–9.

[403] *Cf. Aerial Incident of 3 July 1988* (Iran v. USA), Order of 22 February 1996, ICJ Reports (1996), pp. 9, 10; *Certain Documents and Data*, ICJ Press Release No. 2014/28 of 5 September 2014.

[404] In November 2003, Congo and Uganda asked the Court to adjourn the hearings until April 2004, but these were in fact rescheduled for April 2005; *cf. Armed Activities* (DRC v. Uganda), ICJ Press Releases No. 2003/39 of 7 November 2003 and No. 2004/36 of 6 December 2004. *Cf.* also Prager, 'Procedural Developments at the International Court of Justice', *LPICT* 3 (2004), pp. 125–42, 128.

[405] *Cf. Diallo*, CR 2010/1, 19 April 2010, p. 8; *ibid*., CR 2010/2, 19 April 2010, p. 35; *ibid*., CR 2010/3, 26 April 2010, p. 8. The delegation of the DRC (as well as counsel for Guinea) could not be present at the opening of the oral proceedings owing to the disturbances caused in the air transport sector following the volcanic eruption in Iceland during April 2010.

[406] *Diallo*, CR 2010/1, 19 April 2010, p. 13.

[407] *Cf.* ICJ Press Releases No. 2010/9 of 20 April 2010 and No. 1010/6 of 17 March 2010.

[408] *Cf.* Art. 101 of the Rules.

[409] *Cf.* Art. 53, para. 2, Art. 57 and Art. 82, para. 1 of the Rules.

the case[410] and the retiring President continues to preside. A judge who resigns or passes away after the opening of oral proceedings in a phase of a case is not replaced in respect of that phase.

**b) Course of Oral Proceedings**

*aa) Practical Arrangements*

**102** The oral proceedings are normally held at the seat of the Court, in the Great Hall of Justice at the Peace Palace, in The Hague.[411] However, after ascertaining the views of the parties, the Court may decide to hold the proceedings elsewhere.[412] The oral proceedings consist of public sittings unless the parties ask for them to be *in camera* or the Court decides of its own motion.[413] In September 2011, the Court for the first time broadcasted live and in full (in the official languages of the Court) on its website <http://www.icj-cij.org> the public sittings in contentious proceedings.[414] The oral proceedings are now typically streamed live and on demand through various online channels; in addition, still photographs are posted on the Court's website as well as on its Twitter feed (@CIJ_ICJ).[415]

**103** The public sittings are usually held on weekdays from 10.00 a.m. to 1.00 p.m. and/or from 3.00 p.m. to 6.00 p.m., although the specific times may vary, sometimes even within the course of a single case.[416] The Registrar arranges for the dates and times of public sittings to be published.[417] The Court usually adjourns at around 11.30 a.m. and 4.30 p.m. for its 15-minute working 'coffee break' and counsel stops at a convenient place in their speech and suggests to the President that the Court might wish at this point to take its short adjournment.[418] In proceedings instituted by an application, the applicant sits on the President's left and the respondent on the President's right; in proceedings instituted by the notification of a special agreement, the parties are placed in alphabetical order from the left.[419]

[410] For comment *cf.* Dugard on Art. 13 MN 11–17.

[411] *Cf.* Ninth Annual Report, PCIJ, Series E, No. 9, p. 45.

[412] *Cf.* Art. 22, para. 1 of the Statute and Art. 55 of the Rules. For comment *cf.* Shaw on Art. 22 MN 15–23.

[413] Art. 46; and *cf.* von Schorlemer/Tzanakopoulos on Art. 46 MN 24–31 for comment on the Court's practice. For closed sittings *cf. Continental Shelf* (Tunisia/Libya), Judgment, ICJ Reports (1982), pp. 18, 25, para. 12 and *ibid.*, Pleadings, vol. V, p. 289 and *ICJ Yearbook* (1981–1982), p. 144; *Preah Vihear*, Merits, ICJ Reports (1962), pp. 6, 9 and *ibid.*, Pleadings, vol. II, p. 129. In both cases a film was shown to the Court *in camera. Cf.* also *South West Africa* cases, Second Phase, ICJ Reports (1966), pp. 6, 9 (the Court heard the parties' contentions relating to the composition of the Court *in camera*); *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 20 and 24, paras. 33 and 46 (protected witnesses were heard in closed session).

[414] *Cf.* ICJ Press Release No. 2011/25 of 5 September 2011. The first full online live broadcast of the public hearings in any case before the Court took place in February 2004 in the *Wall* case, *cf.* ICJ Press Release No. 2004/10 of 19 February 2004.

[415] *Cf. e.g.*, ICJ Press Release No. 2018/19 of 5 April 2018.

[416] *Cf. e.g.*, ICJ Press Release No. 2018/28 of 22 June 2018.

[417] *Cf.* Art. 10, para. 2 of the Instructions for the Registry (as drawn up by the Registrar and approved by the Court on 20 March 2012).

[418] There is some flexibility regarding the timing of the 'coffee break'. *Cf. e.g.*, *Construction of a Road in Costa Rica along the San Juan River*; *Certain Activities carried out by Nicaragua in the Border Area*, CR 2015/12, 24 April 2015, p. 19, where the coffee break was taken 'unusually early' in order not to interrupt the examination of an expert called by one of the parties. As pointed out in an earlier case by President Higgins, somewhat jokingly: 'Well the coffee break is "sacrosanct" but the timing is not'; *cf. Maritime Delimitation in the Black Sea*, CR 2008/18, 2 September 2008, p. 43. But *cf.* also *Territorial and Maritime Dispute* case, CR 2007/14, 23 March 2007, p. 10, where the Court dispensed with the coffee break.

[419] *Cf. ICJ Handbook* (6th edn., 2014), p. 54; *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series C, No. 17-II, p. 10; Fourth Annual Report, PCIJ, Series E, No. 4, p. 285.

*bb) Number of Rounds of Oral Argument*

As a rule, the oral proceedings comprise two rounds of oral arguments, or 'oral hearings', in which the parties address both the claims and, if applicable, the counter-claims.[420] The second round, if any, should be brief.[421] In practice, there is a weekend or at least one day between the two rounds, so that counsel have time for preparation. Where experts and witnesses are heard by the Court, this may be done between the first and second round of the oral arguments,[422] if their testimony is not integrated into the oral arguments of the parties.[423] In both rounds the parties are given equal time to address the Court. In the case of a State intervening, the two rounds of oral arguments by the parties will usually be followed by one or two rounds of oral arguments where the Court is addressed first by the intervening State, followed by the two parties with their observations on the statements of the intervening State. If the intervention is limited to a certain subject-matter, this matter will be addressed in one or two rounds of oral arguments both by the parties and the intervening State. This may be preceded and followed by further rounds of oral arguments on other subject-matters by the parties only. The oral proceedings are concluded with a final presentation by the intervening State followed by the closing statements of the parties and their submissions. **104**

*cc) Cancellation and Rescheduling of Hearings*

The Court is free to cancel scheduled hearings at any time without giving any reasons.[424] It may also, after consulting with the parties, reschedule any hearings. If the oral proceedings have already begun, the Court will communicate the new dates to the parties for the remainder of the proceedings without delay. **105**

*dd) Order of Speaking*

The order in which the parties are heard is settled by the Court after ascertaining the views of the parties.[425] The Court will usually give effect to any agreement between the parties as to the order of speaking 'unless there are decisive reasons not to'.[426] The schedule of the oral proceedings is usually announced in a press release which is published on the Court's website. The order of speaking is without implication for the burden of proof in a case.[427] **106**

In cases begun by the notification of a special agreement, the order of speaking has no bearing on the status of the parties as applicant and respondent. In the absence of agreement between the parties as to the order in which they intend to address the Court, the parties may be called upon to address the Court either in the order in which they themselves agreed to submit their written pleadings[428] or, in the case of simultaneous filing of the pleadings, in the alphabetical order of the names of the **107**

[420] For an example of a single round of oral argument only *cf. ICJ Yearbook* (1984–1985), p. 179.

[421] *Cf.* ICJ Press Release No. 2002/12 of 4 April 2002, Measure No. 3.

[422] This was the case, *e.g.*, in the *Corfu Channel* case; *Preah Vihear* case; *South West Africa* cases; and *Bosnian Genocide* case; *cf. ICJ Yearbook* (1948–1949), p. 78; *ICJ Yearbook* (1961–1962), p. 89; *ICJ Yearbook* (2005–2006), p. 282 and ICJ Press Release No. 2005/27 of 21 December 2005.

[423] *Cf. e.g.*, *ELSI*, Pleadings, vol. III, pp. 25–30, 37–64, 122–31, 239–45, 300–4, 313–25.

[424] *Cf. e.g.*, ICJ Press Release No. 2006/11 of 21 March 2006.

[425] Art. 58, para. 2 of the Rules. For further comment on the order of speaking *cf.* Yee on Art. 45 MN 22.

[426] Kolb, *ICJ*, p. 973.

[427] For further detail on the burden of proof *cf.* Benzing, Evidentiary Issues, MN 34–50.

[428] *Cf. ICJ Yearbook* (1968–1969), p. 111; *ICJ Yearbook* (1969–1970), p. 102; *ICJ Yearbook* (1971–1972), p. 107; *ICJ Yearbook* (1977–1978), p. 104.

parties.[429] Alternatively, if the Court, on the basis of the pleadings, does not see any particular reason for one party to be heard before the other, the order of speaking may be determined by drawing lots.[430]

**108** In cases begun by means of an application, the applicant will be called upon to address the Court first, unless the parties have agreed otherwise.[431] This also applies to cases in which preliminary objections have been joined to the merits.[432] If there is more than one applicant in a case the Court may allow the applicants to agree between themselves as to the order in which they will speak.[433] Parties in the same interest may address the Court in common.[434] In the case of several cases brought by the same applicant against several respondents which are heard together (without being joined), the applicant may speak first, making a common statement addressed to all cases, followed by the individual respondents, each of whom addresses the case to which it is party.[435] If the respondent has made a counter-claim, the applicant is given an opportunity in each round of the oral arguments to reply to the counter-claim. The Court is thus addressed in the following sequence: applicant—respondent—applicant replying to the counter-claim.[436]

**109** The party which has been the first to speak may be given permission to respond orally, even if only briefly, to any new points raised by the other party during its second round of the oral arguments (the oral rejoinder); especially if new facts were introduced,[437] new documents were referred to,[438] oral replies were given to questions asked by the Court or a judge,[439] or the other party changed or amended its final submissions as originally formulated in the first round of oral argument or in the pleadings.[440] The other party may then comment in turn upon the response made, either orally, before the closure of the oral proceedings, or in writing within a certain time limit fixed by the Court.[441]

**110** A party may always waive its right to speak in the second round of oral argument if it thinks that nothing new has been said by the other party.[442] Equally, a party is under no obligation to use all the time allocated to it for the presentation of its argument.[443]

[429] In the absence of any agreement to the contrary between the parties, the Court follows the French alphabetical order of the names of the States concerned. *Cf.* Sixteenth Report, PCIJ, Series E, No. 16, pp. 188–9. But see PCIJ, Series D, third addendum to No. 2, p. 824, para. 3 (noting two possible exceptions to the reliance on alphabetical order arising from the earlier practice of the PCIJ).

[430] *Cf. e.g.*, *Pedra Branca*, Judgment, ICJ Reports (2008), pp. 12, 20, para. 9 and *ICJ Yearbook* (2006–2007), p. 287.

[431] *ICJ Yearbook* (1953–1954), p. 115.

[432] *ICJ Yearbook* (1968–1969), p. 111.

[433] Eighth Annual Report, PCIJ, Series E, No. 8, p. 266.

[434] *South West Africa* cases, Pleadings, vol. VIII, pp. 2, 106; *North Sea Continental Shelf* cases, Pleadings, vol. II, pp. 3–4 and 75; *Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ, Series C, No. 17-II, pp. 10, 25, 27, 29.

[435] *Cf. Legality of Use of Force* cases, ICJ Press Release No. 1999/19 of 7 May 1999 and No. 99/20 of 12 May 1999 (respondent States spoke in the English alphabetical order) and the *Lockerbie* cases, CR 1992/2, 26 March 1992, p. 15 (Libya as the applicant was followed by the United Kingdom and the United States as the respondents).

[436] *Cf. ICJ Yearbook* (1950–1951), p. 115; *ICJ Yearbook* (2001–2002), p. 298.

[437] *Cf. Diversion of Water from the Meuse*, PCIJ, Series C, No. 81, pp. 228–9 and p. 502.

[438] *Cf.* PCIJ, Series D, third addendum to No. 2, p. 823.

[439] *Barcelona Traction*, Pleadings, vol. X, pp. 667–8 and *ICJ Yearbook* (1968–1969), p. 112.

[440] *Cf. The Pajzs, Záky, Esterházy* case, PCIJ, Series C, No. 80, p. 412 and pp. 695–7. *Cf.* also the Sixteenth Report, PCIJ, Series E, No. 16, p. 191.

[441] *Cf. Frontier Dispute* (Burkina Faso/Republic Mali), Judgment, ICJ Reports (1986), pp. 554, 560, para. 14.

[442] *Cf. e.g.*, *Continental Shelf* (Libya/Malta), Pleadings, vol. II, pp. 659, 660 (Libya and Malta waiving their right of reply) and *ICJ Yearbook* (1983–1984), p. 142.

[443] *Cf. Pulp Mills*, CR 2009/16, 21 September 2009, p. 63; *ibid.*, CR 2009/19, 24 September 2009, p. 50.

*ee) Number of Counsel and Advocates*

Article 58, para. 2 of the Rules of Court provides that the Court shall, after ascertaining the views of the parties, settle the number of counsel and advocates to be heard on behalf of each party. According to the Court's practice the presentation of the argument may be sub-divided, at the discretion of the party concerned, among a number of persons, provided the various speakers deal with different points or different aspects of the subject so as to avoid repetition.[444] The all-time record in this respect is held by Cameroon in the *Land and Maritime Boundary* case which had fifteen persons address the Court on its behalf.[445] This leeway for the parties to determine how many speakers would address the Court applies to both rounds of oral argument.[446] The Court has limited the number of persons allowed to speak in reply in only one case.[447] Where there are several parties in the same interest, each is entitled to address the Court separately with its own counsel. The parties supply the Registry with a list of speakers for each session and with estimates as to how long each person proposes to speak. **111**

**c) Closure of Oral Proceedings**

At the end of the hearings, the President declares the oral proceedings closed but asks the agents of both parties to remain at the disposal of the Court for any further information which may be required.[448] The 'closure of the oral proceedings' is another important cut-off date in the procedure, after which certain actions are precluded.[449] However, the Court may invite the parties to produce additional evidence or to provide further explanations 'at any time'[450] and any responses received from a party are then communicated to the other party, with the Rules of Court expressly foreseeing the possibility of reopening the oral proceedings to facilitate this exchange.[451] Following the closure of the oral proceedings, the Court withdraws to consider the judgment in a private session.[452] **112**

## *2. Oral Argument*

**a) Persons Addressing the Court on Behalf of the Parties**

In practice, the persons appearing before the Court 'as representatives of the parties' are not limited to the persons mentioned in Article 43, para. 5. The Court has been addressed on behalf of the parties by agents (including co-agents, deputy-agents, additional and acting agents),[453] high government officials (such as Foreign Ministers, and in one case **113**

[444] *Eastern Greenland*, PCIJ, Series C, No. 69, p. 18. *Cf.* also PCIJ, Series D, third addendum to No. 2, p. 184; Third Annual Report, PCIJ, Series E, No. 3, p. 204.

[445] The delegations of the parties are even bigger; in the *Gulf of Maine* case, the parties managed to parade 80 agents, advocates, counsel, experts and advisers before the Court.

[446] The initial limitation to one representative for reply and rejoinder no longer applies.

[447] PCIJ, Series D, third addendum to No. 2, pp. 184, 824.

[448] Art. 54, para. 1 of the Statute; and *cf.* Fassbender on Art. 54 MN 9–10. From the Court's jurisprudence *cf. e.g.*, *Fisheries Jurisdiction* (Spain v. Canada), Pleadings, p. 629.

[449] *Cf.* Art. 69, para. 1 (the Court may not request a public international organization to provide information after the closure of oral proceedings), Art. 74, para. 3 (observations concerning a request for the indication of provisional measures will not be taken into account by the Court if they are presented after the closure or the oral proceedings) of the Rules of Court.

[450] Art. 62, para. 1 of the Rules of Court.

[451] Art. 72 of the Rules of Court.

[452] Art. 54, paras. 2–3; see further Higgins, *ICLQ* (2001), p. 123.

[453] *ICJ Yearbook* (1968–1969), p. 92. On the role of the agent, *cf.* Berman/Hernández on Art. 42 MN 6–11.

even by a Prime Minister),[454] counsel and advocates,[455] experts, as well as by technical and other advisers.[456] The parties are free to choose whomever they want to appear on their behalf. The Registry usually inquires which members of a party's delegation will be speaking.

**114** The Statute and the Rules of Court do not prescribe any particular tasks for the persons appearing on behalf of the parties. The agent is not restricted to the political representation of the party; he or she may also act as counsel and advocate and may examine witnesses and experts.[457] The two roles, however, are distinct and any role change should be indicated to the Court.[458] A person whose appointment as agent is invalid may nevertheless appear before the Court in the capacity of counsel for the party which he or she represents.[459] There are, however, two tasks that are reserved to the agent: it is for the agent (i) to read the party's final submissions[460] and (ii) to make or, at least, authorize any other statement during the oral proceedings binding upon the party in questions of procedure.[461] It is customary for the agent to start the party's oral argument and to introduce the members of the delegation addressing the Court. It also falls to the agent, or deputy agent, to make a 'public statement of information' in court to correct any assertion by the other party about their party's counsel or experts.[462]

**115** Technical experts forming part of the delegation of a party and appearing on behalf of the party must be distinguished from 'experts' appointed by the Court or 'experts' or 'witness-experts' called by the parties to give an opinion to the Court.[463] Only the latter come within the scope of Articles 57, 58, 63, 64, and 65 of the Rules of Court and have to make the solemn declaration to be made by 'experts' under Article 64 (b) of the Rules of Court. The former address the Court in the same manner as agents, counsel, and advocates. Technical experts are given their status as experts by virtue of their specialized knowledge[464] and may address the Court at any time the party chooses (unlike experts or witness-experts whose appearance is subject to a decision of the Court);[465] questions can be put to them by the Court or individual judges;[466] they may not be cross-examined by the other party; and their statements cannot be treated as evidence.[467]

**116** The independence, authority, and reliability of technical experts who appear as counsel may be called into question by the other party. Such 'expert-counsel' may not also provide

[454] *Cf. Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 94; *Land, Island and Maritime Frontier Dispute*, Judgment, ICJ Reports (1992), pp. 351, 354.

[455] These terms are used interchangeably; there does not seem to be a difference between the two. See further Berman/Hernández on Art. 42 MN 12–13.

[456] *Cf. e.g.*, *ELSI*, Judgment, ICJ Reports (1989), pp. 15, 16–9, para. 7 and *ibid.*, Pleadings, vol. III, pp. 65, 72, 300 and *ICJ Yearbook* (1988–1989), p. 162; *Fisheries*, Judgment, ICJ Reports (1951), pp. 116, 119.

[457] Art. 65 of the Rules.

[458] *Cf. Diallo*, CR 2010/3, 26 April 2010, p. 10.

[459] *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series C, No. 13-I, p. 11.

[460] Art. 60, para. 2 of the Rules.

[461] Fifth Annual Report, PCIJ, Series E, No. 5, p. 250. *Cf.* also *Prince von Pless Administration*, PCIJ, Series C, No. 70, p. 207.

[462] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 61, para. 61 and *ibid.*, CR 2006/45, 9 May 2006, p. 10.

[463] *ICJ Yearbook* (1981–1982), p. 144; *ICJ Yearbook* (1983–1984), p. 143; *ICJ Yearbook* (1988–1989), p. 162; *ICJ Yearbook* (1996–1997), p. 201.

[464] *ICJ Yearbook* (1985–1986), p. 167.

[465] *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 519–20 (No. 105).

[466] *Cf.* Art. 61, paras. 2 and 3 of the Rules.

[467] *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 518–19 (No. 102).

the Court with the assistance it requires in fact-intensive and scientifically complex cases.[468] In the *Pulp Mills* case, the Court pointed out that, in the interest of the sound administration of justice, it may be more useful if those experts were presented by the parties as witness-experts. It noted that 'those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court'.[469] In this regard, the more recent *Whaling in the Antarctic* case marked a corresponding shift in the Court's procedure in cases involving complex scientific questions.[470] Mindful of the Court's earlier guidance, the parties in that case called their scientific advisors as experts, and as a result the latter were also subject to cross-examination by the opposing party.[471]

**b) Contents of Oral Argument**

The Statute and the Rules of Court do not regulate in detail the contents of the oral argument of the parties. Article 60, para. 1 of the Rules, which was introduced in 1972, only provides that: **117**

> The oral statements made on behalf of each party 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. Accordingly, they 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.[472]

The central problem of this rule lies in its predominantly subjective nature. The requirement of the statements being 'succinct' is qualified by them also being 'requisite for the adequate presentation' of the party's case.[473] Thus it is not surprising that this rule has been more honoured in the breach than the observance, so that the Court in October 2001 felt compelled to remind parties that it 'requires full compliance with these provisions and observation of the requisite degree of brevity'.[474] In practice, the hearings had become (and in many cases still are) a continuation of the pleadings by other means.[475] The parties often do not really engage with the argument put forward by the other party but present instead a summary of their own argument set out in detail in their pleadings, to which they also refer frequently.[476] This has prompted the President from time

[468] For criticism of the blurring of the role of expert and counsel, see Watts, *Max Planck UNYB* (2001), pp. 29–30; Devaney (2016), pp. 221–2.

[469] *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 72, para. 167; *cf.* also *ibid.*, Joint Diss. Op. Al-Khasawneh and Simma, pp. 108, 111, paras. 6–7 and Sep. Op. Greenwood, pp. 221, 231, paras. 27–8; *Pulp Mills*, CR 2009/17, 22 September 2009, p. 12.

[470] See further Bordin, *supra*, fn. 198, pp. 240–1; Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?', *JIDS* 6 (2015), pp. 578–620, 582–4.

[471] *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 237, paras. 20–1; *cf.* also *ibid.*, CR 2013/7, 26 June 2013, p. 35, para. 44 and CR 2013/19, 10 July 2013, pp. 56–7, para. 84. *Cf.* also Devaney (2016), pp. 227–8; Gros, *supra*, fn. 470, pp. 582–4.

[472] Emphasis added.

[473] *Cf.* Rosenne, *LPICT* (2009), p. 178.

[474] Practice Direction VI, para. 2; see ICJ Press Release No. 2001/32 of 31 October 2001.

[475] *Cf.* also Kolb, *ICJ*, p. 958.

[476] On occasion, counsel have simply read out (part of) the pleadings; *cf.* the pertinent example given by counsel for Cameroon with regard to the oral argument of counsel for Nigeria: *Land and Maritime Boundary*, CR 2002/15 (translation), 11 March 2002, pp. 4–6, paras. 9–15. The oral argument has been referred to by counsel as a 'dialogue of the deaf' (*e.g.*, *ibid.*, CR 2002/16, 11 March 2002, pp. 46–47 and CR 2002/17, 12 March 2002, p. 31).

to time to remind counsel not to fall 'on the wrong side of the line of non-repetition'.[477] Counsel read prepared speeches, the typescript of which contains page references for all citations to the pleadings made. The typescript is made available to the stenographers and the citations appear in the verbatim record of the speeches; they are, however, not given by counsel when speaking. The verbatim records thus become supplementary 'miniature pleadings'. One reason for this is a fear on the part of the parties (not entirely unjustified, it is suspected) that some judges may not 'have read attentively' the written pleadings and that they are working from the concise verbatim record of the hearings and not from the voluminous pleadings.[478] Another reason may be that the parties fear that if they do not address all of their arguments set out in the pleading, this might be taken as indicating that those left out have been abandoned.[479]

**118** The Court may at any time prior to or during the hearing indicate any points or issues to which it would particularly like the parties to address themselves, or on which it considers that there has been sufficient argument.[480] In April 2002, the Court announced that it intended in the future to give specific indications to the parties of areas of focus in the oral proceedings, and particularly in any second round of oral arguments.[481] Up until the time of this announcement, the Court had largely refrained from giving any instructions as to the content of the oral argument. There were, however, some difficulties with the Court's new approach: any indication could well be taken by the parties as showing a certain bias or predisposition by the Court as to the way in which the case should be handled.[482] It was therefore suggested in the first edition of this Commentary that the power should be used only when the Court reaches the conclusion that a certain point has been 'fully argued' by the parties.[483]

**119** It is very rare for the Court to provide the parties with specific indications as to the areas on which they should focus in the oral proceedings.[484] In January 2009, it instead provided some general guidance in its revised Practice Direction VI. The Court pointed out that the parties should focus in the first round of oral proceedings on those points which have been raised by one party at the stage of the written proceedings but which have not so far been adequately addressed by the other, as well as on those which each party wishes to emphasize by way of winding up its arguments.[485] The President of the Court now also regularly reminds parties at the end of the first round of oral argument that, pursuant to Article 60, para. 1 of the Rules of Court, the oral presentations must be

[477] *Bosnian Genocide*, CR 2006/40, 3 May 2006, p. 55; *cf.* also, *e.g.*, *Nauru*, CR 1991/19, 18 November 1991, p. 34.

[478] *Cf.* Kolb, *ICJ*, p. 958.

[479] But see *ibid*., p. 971 (suggesting that the perceived need to do so could be obviated if the parties instead 'simply reaffirmed that they stood by all their written arguments other than those … that they are expressly abandoning').

[480] Art. 61, para. 1 of the Rules.

[481] ICJ Press Release No. 2002/12 of 4 April 2002, Measure No. 4.

[482] *Cf.* Bedjaoui, *Pace YIL* (1991), p. 44; Crawford, 'Comment', in Peck/Lee (1997), pp. 151–2; Quintana, *ICJ Litigation*, pp. 357–9. *Cf.* also Tams/Devaney on Art. 49 MN 8–13 for further details on the possibilities of the Court to direct proceedings.

[483] Talmon in the first edition of this Commentary (Art. 43 MN 97); but see Quintana, *ICJ Litigation*, pp. 357–9 (suggesting that if the Court intended to make more use of the provision to steer the presentation of arguments, it should direct its request to the parties well before the opening of the oral proceedings).

[484] *Cf. e.g.*, *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 417, para. 16; *Bosnian Genocide*, CR 1993/12, 1 April 1993, p. 10. *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. III, p. 1340.

[485] Practice Direction VI. *Cf.* also ICJ Press Release No. 2009/8 of 30 January 2009.

as succinct as possible and that the purpose of the second round of oral argument is to enable each of the parties to reply to the arguments advanced orally by the opposing party and to questions put by the judges, while avoiding repetition of earlier statements.[486]

**120** Article 56, para. 4 of the Rules of Court contains a formal limitation to the contents of the oral arguments: 'No reference may be made during the oral proceedings to the contents of any document which has not been produced [by either party] in accordance with Article 43 of the Statute or Article 56 of the Rules of Court, unless the document is *part of a publication readily available*'.[487] This provision was first introduced in 1972 in response to a frequent practice by counsel, especially in the *South West Africa* cases,[488] to quote extensively from documents not previously filed and thus, by reading them into the verbatim record, to introduce them through the backdoor.[489] The Court has pointed out that any recourse to Article 56, para. 4 of the Rules of Court is not to be made in such a manner as to undermine the general rule that all documents in support of a party's contentions shall be annexed to its written pleadings or produced in accordance with Article 56, paras. 1 and 2 of the Rules of Court.[490]

**121** Practice Direction IX*bis*, adopted in December 2006,[491] provides the parties with guidance on whether a document can be considered 'part of a publication readily available'. Both of the following two criteria must be met. First, the document must form 'part of a publication', *i.e.*, must be available in the public domain. The publication may be in any format (printed or electronic), form (physical or online, such as posted on the Internet), or on any data medium (on paper, on digital, or any other media). Second, the requirement of a publication being 'readily available' will be assessed by reference to its accessibility to the Court as well as to the other party. Thus the publication or its relevant parts must be accessible in either of the official languages of the Court,[492] and it must be possible to consult the publication within a reasonably short period of time. This means that a party wishing to make reference during the oral proceedings to a new document emanating from a publication which is not accessible in one of the official languages of the Court must produce a translation of that document into one of these languages certified as accurate.[493] In order to demonstrate that a document is part of a publication readily available, a party when referring to the contents of such a document must give the necessary reference for the rapid consultation of the document, unless the source of the publication is well known (*e.g.*, UN documents, collections of international treaties,

[486] *Cf. e.g.*, *Maritime Delimitation in the Indian Ocean*, CR 2016/11, 20 September 2016, p. 60; *Marshall Islands v. India*, CR 2016/4, 10 March 2016, p. 62; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, CR 2015/27, 6 October 2015, p. 59. However, this practice has not been uniformly followed in all cases: *cf. Immunities and Criminal Proceedings*, CR 2016/15, 18 October 2016, p. 42; *ICSFT and CERD* case, CR 2017/2, 7 March 2017, p. 77.

[487] Emphasis added. On 'readily available' documents, *cf.* also Riddell/Plant (2009), pp. 181–4.

[488] *Cf. South West Africa* cases, Pleadings, vol. X, pp. 460, 461 and vol. XI, p. 220.

[489] But such documents, unless physically produced in accordance with Art. 56 of the Rules of Court, were regarded as arguments and not as evidence. *Cf. Peter Pázmány University*, Judgment, PCIJ, Series A/B, No. 61, pp. 208, 214–6.

[490] Practice Direction IX*bis*.

[491] *Cf.* ICJ Press Release No. 2006/43 of 13 December 2006.

[492] *Cf. ELSI*, Pleadings, vol. III, pp. 79, 178, where a decision of an Italian Court published in Italian in the official court reports was held not to qualify as a document readily available in the sense of Art. 56, para. 4.

[493] See also Tams on Art. 52 MN 8. *Cf. Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 18, para. 22, where the Court accepted that documents described as 'readily available … in the original Serbian version' by Serbia also qualified as documents readily available in the sense of Art. 56, para. 4 after the Court was supplied with an English translation of the relevant extracts from the documents.

major monographs on international law, established reference works, *etc.*).[494] With the rapid development of the Internet, the concept of 'readily available' may need to be re-examined.[495] In particular, the practice of putting new documents on a website created by the party especially for the case, or posting them on existing government websites, only shortly before the opening of the oral proceedings,[496] while formally complying with these criteria, seems to be contrary to the spirit of this Practice Direction.

**122** If during the oral proceedings a party objects to the reference by the other party to a document under Article 56, para. 4 of the Rules of Court, the matter will be settled by the Court. If during the oral proceedings a party refers to a document which is part of a publication readily available, the other party will have an opportunity to comment upon it.[497] Documents in the public domain referred to by counsel in oral argument but not previously submitted are, as a matter of courtesy, subsequently communicated to the Registry in thirty copies (twenty for the members of the Court, and ten for the party opposite).[498] In case of maps to which reference has been made, these are deposited with the Registrar who keeps them for consultation by the members of Court and the party opposite.

**123** Any new document not part of a publication readily available may only be referred to in accordance with Article 56, para. 1 of the Rules of Court if the other party consents or if the Court, after hearing the parties, considers reference to the document necessary. If a party refers to a new document, the other party need not raise objections during the hearing; it cannot be held to have given its consent, by not lodging an objection. Its consent can only be deemed to have been given pursuant to Article 56, para. 1 of the Rules of Court if it has previously been supplied with a copy of the document through the Registrar.[499] Similarly, if one of the parties includes such a new document in the judges' folders without it having been previously annexed to the written pleadings, the Court may disallow that document to be referred to during the hearings even without any objection by the other party.[500]

**124** The applicant may not introduce a new claim at the oral phase of the proceedings if such a claim would have the effect of transforming the subject-matter of the dispute.[501] However, the Court has distinguished between such impermissible new claims and mere

[494] *Cf.* Practice Direction IX*bis*, paras. 2–3.

[495] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. III, p. 1282; *cf.* also Roscini, 'Digital Evidence as a Means of Proof before the International Court of Justice', *JCSL* 21 (2016), pp. 541–54, 547; Miron, *JIDS* (2016), pp. 386–7.

[496] For the practice of Argentina of placing new documents on a specifically created website on the weekend before the hearing began, *cf. Pulp Mills*, CR 2009/17, 22 September 2009, pp. 28–9. The Court did not address the question in its judgment in the case.

[497] *Cf.* Practice Direction IX*bis*, paras. 4–5.

[498] *Cf. e.g.*, *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, p. 500 (No. 125).

[499] *Cf. ELSI*, Pleadings, vol. III, p. 178. On Art. 56 of the Rules *cf. supra*, MN 75–79, as well as Tams on Art. 52 MN 15–21.

[500] *Cf. Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 632, para. 13. On judges' folders, see *infra*, MN 172–174.

[501] *Cf. Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 54–5, para. 109; *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 664–5, paras. 108–11; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659, 695, para. 108; *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 265–7, paras. 63–71; *Norwegian Loans*, Preliminary Objections, Diss. Op. Read, ICJ Reports (1957), pp. 9, 80–1; *Socobel*, Judgment, PCIJ, Series A/B, No. 78, pp. 160, 173.

'new arguments' that a party may present in support of its original claim during the hearings, which, by contrast, are admissible.[502]

Unlike in domestic legal systems, there is no professional code of conduct for counsel and advocates appearing before the Court. In 2010, a study group of the International Law Association published the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals.[503] Although the document is an important contribution towards an emerging 'international legal culture', it has nonetheless no binding force on the Court or persons appearing before it.[504] As of now, therefore, there are no mandatory rules prescribing, for instance, that counsel must lay everything relevant to the case before the Court and act in a fair and reasonable manner.[505] This has led, on occasions, to misleading, partial quotations of the law; distorted presentations of the facts; or unsubstantiated protective declarations.[506] This should be borne in mind when assessing the content of the oral argument (as well as that of the pleadings).[507] **125**

**c) Languages Used in Oral Argument**

Oral argument may be presented in either of the two official languages of the Court, unless the parties have agreed that the case is to be conducted in one language only.[508] It is not required that all argument be in a single language, nor that all of a party's representatives use the same language. The Registry, in order to facilitate the work of translation and interpretation, usually inquires whether a party intends to use English or French and, if it wishes to use both languages, roughly what portion of the oral argument each of the official languages will account for. If the parties use languages other than English or French, they must make the necessary arrangements for interpretation into one of the two official languages, *i.e.*, they must either provide interpreters to make the necessary interpretation in Court, or provide in advance a written translation, in one of the official languages, of the statements that are to be made. In the latter case, when the original statement is made, the translation is read out at the same time and is simultaneously interpreted into the other official language by the staff of the Court.[509] **126**

**d) Text Version of the Oral Argument**

The text of the oral statements, arguments, and comments is to be submitted to the Registry in ten typewritten copies (printed on one side only), together with the corresponding electronic version in MS Word-compatible format, at least one hour prior to the beginning of the hearing. The different sections of each oral pleading must be indicated by the use of brief subheadings printed in bold type. In addition, the paragraphs of each presentation should be numbered. If the parties' representatives quote a text which exists in the Court's other official language, they are requested to include a copy in that language with the text of the oral pleadings they are submitting. **127**

[502] *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 54–5, paras. 108–9.

[503] ILA, 'The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', *LPICT* 10 (2011), pp. 6–11 ('Hague Principles').

[504] *Cf.* Sands, 'The ILA Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', *LPICT* 10 (2011), pp. 1–5, 5; *cf.* also Thirlway, *ICJ*, p. 98.

[505] *Cf.* Hague Principles, *supra*, fn. 504, principle 6(1).

[506] For an example of the latter, *cf. e.g.*, *Diallo*, Merits, ICJ Reports (2010), pp. 639, 672–3, paras. 93–6.

[507] *Cf.* Watts, *Max Planck UNYB* (2001), pp. 27–8.

[508] On that possibility *cf.* Kohen on Art. 39 MN 29–31.

[509] *ICJ Yearbook* (1968–1969), p. 111.

**e) Use of Visual and Other Aids**

**128** The parties may, with the permission of the Court, use audio-visual and other aids to support and illustrate their oral argument.[510] The parties have regularly used overheads, wall-maps, blackboards, topographical bas-reliefs and models constructed for the purpose; they have projected slides showing, *inter alia*, the enlargement of maps, sketch-maps, figures, tables, diagrams, photographs, satellite images, and aerial photographs. It is now also well established that the parties may, with the permission of the Court, show video clips and films.[511] The Registry may help the parties to obtain the necessary projection equipment: the expenses incurred are charged to the parties.[512] The other party in each case must be given an opportunity to submit observations on the aids used.[513] The parties may show a film if it has been filed together with the pleadings pursuant to Article 50, para. 1 of the Rules of Court,[514] unless the Court decides against its projection. The commentary over the film is reproduced as part of the verbatim records of the hearing.[515]

**129** In March 2013, the Court adopted Practice Direction IX*quater*,[516] which stipulates the procedure to be followed if a party wishes to present any audio-visual or photographic material at the hearings, which was not previously included in the case file of the written proceedings.[517] The party in question must submit an advance request to the Court, in which it has to justify the relevance of the material and specify its source, the circumstances and date of its making, and the extent of its availability to the public.[518] The criteria on the provenance of such materials may be rather difficult to meet in practice with respect to digital forms of evidence, given that metadata that contain this information may be relatively easily manipulated.[519] Therefore, in the future, the Court and the parties

[510] A wall-map was used for the first time in *Eastern Greenland*, Pleadings, PCIJ, Series C, No. 66, p. 2594. Satellite imagery was first presented to the Court in the *Gulf of Maine* case, Pleadings, Vol. VI, pp. 405.

[511] Films were shown, *e.g.*, in *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, p. 289; *Temple of Preah Vihear*, Pleadings, vol. II, p. 432; *Gabčíkovo–Nagymaros*, Judgment, ICJ Reports (1997), pp. 7, 13, para. 8; *Kasikili/Sedudu Island*, Judgment, ICJ Reports (1999), pp. 1045, 1051–2, para. 8 and CR 1999/2, 16 February 1999; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, CR 2000/13, 13 June 2000 and *ICJ Yearbook* (1999–2000), p. 273; *Land and Maritime Boundary*, CR 2002/11, 5 March 2002, p. 62; *Pulau Ligitan*, CR 2002/30, 6 June 2002, pp. 19–21; *Bosnian Genocide*, CR 2006/22, 17 March 2006, pp. 26, 34, CR 2006/23, 20 March 2006, p. 33; *Pulp Mills*, CR 2009/20, 28 September 2009, p. 47; *Certain Activities carried out by Nicaragua in the Border Area*, CR 2011/1, 11 January 2011, p. 14, CR 2011/4, 13 January 2011, p. 11; *Croatian Genocide* case, CR 2014/10, 6 March 2014, p. 17 and CR 2014/16, 12 March 2014, pp. 46–7, 49–51; *ICSFT and CERD* case, CR 2017/1, 6 March 2017, p. 45 and CR 2017/2, 7 March 2017, p. 32. In the *Gulf of Maine* case, Canada contemplated showing a film, but (probably because of strong objections by the United States) finally decided not to do so; *cf.* Pleadings, vol. VII, pp. 328–33, 341–2, 352–6, 372 and *ICJ Yearbook* (1983–1984), p. 143. In the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659, 665–6, para. 13, the Court decided not to accede to a request by Honduras to show a short video.

[512] *ICJ Yearbook* (1985–1986), pp. 168–9.

[513] Sixteenth Report, PCIJ, Series E, No. 16, pp. 195–6; *cf.* also Practice Direction IX*quater*, paras. 1 and 5.

[514] Twenty copies of a video film to which reference was made in Qatar's memorial were deposited with the Registry pursuant to Art. 50 of the Rules of Court; see Memorial of the State of Qatar (Merits), vol. I, 30 September 1996, p. 50, fn. 4.

[515] See, *e.g.*, *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, CR 2015/11, 23 April 2015, pp. 16–21, paras. 9–22.

[516] ICJ Press Release 2013/6 of 11 April 2013.

[517] Practice Direction IX*quater*, paras. 1–5.

[518] Practice Direction IX*quater*, paras. 2–3.

[519] *Cf.* Roscini, *supra*, fn. 495, p. 548.

may need to rely on novel technological means of establishing authenticity of digital material in order to satisfy these requirements.[520]

**130** It is unclear whether the parties must also submit a request of this kind with respect to audio-visual or photographic materials that are 'readily available' in the sense of Article 56, para. 4 of the Rules of Court.[521] The Practice Direction itself does not address this question directly, but it has been suggested that because it requires the parties to specify 'the extent to which [a material] is available to the public',[522] it should be considered as a *lex specialis*, thus making the Article 56, para. 4 exception inapplicable to audio-visual and photographic resources.[523] However, it is questionable whether a provision in a Practice Direction may override an express procedural right provided by the Rules of Court.[524] Moreover, Practice Direction IX*quater* contains a *renvoi* to Article 56 of the Rules, which further indicates that the Court did not intend to disturb the right provided in para. 4 of that latter provision.[525] Ultimately, this matter will have to be resolved by the Court in its practice.[526]

**131** In addition to and simultaneously with the request mentioned earlier, the party in question is required to file five copies of the relevant audio-visual or photographic material in the Registry.[527] The Court will then decide on the request, taking into account the views of the other party and the interests of sound administration of justice.[528] Finally, it should be noted that the new Practice Direction covers all types of audio-visual and photographic materials without any further distinction. It would appear that this is in line with the general purpose of Article 56 of the Rules to protect the other party against any surprises, but it may also have the undesired effect of hampering the counsels' ability to effectively present their arguments.[529] It is submitted that a better solution would have been to restrict the new procedure to those materials that have probative evidentiary value of their own, *i.e.*, those that are relied on to prove a certain fact,[530] while excluding those that are simply part of the counsel's oral presentation.[531]

[520] *Ibid*., pp. 548–9 (noting in this regard the potential of mobile device applications that permit the capture of photographs and videos with embedded metadata, which shows the location and time of the collection and confirms that no alteration has occurred).

[521] On which see MN 120–121 *supra*.

[522] *Cf.* Practice Direction IX*quater*, para. 3.

[523] Quintana, *ICJ Litigation*, p. 437.

[524] See further text accompanying fn. 36–37 *supra* (arguing that Practice Directions should be seen as subordinate to the Rules of Court and that the former should be interpreted, insofar as it is possible, in such a manner that an incompatibility with the latter is avoided). *Cf.* also Pellet, *LPICT* (2006), p. 178 (arguing that Practice Directions 'must conform to the Rules of Court').

[525] *Cf.* Practice Direction IX*quater*, para. 1 ('Having regard to Article 56 of the Rules of Court … ').

[526] *Cf. ICSFT and CERD* case, CR 2017/2, 7 March 2017, p. 32, para. 32(c) (Wordsworth), CR 2017/3, 8 March 2017, p. 49, para. 46 (Cheek), and CR 2017/4, 8 March 2017, p. 23, para. 44 (Wordsworth), where the admissibility of a video shown by the Russian Federation was in dispute. The video was publicly available on the BBC website, but the procedure prescribed by Practice Direction IX*quater* had not been followed. The matter was unresolved at the moment of writing.

[527] Practice Direction IX*quater*, para. 4.

[528] Practice Direction IX*quater*, para. 5.

[529] *Cf. Whaling in the Antarctic*, CR 2013/23, 16 July 2013, p. 17 (Pellet) (noting that he was 'deterred from [presenting a visual aid] by the Court's excessively rigid and stringent Practice Direction IX*quater*').

[530] *Cf. e.g.*, *Bosnian Genocide (Revision)*, CR 2002/43, 7 November 2002, p. 27, where reference was made to a video film, to prove that a person had made a statement on TV.

[531] *Cf. Diversion of Water from the Meuse*, PCIJ, Series C, No. 81, p. 215 and Fourteenth Annual Report, Series E, No. 14, p. 157, where the Court considered a practical demonstration with the aid of maps and models 'as part of the agent's pleadings'.

**f) Questions to the Parties**

132 'Hearing by the Court' under Article 43, para. 5 includes the putting of questions to the representatives of the parties. Questions and requests for explanations may be put by the Court and by individual judges (including the judges *ad hoc*).[532] If a judge is prevented from attending by illness or for other serious reasons, the President may allow the Registrar to read the question.[533] The Court meets in private from time to time during the oral proceedings to enable judges to exchange views concerning the case and to inform each other of possible questions which they may intend to put to the agents, counsel, and advocates.[534] Unlike in the common law system, there is no questioning of counsel by the Court during the course of counsel's presentation of argument.[535] Questions are usually put to the parties at the end of a round of oral arguments or at the end of the oral proceedings. The text of the questions is sent to the parties as soon as possible.[536] Replies may be given orally or in writing, with documents in support; they may be given either immediately or within a time limit fixed by the President.[537] If written replies are received by the Court after the closure of the oral proceedings, they are communicated to the other party, which is usually given the opportunity of commenting in writing upon them within a time limit fixed by the President.[538]

133 Questions have also been put by one party to the other in the course of the oral proceedings through the President. It is for the President to decide whether to pass on such questions. It is argued that if the President passes such a question on, that question becomes one of the Court to which Article 49 of the Statute applies.[539]

**g) Final Submissions**

134 Article 60, para. 2 of the Rules of Court provides that 'at the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the argument, shall read that party's final submissions'.[540] In practice, the Court has allowed the agents to present 'final' or 'closing statements' by way of introduction to their submissions, on the condition of not raising any new issues.[541] The parties have also used the submissions to correct 'misstatements' by the other party in their oral pleadings.[542] These final or

[532] *Cf.* Art. 61, paras. 2 and 3 of the Rules. It had been the practice of the Court since 1931 to allow judges, with the President's permission, to put questions to agents (Eighth Annual Report, PCIJ, Series E, No. 8, p. 262). The present provision was first introduced in Art. 52 of the 1936 Rules.

[533] *Cf. Cumaraswamy*, CR 98/17, 10 December 1998, p. 53.

[534] Art.1, para. (iii) of the Resolution concerning the Internal Judicial Practice of the Court (Rules of Court, Article 19), 12 April 1976.

[535] On the reasons for not questioning counsel, *cf.* Watts, *Max Planck UNYB* (2001), pp. 25–7; Higgins, *ICLQ* (2001), pp. 127–8; Rose, 'Questioning the Silence of the Bench: Reflections on Oral Proceedings at the International Court of Justice', *Journal of Transnational Law and Policy* 18 (2008), pp. 48–64, 54–8.

[536] *Cf. e.g.*, *Certain Activities carried out by Nicaragua in the Border Area*, CR 2011/4, 13 January 2011, p. 42.

[537] Art. 61, para. 4 of the Rules. *Cf.* also *ICJ Yearbook* (1972–1973), pp. 141–2.

[538] Art. 72 of the Rules. *Cf. e.g.*, *ELSI* case, Pleadings, vol. III, p. 371.

[539] *Cf.* Tams/Devaney on Art. 49 MN 16, and, for an example, *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Pleadings, pp. 171 and 189. But note that Tunisia did not regard itself bound to reply to the question.

[540] A copy of the written text of these submissions, signed by the agent, must be communicated to the Court and transmitted to the other party. However, it does not seem necessary to communicate a copy of the written text of the submissions if the party only confirms the submissions set out in the pleadings; *cf. ICJ Yearbook* (1971–1972), p. 107. On the substantive requirements of submissions, *cf. Navigational and Related Rights*, Judgment, ICJ Reports (2009), pp. 213, 268, para. 153.

[541] *Land and Maritime Boundary*, CR 2002/15 (translation), 11 March 2002, p. 2.

[542] *Navigational and Related Rights*, CR 2009/6, 9 March 2009, pp. 64–7.

closing statements have a tendency to be exactly what Article 60, para. 2 of the Rules of Court tries to avoid: a recapitulation of the party's argument.[543] The agent does not have to read the party's final submissions in full if he or she confirms and maintains unchanged the submissions previously set forth in the party's pleadings or the submissions read out at an earlier stage in the oral proceedings.[544] The Court may authorize a party to present its final submissions in writing before the closure of the oral proceedings. In this case, the submissions will be appended to the verbatim record of the hearing at which the party addressed the Court.[545] In cases instituted by way of a special agreement that forms the only basis of the Court's jurisdiction, a party's final submissions must remain within the limits defined by the special agreement.[546] If the final submissions do not exactly correspond to the terms of the special agreement, the Court has the power to interpret them so as to maintain them, so far as possible, within the limits of its jurisdiction.[547]

If another State is intervening in the proceedings, the agents of the parties read their final submissions after the intervening State and the parties have presented their views on the intervention. Intervening States do not present final submissions. They have, however, previously made a short summary of their position, called 'formal conclusions'[548] or simply 'conclusions',[549] which has been treated by the Court in a similar way to the submissions of a party.[550] **135**

### *3. Oral Evidence*

#### a) Right of the Parties to Produce Oral Evidence

The parties in contentious proceedings have the right to produce all evidence before the Court by the calling of witnesses and experts.[551] A party must be left to exercise this right as it thinks fit, subject to the provisions of the Court's Statute and Rules. This includes the right to decide not to call a witness, expert, or witness-expert previously notified to the Court, to modify the order in which witnesses, experts, and witness-experts are called or to call a person not previously notified.[552] The parties will usually indicate to the Court the time that they consider necessary for the hearing of witnesses, experts, and expert-witnesses whom they wish to call. In order to preserve the right of the other party to comment on the evidence thus submitted, the common practice is to hear witnesses and experts during the first round of oral argument or between the first and the second **136**

[543] *Cf. e.g.*, *Land and Maritime Boundary*, CR 2002/26, 21 March 2002, pp. 23–36, especially p. 23, para. 5 (agent of Nigeria: 'it now falls to me to recapitulate Nigeria's case'); *Navigational and Related Rights*, CR 2009/7, 12 March 2009, pp. 55–64.

[544] *Cf. e.g.*, *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, p. 349 (maintaining submissions made at the end of the first round of oral argument) and p. 500 (No. 124).

[545] *Barcelona Traction*, Pleadings, vol. X, pp. 350, 351–64, 365, 669, and 754 (No. 127).

[546] *Frontier Dispute* (Burkina Faso/Niger), Judgment, ICJ Reports (2013), pp. 44, 68–9, para. 42.

[547] *Ibid.*, p. 69, paras. 43–4.

[548] *Land, Island and Maritime Frontier Dispute*, C 4/CR 1991/49, 13 June 1991, pp. 46–7.

[549] *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, CR 2010/15, 14 October 2010, p. 26.

[550] *Cf. Land, Island and Maritime Frontier Dispute*, Judgment, ICJ Reports (1992), pp. 351, 379, para. 26; *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, ICJ Reports (2011), pp. 348, 356, para. 18.

[551] *Cf.* Riddell/Plant (2009), pp. 48–9; and for a duty of disclosure, *ibid.*, p. 49, and *Pulp Mills*, Judgment, ICJ Reports (2010) pp. 14, 71, para. 163. On evidence before the ICJ in general, *cf. e.g.*, Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court', in *Essays in Honour of Judge Taslim Olawale Elias* (Bello/Ajibola, eds., 1992), vol. I, pp. 265–76.

[552] *Cf.* Mawdsley, in Macdonald (1994), pp. 543–4.

rounds.[553] The Court cannot curtail the right of parties to call witnesses and experts to testify personally by ordering the parties to embody the evidence of witnesses or experts in a properly authenticated deposition or written statement. This is so, even if the other party waives all rights to be present during the taking of such depositions or the preparation of such statements for any purpose, including the purpose of cross-examination.[554] Such a procedure, whereby the written statement would constitute a full and complete statement of evidence which such witnesses or experts would have adduced if personally in court, may be adopted only if the parties agree to it.[555] The parties may also agree not to call any witnesses or experts but, in view of Article 62, para. 1 of the Rules of Court, such an agreement will not be binding on the Court.[556]

**137** The personal testimony of a large number of witnesses and experts in Court may cause considerable inconvenience, burden, and expense upon the other party whose agent, counsel, and advocates must be present in the courtroom and may put considerable strain on the Court's resources.[557] Faced with the prospect of a party calling hundreds of witnesses (which did not materialize), the Court in 2001 carried out a detailed study of the practical issues involved in hearing a large number of witnesses.[558] In such a situation, the way forward seems to be to make better use of Article 63, para. 2 of the Rules of Court which allows the Court, or the President if the Court is not sitting, to take the necessary steps for the examination of witnesses (but not experts) other than before the Court itself. The Court could delegate one or more of its members, nominate a commission of inquiry in the sense of Article 50,[559] or entrust the parties to take the testimony.[560]

**138** In the practice of the Court, expert or witness testimony seems to be of doubtful value: in some cases it has been superfluous, as the decision was reached on separate legal grounds,[561] in other cases, the technical evidence either neutralized itself because of its complexity or lack of distinctness, or was neutralized or rendered irrelevant for purposes of the decision by the production of counter-evidence.[562] In any event, as the Court has highlighted on several occasions, the responsibility to determine which facts are to be

[553] *Cf.* Kolb, *ICJ*, p. 973; Quintana, *ICJ Litigation*, pp. 352–3; Shaw, *Rosenne's Law and Practice*, vol. III, p. 1348.

[554] *Cf. South West Africa* cases, Pleadings, vol. VIII, p. 42 and vol. X, p. 514 and *ICJ Yearbook* (1964–1965), p. 88. For such a proposal by Ethiopia and Liberia, *cf. ibid*., Pleadings, vol. IX, pp. 122–3.

[555] *Cf. e.g.*, *Kasikili/Sedudu Island*, where a Joint Team of Technical Experts had examined seventy-three witnesses prior to the proceedings before the Court. The agreed transcript of the hearings of oral evidence was submitted to the Court by Namibia in vols. II and III of its memorial of 28 February 1997. Both parties referred to the oral evidence submitted to the Court in their pleadings.

[556] For such an agreement *cf. Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 114–5, para. 8.

[557] In the *South West Africa* cases, public hearings and some two months' time were devoted to the hearing of 13 witness-experts and one expert, *cf.* Pleadings, vol. VIII, pp. 56–84.

[558] Speech by President Guillaume to the UN General Assembly, UN Doc. A/56/PV.32 (2001), p. 8. Serbia and Montenegro had indicated that it would call hundreds of witnesses in the merits phase of the *Bosnian Genocide* case. In the end, Serbia and Montenegro called only seven witnesses and witness-experts; see *ibid*., Judgment, ICJ Reports (2007), pp. 43, 61, para. 58.

[559] On which see further Tams/Devaney on Art. 50 MN 16–17.

[560] *Cf.* PCIJ, Series D, third addendum to No. 2, pp. 216–27, 770, 825, 873 and Series D, No. 2, pp. 145–6.

[561] For an analysis by the Court of the expert evidence produced, however, *cf. Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 16–7.

[562] *Cf.* Bedjaoui, *Pace YIL* (1991), pp. 45–6; Highet, *AJIL* (1997), p. 22, and on oral evidence in general, *ibid*., pp. 20–8. But *cf.* Statement by President Tomka to the Sixth Committee of the General Assembly, 31 October 2014, p. 2 (noting that testimonial evidence adduced by the parties may play an important role in establishing the factual record before the Court).

considered relevant, to assess their probative value, and to draw conclusions from them lies exclusively with the Court.[563]

**b) Persons Giving Oral Evidence**

*aa) Witnesses*

Witnesses give evidence on *matters of fact* within their personal knowledge. The oral testimony of witnesses is thus limited to events or conduct within living memory. Witnesses will usually testify in person but can also be heard, *e.g.*, by a two-way video link.[564] They may be called either by a party or by the Court.[565] The Court, however, has no coercive powers to ensure the presence of a witness. In the *Croatian Genocide* case, the Court ordered a number of protective measures for some of the witnesses appearing before it, including the use of pseudonyms and closed session hearings, as well as the production of two sets of documents (confidential and public, with the latter being redacted so as to remove any identifying information).[566] The Court may decline to hear a witness called by a party only if it is clear that the person in question has no personal knowledge of the facts to which he or she is supposed to testify,[567] or if it would otherwise not be appropriate in the circumstances (especially in the face of opposition by the other party) to authorize the calling of the witness.[568] While the Court has never called a witness on its own initiative (a so-called Court witness),[569] or acceded to requests by a party to arrange for the attendance of specific witnesses pursuant to Article 62, para. 2 of the Rules of Court,[570] the parties have called witnesses on several occasions.[571] Every person having personal knowledge of certain facts may be called as a witness, including members of a party's delegation or legal team. Advisers or counsel of a party who are referring in their speeches to matters within their personal knowledge may be treated by the Court, at the request of the other party, *pro tanto* as (involuntary) witnesses and may be asked to make the solemn declaration made by witnesses at the end of their statement and may be subjected to cross-examination.[572] Witnesses are not obliged, should the contingency arise, **139**

[563] *Cf. Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 72–3, para. 168; *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665, 725, para. 172; *cf.* also Speech by President Abraham to the Sixth Committee of the General Assembly, 28 October 2016, pp. 7–8.

[564] *Cf.* Art. 63, para. 2, of the Rules.

[565] Art. 62 of the Rules.

[566] *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 20, para. 33.

[567] *Corfu Channel*, Pleadings, vol. III, p. 250 and *ICJ Yearbook* (1948–1949), p. 78.

[568] *Cf. Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 178, para. 15; *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 56, para. 9.

[569] The Court, however, usually reserves its right to do so; *cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 56–7, para. 42. *Cf.* also Speech by President Higgins to the Sixth Committee of the General Assembly, 2 November 2007, p. 4 ('it is a possibility that is constantly in its view').

[570] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 56–7, paras. 40–2.

[571] Witnesses (and experts) were heard in the *Corfu Channel* case, Pleadings, vol. III, pp. 425–694 and vol. IV, pp. 9–468; *Preah Vihear*, Pleadings, vol. II, pp. 331–442; *South West Africa* cases, Pleadings, vol. X, pp. 88–182, 238–558, vol. XI, pp. 30–708, and vol. XII, pp. 3–66; *ELSI*, Pleadings, vol. III, pp. 25–30, 37–64, 122–31, 239–45, 300–4, 313–25; *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 60–1, paras. 57–8. Witnesses only were heard in *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 18, para. 13; *Land, Island and Maritime Frontier Dispute*, Pleadings, vol. VII and C 4/CR 1991/34, 29 May 1991; *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 24, para. 46.

[572] *ELSI*, Judgment, ICJ Reports (1989), pp. 15, 19, para. 8 and *ibid.*, Pleadings, vol. III, pp. 301, 304, 313. In that case the witness will not declare that s/he 'will speak the truth' but that s/he has 'spoken the truth'.

to violate professional secrecy.[573] They have to make the solemn declaration to speak the truth set out in Article 64 (a) of the Rules of Court. The declaration may be made in a language other than English or French.[574]

**140** The calling of witnesses seems to be of limited value and, more often than not, the parties will gain little from their testimony. Witnesses will often duplicate what has been pleaded already by the parties. A lot of time and effort is usually spent on calling into question the credibility and reliability of the other party's witnesses. It is thus not surprising that, with one recent exception,[575] the Court has made little to no reference to the testimony of witnesses in its judgments.[576]

**141** Witnesses who appear at the instance of the Court are, where appropriate, paid out of the funds of the Court.[577] For that purpose, the Registrar obtains statements of their expenses and causes the amount due to be paid to them.[578] Witnesses called by the parties are paid by the parties.

*bb) Experts*

**142** The purpose of the expert opinion is 'to assist the Court in giving judgment upon the issues submitted to it for decision.'[579] Accordingly, experts express an opinion upon certain facts (of a scientific, technical, financial, military nature) on the basis of their special knowledge.[580] However, it is not their task to testify to facts, or alleged facts.[581] A person can be an expert in any field in which he or she reveals a special knowledge which is 'far in excess of that which is normally held by a lay person'.[582] Where a person so qualifies, it is not a question of the admissibility of the expert opinion which is expressed but a question of the weight to be accorded to this opinion, something the Court considers in its deliberations.[583] Given the increasing number of cases with a technical background, the reliance on experts before the Court will likely continue to grow.[584] Experts may be called both by the Court[585] and the parties.[586] Parties may be allowed to submit written

[573] PCIJ, Series D, No. 2, p. 211; PCIJ, Series D, third addendum to No. 2, pp. 132, 826; Third Annual Report, PCIJ, Series E, No. 3, p. 212.

[574] *Cf. e.g.*, *Land, Island and Maritime Frontier Dispute*, C 4/CR 1991/34, 29 May 1991, p. 10; *Bosnian Genocide*, CR 2006/24, 23 March 2006, p. 11 and CR 2006/29, 28 March 2006, p. 10.

[575] *Cf. Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 83–4, para. 222, 86, para. 236, 90, para. 253, 133, para. 459 (expressly according evidential weight to multiple statements made by witnesses who had testified before the Court).

[576] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43 *et seq.*, where the Court only once referred to the statement of a witness called by the parties at *ibid.*, p. 141, para. 239.

[577] Art. 68 of the Rules.

[578] Art. 16 of the Instructions for the Registry (as drawn up by the Registrar and approved by the Court on 20 March 2012).

[579] *Continental Shelf* (Tunisia/Libya), Judgment, ICJ Reports (1985), pp. 192, 228, para. 65.

[580] On the use of experts, *cf.* especially White, *The Use of Experts by International Tribunals* (1965); Riddell/Plant (2009), pp. 329–58; Devaney (2016), pp. 20–5 and 217–40; Special Issue 'The Expert in the International Adjudicative Process', *JIDS* 9 (2018), pp. 339–505.

[581] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, p. 28.

[582] *South West Africa*, Pleadings, vol. X, p. 515.

[583] *Cf. ibid.*

[584] *Cf.* Kolb, *ICJ*, p. 977; Quintana, *ICJ Litigation*, p. 453.

[585] Art. 50 of the Statute; Art. 67, para. 1 of the Rules. *Cf. Corfu Channel*, Judgment, ICJ Reports (1949), pp. 4, 9; *Gulf of Maine*, Judgment, ICJ Reports (1984), pp. 246, 256, para. 8; *Frontier Dispute* (Burkina Faso/Niger), Order of 12 July 2013, ICJ Reports (2013), pp. 226, 227–8; *Caribbean Sea Delimitation* and *Isla Portillos*, Judgment of 2 February 2018, paras. 15–7. See further Tams/Devaney on Art. 50 MN 16–17.

[586] Experts (and witnesses) were called by the parties in *the Corfu Channel* case, Pleadings, vol. III, pp. 425–694 and vol. IV, pp. 9–468; *Preah Vihear* case, Pleadings, vol. II, pp. 331–442; *South West Africa* cases,

statements in response to expert statements provided to the Court before the opening of the oral proceedings.[587]

Experts called by a party are evidently far from the continental European idea of an expert.[588] The fact that a person is a soldier or other government official or is employed as a technical adviser by the party does not prevent them from giving evidence as an expert. The expert's association with a party may bear upon the weight to be given to the evidence: it does not affect its admissibility.[589] The designation of a person as an 'expert' in the party's list of delegation is not determinative of his or her status in the proceedings.[590] In practice, persons with particular 'expert' knowledge are regularly included as part of the teams rather than as experts within the provisions of the Statute and the Rules of Court. The task of proving historical, legal, or technical facts, *e.g.*, is usually done as part of the (written and oral) pleadings of the team by 'experts as team members'.[591] The statements of such 'expert counsel' are given the same treatment as is normally given to statements by any other counsel or advocate.[592] Only the statements of persons having made the solemn declaration to be made by experts laid down in Article 64 (b) of the Rules of Court are treated as evidence by the Court.[593] Counsel or advisers of a party who, albeit inadvertently, make this declaration, are treated as experts and are therefore available for cross-examination by the opposite party.[594] **143**

A party that raises objections to the qualification of a person as an expert, either in general or for particular questions, is given an opportunity to examine the expert on the *voir dire* for the purpose of establishing that person's expertise.[595] To this end, the party may put questions to the expert which must be of a general (and not of a specific) character and must be strictly on the *voir dire*.[596] Objections to the qualification of an expert may be raised only **144**

Pleadings, vol. X, pp. 88–182, 238–558, vol. XI, pp. 3–708, and vol. XII, pp. 3–66; *ELSI* case, Pleadings, vol. III, pp. 25–30, 370–64, 122–31, 239–45, 300–4, 313–25; *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 60, paras. 57–8. Experts only were called in *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 182–98; *Gulf of Maine* case, Pleadings, vol. VI, pp. 393–435; *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 197–282; *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 237, paras. 20–1; *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665, 680, para. 45.

[587] *Cf. Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 236, para. 17; *Caribbean Sea Delimitation* and *Isla Portillos*, Judgment of 2 February 2018, para. 32.

[588] *Cf.* Favoreu, 'Récusation et administration de la preuve devant la Cour internationale de justice. A propos des Affaires du Sud-Ouest Africain (Fond)', *AFDI* 11 (1965), pp. 233–77, 264–5.

[589] *Cf. South West Africa*, Pleadings, vol. X, p. 123.

[590] *Cf. Pulp Mills*, CR 2009/17, 22 September 2009, p. 12; *Gabčíkovo–Nagymaros*, CR 97/8, 25 March 1997, pp. 38–9.

[591] *Cf.* Speech by President Higgins to the Sixth Committee of the General Assembly, UN Doc. A/C.6/62/SR.23 (2007), p. 14, paras. 82–3.

[592] *Cf. Armed Activities* (DRC v. Uganda), CR 2005/7, 18 April 2005, p. 42.

[593] Experts appointed by the Court make the following declaration which differs from the one laid down in Art. 64 (b) of the Rules of Court: 'I solemnly declare, upon my honour and conscience, that I will perform my duties in all sincerity and will abstain from divulging or using outside the Court any secrets [of a military or technical nature] which may come to my knowledge in the course of the performance of my task'. *Cf. Corfu Channel*, Order of 17 December 1948, ICJ Reports (1948), pp. 124, 126; *ibid*., Order of 19 November 1949, ICJ Reports (1949), pp. 237, 238 and *ICJ Yearbook* (1948–1949), p. 79; *ICJ Yearbook* (1959–1960), p. 133. *Cf.* also *Caribbean Sea Delimitation* and *Isla Portillos*, Judgment of 2 February 2018, para. 14.

[594] *ELSI*, Pleadings, vol. III, pp. 242, 245 and *ICJ Yearbook* (1988–1989), pp. 161–2.

[595] In Anglo-American procedure, the preliminary examination of witnesses and experts in order to establish their background, qualifications or knowledge of the fact is called '*voir dire*', a French term meaning 'to speak the truth'.

[596] *Cf. South West Africa*, Pleadings, vol. X, pp. 340–1, 345.

after the expert has made the solemn declaration and the party calling the expert has established that person's competence to speak on the subject-matter in question. Only when a question is put to the expert on a subject-matter on which, in the view of the other party, that person's competence has not been sufficiently established, may it raise an objection.[597]

**145** Expenses of experts who appear at the instance of the Court are, where appropriate, to be paid out of the funds of the Court;[598] expenses of experts designated by the parties are to be paid for by the parties.[599]

*cc) Witness-experts*

**146** The hybrid category of 'witness-expert' is not expressly mentioned in the Statute or the Rules of Court, but was recognized in several cases before the Court.[600] The term refers to persons who can testify both as to knowledge of facts, and also give an opinion on matters upon which they have expertise.[601] Witness-experts do not have to make a double solemn declaration,[602] but make the declaration for experts set down in Article 64 (b) of the Rules, which includes the text of the declaration for witnesses.[603] The combination of facts and opinion in one and the same statement may make it difficult for the Court to distinguish between the two. Therefore, a witness-expert should at every stage clearly indicate whether he or she is testifying to facts or expressing an opinion.

**147** Expenses of witness-experts who appear at the instance of the Court are, where appropriate, to be paid out of the funds of the Court; expenses of witness-experts designated by the parties are to be paid for by the parties.[604]

**c) Information on the Oral Evidence to Be Produced**

**148** The procedure for the production of oral evidence is laid down in Article 57 of the Rules of Court which provides that:

> each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce … This communication shall contain a list of the surnames, first names, nationalities, description and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission [by the Registrar] to the other party.[605]

In addition, the Court has asked the parties to provide information on the language in which each witness, expert, or witness-expert will speak and, in respect of those speaking

[597] *Cf. ibid.*, Pleadings, vol. X, pp. 335, 336, 340–1, 342 and vol. XI, p. 456–7.

[598] *Cf.* Speech by President Abraham to the Seventy-first Session of the United Nations General Assembly, 27 October 2016, p. 7 (discussing the budgetary implications of the appointment of experts by the Court); Bennouna, 'Experts before the International Court of Justice: What for?' *JIDS* 9 (2018), pp. 345–51, 347 (noting that if the Court decides to appoint its own experts, it must request additional funds from the General Assembly)

[599] *Cf.* Art. 64 of the Statute.

[600] *Cf. Corfu Channel* case; *Preah Vihear* case; *South West Africa* cases; the *Bosnian Genocide* case; and the *Croatian Genocide* case.

[601] *Cf.* Speech by President Higgins to the Sixth Committee of the General Assembly, UN Doc. A/C.6/62/SR.23 (2007), p. 15, para. 86. On witness-experts, *cf.* also Riddell/Plant (2009), pp. 319–24.

[602] But, *cf.* Lalive, 'Quelques remarques sur la prevue devant la Cour permanente et la Cour internationale de justice', *ASDI* 7 (1950), pp. 77–103, 97, fn. 71.

[603] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, p. 10.

[604] *Cf.* Art. 64 of the Statute.

[605] *Cf.* also Art. 9 of the Instructions for the Registry (as drawn up by the Registrar and approved by the Court on 20 March 2012).

in a language other than English or French, the arrangements the parties intend to make for the interpretation into one of the official languages of the Court.[606] The information supplied by the party must be sufficiently precise to enable the other party to prepare its case; an indication of the general field in which the evidence will fall (such as 'geology and geomorphology of the sea-bed and subsoil of the continental shelf') will not be sufficient.[607] It is, however, not necessary—if not impossible—to inform the party opposite in detail what a witness's evidence is going to be.[608] The parties may indicate that their list of witnesses, experts, and witness-experts is to be regarded as provisional.[609] If the information provided about these persons is not sufficient the other party may request that fuller details be supplied.[610] The Court initially adopted a fairly liberal attitude to the requirement that the information regarding the experts and witnesses shall be communicated in 'sufficient time before the opening of the oral proceedings'. In several cases, the list identifying the witnesses and experts intended to be called and describing the points to which their evidence would be directed was supplied less than a week before the opening of the hearings;[611] the hearing of the first witnesses, experts, and witness-experts being not much thereafter.[612] This practice was criticized for depriving the other party of a proper opportunity to establish the credentials of these persons and to prepare for their cross-examination.[613] More recently, the Court has asked the parties to supply the relevant information on the witnesses, experts, and witness-experts some five-and-a-half months prior to the opening of the oral proceedings.[614] It has also asked the parties to provide it with a detailed schedule and running order for the hearing of their witnesses, experts, and expert-witnesses.[615] In addition, the Court has requested the parties to provide at least three days before the hearing of each witness, expert, or witness-expert a one-page summary of the latter's evidence or statement.[616]

If no running order of witnesses, experts, and witness-experts, and no summary of **149**
the evidence to be adduced is provided prior to the hearings, the party calling the persons in question should, for the convenience of the Court and the other party, either announce in court or inform the other party of the persons that it intends to call on the following day.[617] Before an expert, witness, or witness-expert take their place at the *rostrum*, the agent or counsel of the party calling the person should indicate to the Court,

[606] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 56–7, para. 42.
[607] *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 519–20 (No. 105).
[608] *Cf. South West Africa*, Pleadings, vol. X, pp. 137–8.
[609] *ICJ Yearbook* (1964–1965), p. 88.
[610] *Land, Island and Maritime Frontier Dispute*, C 4/CR 1991/34, 29 May 1991, p. 10.
[611] *Cf. Nicaragua*, Pleadings, vol. V, pp. 3, 12, 413–15 (No. 128): two days; *Land, Island and Maritime Frontier Dispute*, Judgment, ICJ Reports (1992), pp. 351, 360, 361, paras. 18, 20: three days; *Continental Shelf* (Libya/Malta), Pleadings, vol. III, pp. 273, and vol. IV, p. 197 and p. 517 (No. 97): three days.
[612] In the *ELSI* case, the first witness was heard only 11 days after the submission of the required information; *cf. ibid.*, Pleadings, vol. III, pp. 8, 25 and p. 421 (No. 55). In *Continental Shelf* (Tunisia/Libya), the information on the points to which the evidence will be directed was supplied only five days before the expert was called; *cf. ibid.*, Pleadings, vol. V, pp. 182, 495 (No. 113), 496–7 (No. 116).
[613] *Cf. Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 519–20 (No. 105).
[614] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 56, para. 40; *cf.* also *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 17, para. 20 (noting that the parties agreed to submit to the Court a list of witnesses and witness-experts they intended to call by a set deadline; the public hearings in the case were only held seven and a half months after this deadline).
[615] *Cf.* ICJ Press Release No. 2006/10 of 16 March 2006.
[616] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 59–60, para. 53.
[617] *Cf. South West Africa*, Pleadings, vol. VIII, p. 56.

as a preliminary note, briefly but with reasonable particularity, the points to which the evidence of the person will be directed, and the particular issues in the case to which that evidence is said to be relevant.

**150** If at any time during the hearing a party wishes to call a witness, expert, or witness-expert whose name has not been included in the list communicated to the Court pursuant to Article 57 of the Rules, it must so inform the Court and the other party, and must supply the information required by Article 57. In such a case, the person may be called only if the other party makes no objection, or if the Court is satisfied that their evidence seems likely to prove relevant.[618] The withdrawal of a witness, expert, or witness-expert, on the other hand, does not need the approval of the other party or the permission of the Court.[619]

**d) Procedure for the Obtaining of Oral Evidence**

**151** The Statute and the Rules of Court are silent on the procedure to be followed for the hearing of witnesses, experts, and witness-experts.[620] The rules of procedure for obtaining evidence have been largely developed in the practice of the Court. The Court does not follow the procedure with regard to evidence of any particular legal system;[621] the procedure for the examination of witnesses and experts rather represents a combination of the procedure in common law and civil law countries.[622] In general, the Court's attitude to the procedure for the obtaining of oral evidence has been very liberal and demonstrably flexible; the Court's main interest is that as much light as possible is cast upon the matters before it.[623]

**152** The following procedure for obtaining oral evidence has developed in the practice of the Court. While the Court had initially given the parties considerable leeway with regard to the conduct of this part of a case, more recently it has laid down fairly strict rules for the obtaining of oral evidence. Witnesses, experts, and witness-experts must, as a rule, remain outside the courtroom both before and after giving evidence.[624] However, experts who did not testify about facts as being within their knowledge, and witnesses whose evidence did not concern factual aspects on which other witnesses were testifying, have been allowed by the Court to be present in the courtroom prior to giving evidence, when no objection has been raised by the other party.[625] The Court has also allowed witnesses, experts, and witness-experts to stay in the courtroom after being released and be present when further oral evidence is taken.[626] At the invitation of the President, the

[618] *Cf.* Art. 63, para. 1 of the Rules. *Cf.* also *Arbitral Award of 31 July 1989* case, Judgment, ICJ Reports (1991), pp. 53, 56, para. 9 and CR 91/7, 9 April 1991, p. 8, where the Court considered it not to be appropriate to accede to a request to call a witness made in the course of the hearing which was opposed by the other party.

[619] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 58–9, para. 49, p. 59–60, para. 53, p. 60, para. 56.

[620] *Cf.* Art. 58, para. 2 of the Rules.

[621] *Cf. South West Africa*, Pleadings, vol. X, p. 123.

[622] Sandifer (1975), p. 307.

[623] *Cf. Corfu Channel*, Pleadings, vol. III, p. 427; *South West Africa*, Pleadings, vol. XI, pp. 460–1 and vol. XII, p. 358. *Cf.* also the Statement by President Schwebel to the 52nd session of the General Assembly in connection with the annual report of the ICJ, UN Doc. A/52/PV.36 (1997), p. 4.

[624] Art. 65 of the Rules. *Cf.* also *Bosnian Genocide*, CR 2006/22, 17 March 2006, p. 10; *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 20, para. 33.

[625] *Cf. Sout West Africa*, Pleadings vol. X, pp. 355, 387; *Corfu Channel*, Pleadings, vol. V, p. 220.

[626] *Cf. Corfu Channel*, Pleadings, vol. III, p. 520; *South West Africa*, Pleadings, vol. VIII, p. 58. *Cf.* also *ICJ Yearbook* (1985–1986), p. 168.

witness, expert, or witness-expert enters the Great Hall of Justice and takes his or her place at the *rostrum*. The person then makes the appropriate declaration in accordance with Article 64 of the Rules of Court. Witnesses will make the declaration set down in sub-para. (a), while experts and witness-experts will make the declaration set down in sub-para. (b).

153 Witnesses, experts, or witness-experts may give their evidence in the form of a statement and/or as replies to questions put to them by the party having called them, at the option of that party.[627] There is no right of the other party to be provided with a copy of the text of the statement made by the witness, expert, or witness-expert.[628] It is good practice for the person providing oral evidence to speak directly to the Court and not towards counsel questioning them or the interpreter. Questions may be put by the agent, a counsel, a technical adviser, or an expert counsel (but not another witness-expert).[629] It is for the party concerned to decide in which order it wants to call its witnesses, experts, and witness-experts. This sequence need not necessarily be identical to the list of witnesses, experts, and witness-experts which the party has communicated to the Registrar in accordance with Article 57 of the Rules of Court.[630] The party is also free in the type of questions it puts to a person, and in the length of time it spends conducting the examination. If the Court, after consulting the parties, has fixed a schedule for the taking of oral evidence, the parties are bound by it and if a party overruns the time allocated for examination, it may put at risk its right to re-examination.[631]

154 On completion of the examination-in-chief, the other party (but not the intervening State) is entitled to cross-examine. For this purpose, it is allowed the same amount of time as was required for examination.[632] As a matter of parity, time allowed for cross-examination cannot be transferred between witnesses, experts, or witness-experts.[633] Questions should therefore be answered by the person questioned as succinctly as possible in order to allow counsel to get through their programme for cross-examination. The question of whether or not to cross-examine is a matter for the party. The cross-examination of a witness, expert, or witness-expert is to follow immediately on the examination-in-chief; the fact that the transcript of the evidence is not yet available to counsel or that there has been no opportunity to study the transcript is no reason for postponement of the cross-examination. Cross-examination of an expert or witness-expert may include questions as to their qualifications as an expert and questions as to the substance of their evidence. The range of questions in cross-examination is not limited by the facts to which the witness has deposed, or the opinion an expert has given during the examination-in-chief.[634] It is permissible during cross-examination to read to an expert the views of other experts in the field, in order to test his or her credibility or possible bias. In this case, the expert should be given a copy of the document that

[627] *Cf. e.g.*, *Whaling in the Antarctic*, CR 2013/9, 27 June 2013, pp. 39–50 (expert evidence given by way of replies to questions asked by the counsel); *ibid.*, CR 2013/14, 3 July 2013, pp. 17–22 (expert evidence given by way of reading an approximately twenty-minutes long prepared statement).

[628] *Cf. Bosnian Genocide*, CR 2006/26, 24 March 2006, pp. 12–3.

[629] *Cf. Corfu Channel*, Pleadings, vol. III, pp. 429–30, 690–1. *Cf.* also Art. 65 of the Rules.

[630] *Cf. Corfu Channel*, Pleadings, vol. III, pp. 173, 174, 184, 474–6: *South West Africa*, Pleadings, vol. VIII, p. 56.

[631] *Cf. Bosnian Genocide*, CR 2006/23, 20 March 2006, p. 32.

[632] *Cf. ibid.*, CR 2006/22, 17 March 2006, p. 10; *ibid.*, CR 2006/26, 24 March 2006, p. 48.

[633] *Cf. ibid.*, CR 2006/27, 27 March 2006, p. 24.

[634] *Cf. South West Africa*, Pleadings, vol. XI, p. 564.

has been read out, but any document supplied may not show counsel's observation on the side.[635] The views of others, however, do not in themselves become evidence of the truth or correctness of these views. If the expert agrees with somebody else's view which is put to him or her in cross-examination, then that view does become evidence, not because it has been expressed by somebody else, but because the expert makes it evidence by agreeing with it and, therefore, indicating that it is also the expert's own view. But if the expert disagrees with the view put to him or her, then such a view does not become evidence, in the sense that there are now two conflicting views on record which must be weighed by the Court—the reason for this being that the other person never had to qualify as an expert and their expertise could not be tested by the party opposite.[636] The relevance of the operation is to see whether the expert agrees or not; if the expert does not agree, there may be features in the way in which he or she answers, in his or her demeanour, or in other circumstances which may afford the Court some guidance as to what weight is to be attached to his or her evidence.[637]

**155** After the cross-examination and after questions by the Court (if applicable), the party who calls the witness, expert, or witness-expert is afforded an opportunity for a brief re-examination which should, as far as possible, be confined to the questions that have arisen in the cross-examination and in any questions that have been put by the Court or the judges.[638]

**156** After the re-examination, the opposite side once again may be given an opportunity to put any further questions to the witness, expert, or witness-expert.[639] This opportunity should, however, not be used for a re-cross-examination. Questions should be confined to matters arising from the re-examination and any questions put by the judges.[640]

**157** The Court gives the parties wide latitude in putting questions to the witnesses, experts, and witness-experts. Objections raised by a party to questions put by the other party to a person giving evidence have largely been unsuccessful. Objections may be raised against 'leading questions' which suggest to the person questioned the answer which counsel is hoping to receive,[641] questions concerning facts of which the witness has no knowledge, or questions concerning a legal interpretation or requiring a legal conclusion,[642] questions covering evidence that has already been covered by a written report of the expert and which is uncontested, as well as questions irrelevant to any issue before the Court.[643] If, on any particular matter, the person who is giving an expert opinion has not qualified as an expert, objection may be taken to it.[644] Any objection must be raised when a question is put to the expert or witness. A general objection to all questions and all answers made prior to the questioning of a person does not suffice.[645] Objections to evidence or the relevance of evidence must be made in open Court and not by correspondence to the

[635] *Cf. ibid.*, Pleadings, vol. XI, pp. 298, 566–7.
[636] *Cf. e.g.*, *Whaling in the Antarctic*, CR 2013/9, 27 June 2013, p. 61.
[637] *Cf. South West Africa*, Pleadings, vol. XII, pp. 357–9, 418–20.
[638] *Cf. Whaling in the Antarctic*, CR 2013/9, 27 June 2013, p. 38; *Croatian Genocide*, CR 2014/7, 4 March 2014, p. 18.
[639] *Cf. Corfu Channel*, Pleadings, vol. III, pp. 519–20, 655–6; *South West Africa*, Pleadings, vol. XI, p. 67.
[640] *Cf. Corfu Channel*, Pleadings, vol. III, p. 185 and vol. IV, p. 231.
[641] *Ibid.*, Pleadings, vol. III, p. 186; *Preah Vihear*, Pleadings, vol. II, pp. 332–3, 361; *South West Africa*, Pleadings, vol. X, p. 123.
[642] *Cf. South West Africa*, Pleadings, vol. XI, pp. 26, 556, 586.
[643] *Preah Vihear*, Pleadings, vol. II, pp. 365–6; *South West Africa*, Pleadings, vol. X, p. 178.
[644] *Cf. South West Africa*, Pleadings, vol. X, p. 123.
[645] *Cf. ibid.*, Pleadings, vol. XI, p. 600–1.

Registry.[646] The Court tries to avoid any impression that a party has been prejudiced in presenting its evidence, or that it has been prevented from eliciting all the facts from a witness. The course usually followed by the Court has been not to rule on an objection but simply to 'note' it, proceed with the evidence, and to determine, if necessary, the value of a question and a reply given at the stage of the deliberations. If the Court cannot gain a moral certainty that the evidence is reliable, its value may be reduced to very little or none at all.[647]

158 Counsel may interrupt the examination of a witness, expert, or witness-expert by the opposing counsel at any time if questions put to the person and their answers are wrongly or not fully translated,[648] if the person is asked a 'leading question', if the person is asked to report about hearsay or reports about hearsay, if questions are unclear or ambiguous,[649] if the person is not provided with a copy of the document put to them by counsel,[650] if statements put to the person are incorrectly or incompletely cited, or if the person's own previous evidence is misreported by counsel examining them, if counsel puts several questions to the person at once rolled up into one statement,[651] or if the person is not answering the questions put to them. Counsel may also raise any general issues concerning the examination or cross-examination of witnesses, experts, and witness-experts.[652]

159 The President may interfere both with the questioning of witnesses, experts, and witness-experts by counsel as well as with the questioning by judges in order to request that questions be withdrawn, rephrased, or put in a more direct form or clearer language.[653] Thus, the President may remind counsel not to lead the examination[654] or to provide the statement from which the counsel is quoting to the person examined.[655] The President may also remind counsel of a position previously taken by the Court if it may appear the counsel is misrepresenting that position during the questioning.[656] The President may also interfere with the statements of experts who are testifying to 'facts' not in their personal knowledge,[657] or remind them of the specific question they were supposed to answer.[658]

160 The Court and members of the Court may put questions to the witnesses, experts, and witness-experts. They may do so after the cross-examination or after the last examination by the parties.[659] The Court usually retires after the last examination, while the parties and the witnesses, experts, and witness-experts are asked to remain in the vicinity of the Great Hall of Justice. The person being examined should not engage in a discussion with any of the parties during the break.[660] If the Court wishes to put questions to the witnesses, experts, and witness-experts, it will return to the courtroom and questions will be

[646] *Cf. ibid.*, Pleadings, vol. VIII, p. 60.
[647] *Cf. ibid.*, Pleadings, vol. X, pp. 107, 122, 123, 349 and vol. XI, pp. 460–1, 646.
[648] *Cf. Corfu Channel*, Pleadings, vol. III, p. 506 and vol. IV, p. 275.
[649] *Cf. Bosnian Genocide*, CR 2006/27, 27 March 2006, p. 19.
[650] *Cf. ibid.*, CR 2006/24, 23 March 2006, p. 27.
[651] *Cf. South West Africa*, Pleadings, vol. XI, pp. 297–8.
[652] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, pp. 61–2.
[653] *Cf. e.g.*, *ibid.*, Pleadings, vol. XI, pp. 201, 451.
[654] *Cf. ibid.*, CR 2006/23, 20 March 2006, p. 25.
[655] *Cf. Croatian Genocide*, CR 2014/9, 5 March 2014, p. 17.
[656] *Cf. Whaling in the Antarctic*, CR 2013/9, 27 June 2013, p. 61.
[657] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, pp. 28, 30.
[658] *Cf. ibid.*, CR 2006/22, 17 March 2006, p. 58; *ibid.*, CR 2006/24, 23 March 2006, p. 21.
[659] *Preah Vihear*, Pleadings, vol. II, pp. 434–42. *Cf. Whaling in the Antarctic*, CR 2013/9, 27 June 2013, pp. 63–71; *South West Africa*, Pleadings, vol. VIII, p. 58.
[660] *Cf. Whaling in the Antarctic*, CR 2013/14, 3 July 2013, p. 49.

posed by the President on behalf of the Court, or by individual judges. If the Court does not wish to do so, it will not return to the courtroom and the Registry will inform the parties and the public accordingly.[661] The Court may also ask the parties, the witnesses, experts, and expert witnesses to remain available for another day for possible further questions by the Court or its members, following their study of the evidence in the verbatim records. The President has also frequently asked additional, clarifying questions during the examination of witnesses and experts by counsel.

**e) Languages Used for Oral Evidence**

**161** Experts, witnesses, and witness-experts may provide evidence in languages other than English and French.[662] The party calling the person must make the necessary arrangements for the statement of its expert, witness, or witness-expert to be interpreted into one of the two official languages of the Court. Before first interpreting in a case, interpreters provided by the parties must solemnly declare in open court upon their conscience that their interpretation will be faithful and complete.[663] The interpretation into the first official language is made consecutively by the party's interpreter who will usually take his or her place next to the witness, expert, or witness-expert at the *rostrum.* This interpretation is translated simultaneously into the other official language by the Court's interpreters.[664] The Registrar, by recruiting a second interpreter, provides for the Court's effective supervision of the translation of evidence or statements by witnesses and experts.[665]

**162** The questions to the experts, witnesses, and witness-experts by agents and counsel of the parties will, as a rule, be put in English or French and then be translated into the other language. The same procedure is followed for any instructions the President of the Court may wish to give to these persons and for questions by the President on behalf of the Court or by individual judges.[666] With the permission of the Court, a party may conduct the examination of its witnesses, experts, and witness-experts in the foreign language. In this case, both questions and answers will be translated consecutively into one of the official languages of the Court by the party's interpreter.[667]

**f) Transcripts of Oral Evidence**

**163** The testimony of witnesses, experts, and witness-experts forms part of the verbatim records of the public sittings of the Court and, as such, is normally made available to the public and posted on the website of the Court in its provisional form within a few hours after the end of the sitting. In exceptional circumstances, the Court may decide not to make available the transcripts of oral evidence until the end of the sittings allocated for the hearing of the witnesses, experts, or witness-experts, or even until the end of the oral proceedings altogether.[668]

[661] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, p. 10.

[662] *Cf.* Art. 70, para. 2 of the Rules and further Kohen on Art. 39 MN 24–25, 39–40.

[663] *Cf.* Art. 70, para. 4, of the Rules.

[664] *Cf. South West Africa* cases, Pleadings, vol. VIII, p. 58; *Bosnian Genocide*, CR 2006/24, 23 March 2006, p. 10.

[665] *Cf.* Art. 15, para. 2 of the Instructions for the Registry (as drawn up by the Registrar and approved by the Court on 20 March 2012). *Cf.* also *ICJ Yearbook* (1948–1949), p. 80; *ICJ Yearbook* (1985–1986), p. 168; *ICJ Yearbook* (1990–1991), p. 179.

[666] *Cf. Bosnian Genocide*, CR 2006/24, 23 March 2006, p. 10.

[667] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 61, para. 59 and CR 2006/29, 28 March 2006; *cf.* also *Croatian Genocide*, CR 2014/7, 4 March 2014, p. 22.

[668] *Cf.* the conflicting statements in the *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 58, para. 48, which speaks about the 'end of the oral proceedings' and CR 2006/22, 17 March 2006, p. 10 ('end of the sittings allocated for the hearing of witnesses, experts and witness-experts'). *Cf.* also *Croatian Genocide*,

All witnesses, experts, and witness-experts are provided with copies, in one of the Court's official languages, of the parts of the verbatim records relevant to their testimony as soon as possible after their testimony or statement.[669] They are asked to insert into the transcript corrections of any mistakes that may have occurred without affecting the sense and content of the testimony given, the statement, or responses.[670] Any corrections should be handwritten on a copy of the verbatim records. The transcript, corrected and duly signed, should be returned to the Registrar within twenty-four hours of its receipt in order to facilitate any supervision that the Court may think proper to exercise in respect of any corrections made.[671] Any corrections to the full transcript are noted on a copy thereof which is available for consultation by the parties in the Library of the Court. 164

**g) Code of Conduct Regarding the Disclosure of Oral Evidence**

With a view to ensuring the sound administration of justice and the proper conduct of proceedings, and in order to enable witnesses, experts, and witness-experts to give their testimony in full independence, the Court has adopted a special code of conduct regarding the disclosure of the content of oral evidence. The general public is allowed to attend the hearings on the condition that it does not disclose the content of testimony before the end of the hearing of the last witness, expert, or expert-witness. Representatives of the media, who are asked to sign the code of conduct, are allowed to attend the proceedings, take photographs, and make sound recordings on the explicit condition that they will not make public the content of testimony before the end of the last hearing during which oral evidence is taken. If representatives of the media breach this embargo, their accreditation will be withdrawn and access to the remainder of the proceedings refused. In addition, both members of the public and the media are required not to communicate in any manner with the witnesses, experts, and witness-experts.[672] 165

### *4. Documents Part of the Oral Proceedings*

**a) Written and Electronic Version of the Oral Argument**

The Court requests the parties to provide both typewritten and electronic versions of the oral arguments of their representatives no later than half an hour before the beginning of each sitting. The different sections of the speeches are to be indicated by short sub-headings printed in bold type and the paragraphs are to be numbered consecutively for ease of cross-referencing. Copies of the typewritten version are supplied to the Court's interpreters and the electronic version forms the basis of the uncorrected transcript which is normally available on the Court's website within a few hours after the end of the sitting. 166

CR 2014/7, 4 March 2014, p. 11 (deciding that 'the written testimonies of witnesses, the written statements of witness-experts, as well as the verbatim records of the sittings during which the witnesses and witness-experts are heard, will not be made available to the public or posted on the website of the Court before the end of the oral proceedings').

[669] *Cf.* Art. 71, para. 5, of the Rules. *Cf.* also *ICJ Yearbook* (2005–2006), p. 282. The parties receive the full transcript.

[670] *Cf. e.g.*, *Croatian Genocide*, CR 2014/9, 5 March 2014, pp. 25, 37.

[671] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, p. 11. *Cf.* also *ICJ Yearbook* (2005–2006), p. 210.

[672] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, pp. 10–11; ICJ Press Release No. 2006/10 of 16 March 2006, pp. 1–2; *Croatian Genocide*, CR 2014/5, 3 March 2014, p. 14; *ibid.*, CR 2014/7, 4 March 2014, p. 11; ICJ Press Release No. 2014/8 of 20 February 2014, Annex.

**b) Documents Referred to by the Parties in Oral Argument**

**167** Any document, including video material, that the parties want to refer to or show during their oral argument must have been produced as part of the pleadings in accordance with Article 43 of the Statute, submitted in line with Article 56, paras. 1 and 2 of the Rules of Court, supplied at the request of the Court or individual judges,[673] or be part of a publication readily available (Article 56, para. 4 of the Rules).[674] Counsel should not simply refer to the 'documents' or the 'bundle of documents' in their speech but indicate at each juncture which document, and the page or paragraph number within a document, they are referring to and give the tab number in the judges' folder where the document may be found. If this is not done during the speech itself, it should be done when the verbatim record of counsel's presentation is being prepared.[675] The Court may request the parties to specify the precise origin of each of the documents, video material, graphics, charts, and photographs referred to or shown at the oral proceedings.[676]

**c) Documents in Illustration of Oral Evidence**

**168** New documents may be introduced into the proceedings at the oral stage by way of a witness, expert, or witness-expert referring to them during their testimony. If the person called by a party intends to refer to documents which have not previously been before the Court, the party should inform the Court and the other party of the particular documents at the same time as it informs the Court as to the nature of the evidence to be given.[677] In case of late information, *i.e.*, only days before or on the day of the hearing, the Court may decide that the document cannot be used during the examination of the witness or expert, or that the hearing must be postponed to a later date in order to allow the other party to prepare for cross-examination.[678] Experts have frequently supported their opinions by reading into the record newspaper cuttings, and extracts from publications and scholarly works. Witnesses have made drawings or sketches and have drawn or superimposed boundary lines on maps (prepared by the party) during the oral proceedings. Any document that has not been provided to the Court and the other party prior to the hearing must subsequently be filed with the Registry. The party calling witnesses, experts, and witness-experts has presented to them documents (such as plans, maps, marine charts, or an album of photographs). However, before doing so, a copy of the documents must be handed first to the Court and the other party.[679] The same applies to the party cross-examining. Any document with which counsel wants to confront a witness, expert, or witness-expert is to be provided to them in a language they can understand.[680] A translation of the document into one of the official languages of the Court handed to

[673] For such document requests by the Court and individual judges *cf. e.g.*, *North Sea Continental Shelf*, Pleadings, vol. II, pp. 162, 212 and *ICJ Yearbook* (1968–1969), p. 112. The Court declined to make such a request in the *Croatian Genocide* case, Preliminary Objections, ICJ Reports (2008), pp. 412, 416–7, para. 15; *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 57, para. 44.

[674] For the conditions used to determine whether a document should be considered as being published and readily available, see *supra*, MN 120–121.

[675] *Cf. Bosnian Genocide*, CR 2006/9, 6 March 2006, p. 49.

[676] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 59, para. 52.

[677] *Cf. South West Africa*, Pleadings vol. X, p. 130.

[678] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 60, para. 55.

[679] *Cf. South West Africa*, Pleadings, vol. X, p. 340.

[680] *Cf. Croatian Genocide*, CR 2014/9, 5 March 2014, p. 17.

the interpreters during the hearing is not sufficient.[681] In addition, any such document must be provided to the Court and the other party prior to the cross-examination. The Court has, however, allowed limited exceptions to this rule.[682] If the document put to the witness, expert, or witness-expert is not in one of the official languages of the Court, a copy of both the original and a translation should be provided to the Court and the other party. Such documents are not put in evidence as 'further documents' in the sense of Article 56 of the Rules of Court (which is shown by the fact that the parties do not file the required 127 copies of the document) but are treated as reference material or material in illustration of the witness or expert testimony.[683] It is for the Court to decide what value it wants to attach to these documents.

**169** If a party wants to put a quotation from a document to a witness, expert, or witness-expert on something they have said or written, the document in question, including the person's own writings, should, as a rule, be available in court so that in fairness to the person giving evidence they can see what it is that is being claimed that they said, and to allow the other party to check whether the quotation is taken out of context.[684] The same is true if counsel wants to question the witness or expert about the content of a document.

**170** A document referred to by a witness, expert, or witness-expert during the examination-in-chief may not be put in evidence by the party cross-examining. This is a matter for the party calling the person to decide. The party cross-examining may ask the person anything it wishes about the document itself, but it does not thereby become part of the documentation.[685]

**d) Documents Submitted in Response to Questions**

**171** Another opportunity for the parties to submit new documents to the Court either during or after the oral proceedings is in reply to questions put to them by the Court or by individual judges.[686] Thus, the Court or judges may ask for (further) 'evidence' as to certain facts stated by the parties' agents or counsel in oral argument or mentioned in the testimony of witnesses, experts, or witness-experts.[687] Such a request for evidence entails an implicit authorization by the Court under Article 56, para. 2 of the Rules to produce documents in evidence.

**e) Documents in the Judges' Folders**

**172** The Court has made a request to parties, in order to have a better understanding of their positions, that any document (even those already submitted or those parts of a publication readily available) referred to in oral argument should be submitted before the opening of each of the oral hearings.[688] The parties have responded to this request by preparing folders of documents for the convenience of the judges during the oral

[681] *Cf. Bosnian Genocide*, CR 2006/24, 23 March 2006, pp. 22–3.
[682] *Cf. ibid.*, CR 2006/24, 23 March 2006, p. 27.
[683] *Cf. Land, Island and Maritime Frontier Dispute*, C 4/CR 1991/34, 29 May 1991, p. 23. On Art. 56 of the Rules *cf. supra*, MN 75–79.
[684] *Cf. Bosnian Genocide*, CR 2006/22, 17 March 2006, pp. 61–2; *Croatian Genocide*, CR 2014/9, 5 March 2014, p. 17.
[685] *Cf. South West Africa*, Pleadings, vol. XI, p. 191, 200.
[686] *Cf.* Art. 61, paras. 2 and 3 of the Rules.
[687] *Cf. Navigational and Related Rights*, CR 2009/7, 12 March 2009, pp. 64–5.
[688] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Pleadings, vol. II, p. 83.

proceedings (so-called 'judges' folders'). These loose-leaf binders contain copies of all documents annexed to the pleadings and of all documents part of a publication readily available to which reference is made by counsel during the course of their oral presentation, as well as copies of all documents which are projected onto the screen in the courtroom in support of counsel's presentation. Folders may also include a summary or outline of the oral presentation (a 'skeleton argument'), a list of maps relied on in oral argument (with references to the relevant atlases annexed to the pleadings), indexes to particular topics to facilitate reference to the pleadings, and timelines of events referred to in the speeches. Each folder has an index. The index and the contents of the folders broadly follow the order in which the documents are referred to in the speeches. Whenever appropriate, the speaker indicates the tab number in the judges' folders for the convenience of the Court and for the record. Usually, thirty copies (twenty for the members of the Court, and ten for the party opposite) are provided to the Registry prior to the hearing in which they are used.[689] The judges' folders prepared by the parties to illustrate their oral argument are not reproduced in the 'ICJ Pleadings' series.

**173** No new documents may be produced in the judges' folder unless the procedure in Article 56 of the Rules of Court is complied with.[690] If a new document is included in the judges' folders without it being 'part of a publication readily available',[691] the Court may disallow it to be produced or referred to during the hearings even when the opposite party does not raise a formal objection.[692]

**174** In December 2006, the Court considered it necessary to provide the parties with further guidance concerning the preparation of judges' folders.[693] The Court invited the parties to exercise restraint in this regard and recalled that the documents included in the judges' folders must be produced in accordance with Article 43 of the Statute or Article 56, paras. 1 and 2 of the Rules of Court. The parties must also indicate from which annex to the written pleadings or which document produced under Article 56, paras. 1 and 2 of the Rules, the documents included in the judges' folder originate.[694]

### f) Thematic Index to Written and Oral Proceedings

**175** The parties have, on occasion, submitted a thematic index to their written and oral pleadings at the end of the hearings. The index is made part of and attached to the final submissions of the party.[695] These indices are reprinted as part of the verbatim record. They make it easier for all concerned to look up references to treaties and cases, as well as substantive points that have appeared in argument. However, they are not allowed to contain any comment whatsoever.

[689] *Cf. e.g.*, *Continental Shelf* (Tunisia/Libya), Pleadings V, pp. 494–5 (No. 112), p. 500 (No. 125).

[690] *Cf.* Practice Direction IX*ter*. On the procedure in Art. 56 of the Rules *cf. supra*, MN 75–79.

[691] Art. 56, para. 4 of the Rules; Practice Direction IX*bis*; *cf.* also *supra*, MN 120–121.

[692] *Cf. Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 632, para. 13.

[693] As to the excessive accumulation of documents in the judges' folders, *cf.* Pellet, *LPICT* (2008), p. 281.

[694] *Cf.* Practice Direction IX*ter*.

[695] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, CR 2000/25, 29 June 2000 (Attachment 1: Index to references in Bahrain's written and oral pleadings to principal issues); *Land and Maritime Boundary* case, CR 2002/25 (translation), 21 March 2002, pp. 28–43 (Thematic index to the written pleadings and oral argument of the Republic of Cameroon).

## D. Procedure in Incidental Proceedings on Preliminary Objections

### I. Introduction

176 In general terms, the procedure described in the preceding sections is the 'normal' procedure in contentious cases, the main or principal proceedings. However, as often as not, these proceedings are interrupted, leading to what are called incidental proceedings or 'cases within cases'. The most common of these incidental proceedings are those triggered by objections to the jurisdiction of the Court or to the admissibility of the application, or by other objections of a preliminary character, the decisions on which are requested before any further proceedings take place on the merits of the case. Other types of incidental proceedings in contentious cases[696] include the proceedings on questions of jurisdiction and/or admissibility,[697] on provisional measures,[698] on counter-claims,[699] on intervention,[700] and on discontinuance.[701]

177 As of 30 June 2018, preliminary objections had been raised, or considered by the Court to have been raised, in forty-eight cases.[702] In recent years, the Court has seen a relative decline in the number of preliminary objections. In many cases, preliminary objections have been well-founded but some have come close to an abuse of the process of the Court. The Statute is silent on the question of preliminary objections and the matter is governed instead by Article 79 of the Rules.

### II. Requirements for Preliminary Objections

#### *1. Formal Requirements*

178 The Rules of Court only provide that any objection to the jurisdiction of the Court or to the admissibility of the application must be made in writing; they do not require it to be termed formally a 'preliminary objection'.[703] It is a matter for consideration by the Court whether a communication constitutes a preliminary objection within the meaning of

[696] For a complete up-to-date list of contentious cases organized by incidental proceedings, see <http://www.icj-cij.org/en/cases-by-phase>.

[697] See *infra*, MN 206–208.

[698] See Oellers-Frahm/Zimmermann on Art. 41 MN 62–89.

[699] See Murphy, Counter-Claims MN 12–81.

[700] See Miron/Chinkin on Art. 62 MN 34 *et seq*.; Miron/Chinkin on Art. 63 MN 51–60.

[701] See Wegen, Discontinuance and Withdrawal, MN 13–69.

[702] Preliminary objections were raised in *Corfu Channel*; *U.S. Nationals in Morocco* (not decided, objections later withdrawn); *Ambatielos*; *Anglo-Iranian Oil Co*.; *Nottebohm* (objection was not formally raised but treated by the Court as such); *Monetary Gold*; *Norwegian Loans*; *Right of Passage over Indian Territory*; *Interhandel*; *Aerial Incident of 27 July 1955* (not decided, case discontinued); *Barcelona Traction*, *Light and Power Company*, *Limited* (not decided, case discontinued); *Compagnie du Port*, *des Quais et des Entrepôts de Beyrouth and Société Radio-Orient* (not decided, case discontinued); *Preah Vihear*; *South West Africa* cases; *Northern Cameroons*; *Pakistani POW* (objection was not formally raised but treated by the Court as such); *Nicaragua* (objection was not formally raised but treated by the Court as such); *Barcelona Traction*; *ELSI* (objection raised but parties agreed to join to merits); *Aerial Incident of 3 July 1988* (not decided, case discontinued); *Nauru*; *Oil Platforms*; *Lockerbie*; *Bosnian Genocide*; *Land and Maritime Boundary*; *Legality of Use of Force* cases; *Croatian Genocide*; *Certain Property*; *Diallo*; *Territorial and Maritime Dispute*; *Georgia v. Russia*; *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* (not decided, case discontinued); *Obligation to Negotiate Access to the Pacific Ocean*; *Caribbean Sea*; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*; *Marshall Islands v. UK*; *Maritime Delimitation in the Indian Ocean*; *Immunities and Criminal Proceedings*; *Certain Iranian Assets*.

[703] Art. 79, para. 1 of the Rules.

Article 79 of the Rules or a refusal, amounting to a default, to appear before the Court.[704] The Court has considered communications disputing its jurisdiction sent to the Court by the respondent, either before or after the filing of a memorial by the applicant, as constituting a preliminary objection to the Court's jurisdiction.[705]

**179** Objections to the Court's jurisdiction made in a counter-memorial may qualify as preliminary objections, even if the counter-memorial also contains submissions on the merits. A preliminary objection must not necessarily be made in a self-contained document. As the wording of Article 79, para. 1 of the Rules shows, the term 'preliminary' refers to the nature of the objection and not to the form in which the objection is lodged. However, if the document in which the preliminary objection is presented, according both to its title and contents, also constitutes a counter-memorial on the merits, the Court will subsequently, if need be, once more fix time limits only for a reply and a rejoinder on the merits.[706]

### *2. Possible Objectors*

**180** According to Article 79, para. 1 of the Rules, preliminary objections may be raised both by the respondent and by 'a party other than the respondent'. The respondent's right to raise preliminary objections has been described by the Court as a 'fundamental procedural right'.[707] In addition, the expression '*party* other than the respondent' includes the applicant and (hypothetically, for such a potentiality is yet to materialize) a State permitted to intervene as a party.[708] Although it is unusual for an applicant to raise a preliminary objection to the jurisdiction of the Court after having filed an application, the wording of the provision does not preclude the applicant from doing so in special circumstances.[709] Notably, the raising of a question of jurisdiction by the applicant is not equivalent to a notice of discontinuance of the proceedings.[710] It is also conceivable that the applicant may wish to raise a preliminary objection to a counter-claim.[711] By contrast, an intervening State does not become a party to a case without the consent of the original parties[712] and as such, it is not entitled to raise a preliminary objection.[713]

**181** Preliminary objections are not limited to cases begun by means of an application. In cases submitted by notification of a special agreement, both parties may make a

[704] On the latter, *cf.* von Mangoldt/Zimmermann on Art. 53, *passim*.

[705] *Cf. Nottebohm*, Preliminary Objection, ICJ Reports (1953), pp. 111, 118 ('By challenging, in its communication … the jurisdiction of the Court to deal with the claim which was the subject of the Application … and by refraining in consequence from presenting a Counter-Memorial, the Government … has raised a Preliminary Objection'). For the Letter from the Minister of Foreign Affairs of Guatemala to the President of the ICJ, which was treated as submission of a preliminary objection, *cf.* Pleadings, vol. I, pp. 162–9. *Cf.* also *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425–6, para. 76.

[706] *Cf.* the <IBT<*Pajzs Csáky*, *Esterházy* case, Preliminary Objection, PCIJ, Series A/B, No. 66, pp. 4, 7–9 and *ibid.*, PCIJ, Series E, No. 16, p. 177 concerning a document entitled 'Counter-Memorial . . . including the formal submission of an objection'; *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 17.

[707] *Diallo*, Merits, ICJ Reports (2010), pp. 639, 658, para. 44.

[708] *Cf.* Thirlway, *ICJ*, p. 168.

[709] *Cf. Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 29.

[710] *Cf. ibid.*, p. 30; *ICJ Yearbook* (1953–1954), p. 118.

[711] *Cf.* Thirlway, *ICJ*, p. 168.

[712] *Land*, *Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 134–6, paras. 99–102.

[713] *Cf.* Kolb, *ICJ*, p. 725. For further information about the status of intervening States *cf.* Miron/Chinkin on Art. 62 MN 120–134; Miron/Chinkin on Art. 63 MN 61–70.

preliminary objection; such an objection will usually concern the interpretation of the special agreement.[714]

Because raising a preliminary objection is a procedural right of the parties, they may also decide to waive it.[715] Accordingly, if the parties have agreed that the pleadings are to address both issues of the merits and of jurisdiction and admissibility, and the Court has made orders accordingly, a subsequent request by the respondent State for authorization to submit preliminary objections involving suspension of the proceedings on the merits will usually not be granted by the Court, unless the other party consents or there are compelling reasons for departing from the agreed procedure.[716] **182**

### *3. Permissible Grounds*

Preliminary objections may be based on three different categories of grounds: lack of jurisdiction, inadmissibility of the application, or any other objection of a preliminary character.[717] Neither the parties nor the Court have always made a clear distinction between the various categories. The Court has, however, stated that the 'distinction between these two kinds of objections [jurisdiction and admissibility] is well recognized in the practice of the Court'.[718] It is important to distinguish between the various objections as paras. 2, 3, and 8 of Article 79 of the Rules apply only to objections to jurisdiction and admissibility (paras. 2 and 3 only) and not to other objections of a preliminary character.[719] **183**

Objections to the jurisdiction of the Court may be based on the claim that the applicant does not have access to the Court under Article 35, paras. 1 and 2 of the Statute, because it is neither a party to the Statute of the Court, nor in any other way entitled to institute proceedings before the Court.[720] The Court may lack jurisdiction (*ratione personae*, *ratione materiae* or *ratione temporis*) under the terms of the jurisdictional clause of a treaty, the provisions of a dispute settlement treaty, or the declaration of acceptance of the Court's compulsory jurisdiction, upon which the applicant has founded its entitlement to bring the case before the Court. The respondent may, for instance, contend that the treaty or declaration of acceptance is null and void or no longer in force; that the applicant is, or at the relevant time was not a party to the treaty; that the dispute in question pre-dates the time to which the treaty or declaration applies; that there is no dispute between the parties, that the dispute is not covered by the treaty or declaration of acceptance; that a reservation attached to a declaration excludes the dispute in question (because, *e.g.*, it falls within the domestic jurisdiction of the party); or that the dispute is covered by a reservation of the applicant's declaration.[721] **184**

[714] *Cf. The Borchgrave* case, Preliminary Objections, PCIJ, Series A/B, No. 72, pp. 158, 160–1; and PCIJ, Series D, third addendum to No. 2, p. 820.

[715] *Cf. Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15, 27; *Avena*, Judgment, ICJ Reports (2004), pp. 12, 28–9, para. 24; *Diallo*, Merits, ICJ Reports (2010), pp. 639, 658, para. 44.

[716] *Arrest Warrant of 11 April 2000*, Order of 27 June 2001, ICJ Reports (2001), pp. 559, 562.

[717] On the various grounds for objections, *cf.* Abi-Saab (1967), pp. 49–200; Herczegh (2003), pp. 406–20; Müller/Mansour, 'Procedural Developments at the International Court of Justice', *LPICT* 8 (2009), pp. 459–528, 511–15. For further comment on Art. 79 of the Rules *cf.* Tomuschat on Art. 36 MN 112 *et seq*.

[718] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120. On the distinction, *cf.* also Lauterpacht, *Rec. des Cours* (2009), pp. 502–3.

[719] *Contra* Thirlway, *ICJ*, p. 169, fn. 12.

[720] *Cf. Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 314–5, para. 91.

[721] *Cf.* further Tomuschat on Art. 36 MN 121–124.

**185** 'Admissibility' is not defined in the Rules.[722] A preliminary objection to admissibility covers a more disparate range of possibilities than a jurisdictional objection.[723] The Court noted that '[o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits'.[724] An application can be inadmissible on a number of grounds. For example, the respondent may contend that the essential provisions of the Statute or of the Rules of Court for bringing an application have not been complied with; that the dispute relates to a non-existent right or duty, or is not of a legal nature within the meaning of the Statute;[725] that the claim is not sufficiently substantiated; that the judgment would be without practical effect or would be incompatible with the role of the Court; that the applicant lacks capacity to act, has no legal interest in the case or has not exhausted the possibilities of negotiations or other preliminary procedure; that the applicant's prior conduct debars the Court from examining the merits of the claim (the notion of 'clean hands'); that the parties have agreed to use another method of dispute settlement; that the Court should not decide the case for reasons of judicial propriety; or that the private party whom the applicant is seeking to protect does not have its nationality or has failed to exhaust the local remedies available in the respondent State.

**186** The third category serves as a residual ground and leaves the Court broad discretion to dispose of a case before any further proceedings on the merits. For instance, an objection of this kind, in other words one that does not relate either to jurisdiction or to admissibility, has been raised in the *Lockerbie* cases by the United States. According to that objection, a decision of the Security Council issued after the filing of the application in the case had rendered the claim 'moot' and without object.[726] Additionally, the respondent may conceivably argue, *e.g.*, that the dispute brought before the Court involves other aspects of which it is not seised; that the applicant has not cited before the Court certain third parties whose presence is essential; that the applicant is alleging facts which come within the province of a political organ of the United Nations; or that certain negotiating procedures have not been exhausted.[727]

### *4. Time Limits*

**187** Initially, a party could raise preliminary objections up until the date set for the submission of the counter-memorial. In numerous cases, this time frame led to drawn out proceedings.[728] In December 2000, as one of several efforts in recent years to increase its throughput, the Court, amending its Rules of Court, decided to introduce a strict time limit, requiring the respondent to make preliminary objections 'as soon as possible, and not later than three months after the delivery of the Memorial' (Article 79, para. 1 of the

[722] *Cf.* further Tomuschat on Art. 36 MN 125 *et seq*.

[723] *Cf. Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120.

[724] *Oil Platforms*, Judgment, ICJ Reports (2003), pp. 161, 177, para. 29.

[725] For comment on these issues *cf.* Tomuschat on Art. 36 MN 8–18.

[726] *Lockerbie* case (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 131, para. 45. In the specific circumstances of the case, the Court found the objection did not have 'an exclusively preliminary character' within the meaning of Art. 79, para. 9 of the Rules (on which see *infra*, MN 201–204) and as a result, it was never resolved, *ibid.*, p. 134, paras. 49–50.

[727] The classification in MN 184–186 is largely based on the *ICJ Handbook* (6th edn., 2014), pp. 59–60.

[728] In the *Bosnian Genocide* case, preliminary objections were raised 14 months after the delivery of the memorial. In the *Diallo* case, it was more than 18 months.

Rules of Court).[729] With this compression of the timeline, the Court can now swiftly identify those cases in which issues of jurisdiction and admissibility arise and can thus factor the additional stage of hearings on preliminary objections into its annual calendar.[730] Parties other than the respondent may still file their preliminary objections within the time limit fixed for the delivery of their first pleading. A respondent who wishes to submit preliminary objections is entitled before doing so to be informed as to the precise nature of the claim by the submission of a memorial by the applicant, but may nevertheless choose to file an objection earlier.[731]

Parties cannot, by purporting to 'reserve their rights' to take some procedural action, exempt themselves from the application to such action of the provisions of the Statute and Rules of Court.[732] It is thus not within the power of the parties to 'reserve' their right to raise a preliminary objection at a later stage in the proceedings. **188**

The strict time limit in Article 79, para. 1 of the Rules of Court, however, applies only to objections to jurisdiction or admissibility raised by way of the preliminary objection procedure under Article 79 of the Rules. For an objection to be covered by Article 79, it must possess a 'preliminary' character. Article 79, para. 1, characterizes as 'preliminary' an objection 'the decision upon which is requested before any further proceedings'.[733] Thus, a party is not necessarily barred from raising objections to the Court's jurisdiction or the admissibility of the case during the proceedings on the merits of the case. There may be circumstances in which a party failing to put forward an objection to jurisdiction might be held to have acquiesced to the jurisdiction of the Court. Apart from such circumstances, a party failing to present an objection in a timely manner may forfeit the right to bring about a suspension of the proceedings on the merits (Article 79, para. 5), but can still argue the objection along with the merits.[734] This may be explained by the fact that the Court cannot give judgment on the merits of a case unless it is satisfied that it has jurisdiction and the case is admissible, and must, if necessary, go into these matters *proprio motu*. Even such belated objections may be considered 'preliminary' in the sense that, if upheld, the Court will not proceed to determine the merits.[735] **189**

[729] The new rule was first applied in the *Certain Property* case, Order of 28 June 2001, ICJ Reports (2001), pp. 565, 566, where the Court expressly noted that Art. 79, para. 1 of its Rules, in its version applicable with effect from 1 February 2001, would be applicable.

[730] *Cf.* Speech by President Higgins to the Sixth Committee of the General Assembly, UN Doc. A/C.6/63/SR.21 (2008), p. 11, para. 62.

[731] *Aerial Incident of 3 July 1988* (Iran v. USA), Order of 13 December 1989, ICJ Reports (1989), pp. 132, 134. *Cf.* also the views of the parties in that case, Pleadings, vol. II, pp. 631–9. In the *Interhandel* case, the United States filed a preliminary objection ten days after the filing of the application, *cf. Interhandel*, Pleadings, p. 77. For the view that preliminary objections must be filed 'after' the presentation of the memorial, *cf. e.g.*, *Fisheries Jurisdiction* (UK v. Iceland), Order of 18 August 1972, Joint Diss. Op. Bengzon and Jiménez de Aréchaga, ICJ Reports (1972), pp. 184, 185, paras. 4–5. But *cf.* also Jiménez de Aréchaga, *AJIL* (1973), p. 19.

[732] *Cf. e.g.*, *Avena*, Judgment, ICJ Reports (2004), pp. 12, 28–9, para. 24.

[733] *Cf. ibid.*, p. 28–9, para. 24; *Lockerbie* (Libya v. UK), Preliminary Objections, ICJ Reports (1998), pp. 9, 26–7, para. 47.

[734] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 84–5, para. 101. But for criticism of this 'irregular' procedure, see *ibid.*, Diss. Op. Al-Khasawneh, ICJ Reports (2007), pp. 241, 252–3; *ibid.*, Sep. Op. Tomka, ICJ Reports (2007), pp. 310, 313–14. *Cf.* also *Avena*, Judgment, ICJ Reports (2004), pp. 12, 28–9, para. 24; *Diallo*, Merits, ICJ Reports (2010), pp. 639, 658, para. 44; *Application of the Interim Accord of 13 September 1995*, Judgment, ICJ Reports (2011), pp. 644, 649–50, para. 6.

[735] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 79, para. 86.

## III. Effects of Preliminary Objections

### *1. Incidental Proceedings on the Objections*

**190** According to Article 79, para. 5 of the Rules, upon receipt by the Registry of a preliminary objection, the proceedings on the merits are suspended and incidental proceedings on the objections are triggered. However, such a suspension is only automatic if the party expressly labels and files an objection as a preliminary objection.[736] If a party only raises a challenge to the jurisdiction or admissibility of the case, the Court will be free to determine the most appropriate procedure.[737] As the Court observed in *Avena*, bringing about a suspension of the proceedings on the merits is a right that belongs to the objector State and as such, it may also be forfeited by that State.[738]

**191** Originally, the submission of a preliminary objection was assimilated to the institution of new, separate proceedings and treated like an application.[739] In 1952, the Court decided that in future cases preliminary objections would only be treated as a distinct phase of the proceedings on the merits, and no longer as an entirely separate case.[740] In consequence, first, the document by which one of the parties lodges a preliminary objection is to be filed in as many copies as other documents in the proceedings on the merits.[741] Second, the document raising a preliminary objection which often deals with matters closely affecting the merits of the case, will not, unlike an application, be distributed to all States parties to the Statute of the Court and will be treated as a confidential document, like all other pleadings. Third, preliminary objections will not be entered in the General List with a separate number. Fourth, judges *ad hoc* appointed to hear cases on the merits need not make a new solemn declaration for the hearing of the preliminary objection.[742] Finally, as the proceedings constitute a distinct phase of the case, the preliminary proceedings and the proceedings on the merits need not be dealt with by the Court in the same composition.[743]

### *2. Hearing of Objections within the Framework of the Merits*

**192** If the parties agree that a formal preliminary objection lodged by one of them be heard and determined within the framework of the merits, the Court, according to Article 79, para. 10 of the Rules of Court, must join the objections to the merits.[744] The Court has also dealt with objections to jurisdiction and admissibility at the merits stage if the party raising the objections informed the Court that, rather than raising preliminary objections under Article 79 of the Rules, it would be addressing 'issues of jurisdiction together with those on the merits', and the other party did not object.[745]

[736] *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 43. On suspension as an automatic consequence *cf.* also Thirlway, 'Law and Procedure, Part Twelve', pp. 136–7; Shaw, *Rosenne's Law and Practice*, vol. II, pp. 887–9.

[737] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 54–5, para. 26, and p. 56, para. 35.

[738] *Cf. Avena*, Judgment, ICJ Reports (2004), pp. 12, 28–9, para. 24; *cf.* also Quintana, *ICJ Litigation*, p. 756; Thirlway, *ICJ*, p. 176, fn. 47.

[739] For the situation until 1952 *cf.* the Sixteenth Report, PCIJ, Series E, No. 16, pp. 178, 179, 190.

[740] *Cf. Ambatielos*, Order of 14 February 1952, ICJ Reports (1952), pp. 16, 16–17; but see Thirlway, *ICJ Law and Procedure*, vol. II, p. 1814 and fn. 422.

[741] For the number of copies *cf.* MN 38–44 *supra*.

[742] Further on this issue *cf.* Khan on Art. 20 MN 7–8.

[743] *ICJ Yearbook* (1953–1954), p. 118 and *ICJ Yearbook* (1954–1955), p. 98. For critical comment *cf.* Dugard on Art. 13 MN 15–18.

[744] This was done in the *ELSI* case and *East Timor* case.

[745] *Cf. Application of the Interim Accord of 13 September 1995* case, Judgment, ICJ Reports (2011), pp. 644, 649–50, para. 6, and p. 655, para. 25.

## IV. Incidental Written Proceedings

### *1. Written Statement of Preliminary Objections*

The written statement of preliminary objections is the first pleading submitted in the incidental proceedings.[746] The statement is to be filed by the objector within the time limit set out in Article 79, para. 1 of the Rules. It shall contain: **193**

(1) a statement of the relevant facts and the law on which the objection is based;
(2) information regarding any evidence which the objector intends to produce;
(3) a short summary of the reasoning;
(4) a statement of the objector's submissions;
(5) a list of every document in support of the arguments set forth: these documents shall be attached to the statement.

The exposition of the facts and law must be confined to those matters that are relevant to the objections. Contrary to the principal proceedings, the information regarding the evidence the objector intends to produce is not to be supplied to the Court in a separate communication to the Registry, in sufficient time before the oral proceedings, but is to be included in the written statement of preliminary objection itself.

### *2. Written Statement of Observations and Submissions*

The written statement of observations and submissions on the preliminary objections constitutes the second pleading in the incidental proceedings. An indication by a party in its memorial that it would be satisfied to reply orally to any preliminary objection, is not sufficient to allow the Court to dispense with the setting of a time limit within which the party may file this pleading.[747] Article 79, para. 5 of the Rules sets out content requirements, symmetrical to those for the preliminary objections.[748] The statement of observations and submissions shall contain: **194**

(1) a statement of the factual and legal observations on the preliminary objections;
(2) information regarding any evidence which the objector intends to produce;
(3) a short summary of the reasoning;
(4) a statement of the objector's submissions;
(5) a list of every document in support of the arguments set forth: these documents shall be attached to the statement.

The written statement of observations must also be confined to those matters that are relevant to the objections. The Court, or the President of the Court if the Court is not sitting, fixes the time limit within which the other party must present the written statement of its observations and submissions. This shall be done 'upon receipt' of the preliminary objection, indicating that it is to be done without undue delay. With the aim of accelerating

[746] Art. 79, para. 7 of the Rules refers to the preliminary objection as one of the 'pleadings'. *Cf.* also *Lockerbie* (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 119, para. 10.

[747] *Anglo-Iranian Oil Co.*, Order of 11 February 1952, ICJ Reports (1952), pp. 13, 14. *Cf.* also Prager, *supra*, fn. 18, p. 174.

[748] *Cf. supra*, MN 193. Judge *ad hoc* Kreća speaks of 'asymmetrical relations' between paras. 4 and 5 of Art. 79 Rules of Court: *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, Sep. Op. Kreća, ICJ Reports (2004), pp. 279, 407, para. 54. However, the 'shall set out' in para. 4 of Art. 79 relates to the content of the written statement of preliminary objections, while the words 'may present' in para. 5 of Art. 79 refer to the filing of the written statement of observations and submissions.

proceedings on preliminary objections the Court, in January 2001, prescribed that the presentation of the written statement 'shall generally not exceed four months'.[749] This was made more precise in July 2004 in an amendment to Practice Direction V, when the Court added that the four-month time limit would run 'from the date of the filing of the preliminary objections'.[750]

### *3. Further Written Statements*

**195** The Court may authorize the objector, under Article 79, para. 6 of the Rules of Court, to file a written answer to the observations and submissions contained in the statement of the other party within a time limit fixed by the Court. The Court may also authorize the filing of written observations with regard to this answer. The filing of such further written statements does not preclude the Court from subsequently holding oral proceedings.[751]

**196** Further written statements authorized by the Court must be distinguished from 'comments' or 'observations' by the objector on the other party's written statement of its observations and submissions, and the comments in response thereto.[752] Such comments are, strictly speaking, outside the procedural framework set by the Statute and by the Rules of Court. They are not part of the pleadings of the incidental proceedings but constitute, like other correspondence addressed to the Court, other documents.

## V. Incidental Oral Proceedings

**197** Article 79, para. 6 of the Rules shows that oral proceedings are not obligatory in preliminary objection proceedings. The parties may notify the Court of their desire to dispense with oral proceedings on the preliminary objections.[753] In practice, however, the Court has never rendered a decision on preliminary objections without holding oral hearings.

**198** Oral proceedings in incidental proceedings are conducted along the same lines as in proceedings on the merits. This includes the practice according to which copies of the pleadings are normally made accessible to the public on the opening of the oral proceedings.[754] This has the curious consequence that the pleadings made public at that point will often include the applicant's Memorial, while the Counter-Memorial of the other party and any additional pleadings filed thereafter will remain confidential until the opening of the oral proceedings on the merits.[755] At the hearings, the party that raised the objections

[749] *Cf.* Modification of the Note Containing Recommendations to the Parties, ICJ Press Release No. 2001/1 of 12 January 2001, p. 3, para. 3(E).

[750] Practice Direction V. *Cf.* also Watts, *supra*, fn. 29, p. 386.

[751] *Cf. Phosphates in Morocco*, Preliminary Objections, PCIJ, Series A/B, No. 84, pp. 10, 20–1; *ibid.*, Series C, No. 85, pp. 1373–4 and Sixteenth Report, PCIJ, Series E, No. 16, p. 189.

[752] *Cf. e.g.*, *Legality of Use of Force* (Serbia and Montenegro v. UK), Preliminary Objections, ICJ Reports (2004), pp. 1307, 1313, paras. 12–3. *Cf.* also the Letter from the Agent of the United Kingdom, 17 January 2003, and the Letter from the Agent of Serbia and Montenegro, 28 February 2003. Similar letters were sent by the other seven parties in the *Legality of Use of Force* cases.

[753] *ICJ Yearbook* (1951–1952), p. 99 (with regard to the *U.S. Nationals in Morocco* case; there were in fact no oral proceedings as the preliminary objections were withdrawn).

[754] *Cf.* Art. 53, para. 2 of the Rules and detailed discussion in MN 91–93 *supra*.

[755] *Cf. e.g.*, *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, Judgment of 2 February 2017, para. 8. Pleadings made public included the Memorial of Somalia, the Preliminary Objections of Kenya, and the Written Statement of Somalia Concerning the Preliminary Objections of Kenya. *Cf.* also Quintana, *ICJ Litigation*, pp. 343–4 and 757.

is called upon to speak first.[756] The oral argument by the parties and the evidence presented shall be confined to those matters that are relevant to the objections, unless the Court, in order to be able to determine its jurisdiction at the preliminary stage of the proceedings, requests the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.[757] On occasion, the Court has specifically requested the parties to confine their arguments to the objections.[758]

## VI. Disposal of Preliminary Objections

### *1. Upholding of the Objections*

The Court disposes of the preliminary objections in the form of a judgment.[759] If the Court upholds at least one of the preliminary objections the case will come to an end, either wholly or in respect of any claims to which the objection is fatal, leaving the other claims untouched.[760] The case may be resumed later, once the ground on which the preliminary objection was upheld no longer applies (*e.g.*, where domestic remedies have been exhausted to no avail). **199**

### *2. Rejection of the Objections*

If the Court rejects all objections (or finds some of them not to be of an exclusively preliminary character), the principal proceedings on the merits will resume from the point at which they were suspended. In this case, the Court must fix time limits for the further proceedings.[761] The time limits may be fixed in the judgment on the preliminary objections, or by a subsequent order after the President has consulted the parties as to their views with regard to these time limits.[762] In fixing the new time limits, the Court will be guided by the circumstances in each particular case: the new time limits may either be shorter than those originally fixed, taking into account that the party filing the preliminary objection thereby may have gained up to three months for the preparation of its counter-memorial, or may be the same as those originally contemplated.[763] The rejection of an objection to jurisdiction signifies that the Court has jurisdiction and the Court will make a specific finding to that effect.[764] However, this outcome does not necessarily preclude the reopening of the question of jurisdiction in case of changed circumstances,[765] **200**

[756] *ICJ Yearbook* (1977–1978), p. 107. *Cf.* also Third Annual Report, PCIJ, Series E, No. 3, p. 207; PCIJ, Series D, third addendum to No. 2, p. 824.

[757] Art. 79, para. 8 of the Rules. *Cf.* also Practice Direction VI and Modification of the Note containing recommendations to the parties, ICJ Press Release No. 2001/1 of 12 January 2001, p. 3, para. 3(F).

[758] *Cf. e.g.*, *Anglo-Iranian Oil Co.*, Pleadings, p. 499; *Ambatielos*, Pleadings, p. 304; *Croatian Genocide*, CR 2008/8, 26 May 2008, p. 14; *ibid.*, CR 2008/10, 27 May 2008, p. 8.

[759] Art. 79, para. 9 of the Rules.

[760] *Cf. e.g.*, *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 268–9, para. 72(3); *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 617, para. 98(3)(a); *Immunities and Criminal Proceedings*, Preliminary Objections, Judgment of 6 June 2018, para. 154(4).

[761] Art. 79, para. 9 of the Rules.

[762] Torres Bernárdez/Moïse Mbengue on Art. 48 MN 31.

[763] The problem of the 'free ride' a party can obtain by filing a preliminary objection has been mitigated by the 2000 change to the Rules; it has, however, not been totally eliminated. On this problem *cf.* Highet, supra, fn. 288, p. 135.

[764] See, *e.g.*, *Obligation to Negotiate Access to the Pacific Ocean*, Preliminary Objection, ICJ Reports (2015), pp. 592, 610–1, para. 56(2).

[765] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43 *et seq*.

subsequent argument as to the scope of that jurisdiction,[766] or a subsequent challenge to jurisdiction on other grounds.[767]

### *3. Declaration that the Objections Are Not Exclusively Preliminary*

**201** Originally, the Court could either 'give its decision on the objection or … join [all or part of] the objection to the merits'.[768] Joinder of the preliminary objections to the merits was to be decided whenever the interests of the good administration of justice so required or a decision on the preliminary objections raised questions of fact and law with regard to which the parties were in disagreement and which were too closely linked to the merits to adjudicate upon them separately.[769] The Court had availed itself of this possibility on several occasions.[770]

**202** In 1972, the possibility to join an objection to the merits was deleted from the Rules of Court.[771] The revision of the Rules was prompted by the *Barcelona Traction* case where the Court had joined the preliminary objection to the merits, but ultimately decided the case on the preliminary objection, after requiring the parties to plead the merits fully.[772] The Court acknowledged in 1986 that this was regarded 'as an unnecessary prolongation of an expensive and time-consuming procedure'.[773] Under Article 79, para. 9 of the present Rules, the Court can no longer formally join an objection to the merits. It can, however, reach de facto the same result by declaring that an 'objection does not possess, in the circumstances of the case, an exclusively preliminary character'.[774] However, the 1972 modification of the Rules was intended to be not just one of drafting but of substance.[775] Under the new wording, the Court must 'take a definite stand'[776] and make a specific finding that the objection does not have an 'exclusively preliminary character'.[777] It is no longer open to it to join the objection to the merits simply because doing so would 'place the Court in a better position to adjudicate with a full knowledge of the facts'.[778]

[766] *Cf. Fisheries Jurisdiction* (Germany v. Iceland), Merits, ICJ Reports (1974), pp. 175, 189–90, paras. 34–40.

[767] For the problem of a possible implicit waiver of further objections to jurisdiction, *cf. Minority Schools (Silesia)*, Judgment, PCIJ, Series A, No. 15, pp. 4, 22–6.

[768] This provision was first introduced in Art. 62, para. 5 of the 1936 Rules of Court.

[769] *The Panevezys-Saldutiskis Railway*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 53, 56.

[770] *Cf. Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 47 (third and fourth objection joined, others rejected); *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 152 (fifth and sixth objection joined, others rejected). The PCIJ joined objections to the merits in the *Pajzs*, *Csáky*, *Esterházy* case, Preliminary Objection, PCIJ Series A/B, No. 66, pp. 4, 9; *The Losinger & Co.* case, Preliminary Objection, PCIJ, Series A/B, No. 67, pp. 15, 25; *Panevezys-Saldutiskis Railway* case, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 53, 56.

[771] On the change to the Rules, *cf.* Jiménez de Aréchaga, *AJIL* (1973), pp. 13–8.

[772] *Cf. Barcelona Traction*, Merits, ICJ Reports (1970), pp. 3, 30–1, para. 27 and 51, para. 103.

[773] *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 29–30, para. 39; *cf.* also *Obligation to Negotiate Access to the Pacific Ocean*, Preliminary Objection, Sep. Op. Cançado Trindade, p. 4, para. 15 (referring to the Court's 'prolonged and cumbersome handling of the *Barcelona Traction* case'); *ibid.*, Decl. Bennouna, p. 2 ('the 1972 revision was inspired by the Court's desire to curb abuse of the preliminary objection procedure'), *Croatian Genocide*, Judgment, Sep. Op. Owada, ICJ Reports (2015), pp. 169, 170, para. 5 (concluding, after examining the unpublished *travaux préparatoires* of the 1972 revision of the Rules, that the change was motivated by the criticism of the Court's management of the *Barcelona Traction* case).

[774] Art. 79, para. 9 of the Rules. On how to establish whether an objection has an exclusively preliminary character, *cf.* Thirlway, 'Law and Procedure, Part Twelve', pp. 146–57.

[775] *Cf.* Jiménez de Aréchaga, *AJIL* (1973), p. 16; Thirlway, 'Law and Procedure, Part Twelve', p. 144.

[776] Jiménez de Aréchaga, *AJIL* (1973), p. 16.

[777] *Cf.* Thirlway, *ICJ*, pp. 173–4.

[778] *Cf. Pajzs*, *Csáky*, *Esterházy*, Preliminary Objections, PCIJ Series A/B, No. 66, pp. 4, 9; *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 41.

**203** According to Article 79, para. 8 of the Rules, the Court may, whenever necessary, request the parties to argue '*all* questions of fact and law' (including those touching upon certain aspects of the merits)[779] in order to enable it to determine its jurisdiction or the admissibility of the case at the preliminary stage of the proceedings. Rather than carrying the preliminary objections over into the merits phase, questions of fact and law 'touching upon' the merits are now brought forward into the jurisdictional phase, to dispose of the objections at the earliest possible stage in the proceedings. Thus, under the present Rules, objections should be decided at the preliminary stage wherever reasonably possible: *in dubio preliminarium eligendum*.[780] This also seems to be in line with the approach taken by the Court, which has been very cautious in declaring an objection to be 'not exclusively preliminary' in character and, in fact, has done so only on four occasions.[781] Specifically, the following objections were declared to be of a non-exclusively preliminary character, in the circumstances of the relevant cases: an objection to jurisdiction based on a multilateral treaty reservation;[782] an objection based on the mootness of the claim on the basis of events subsequent to the filing of the application;[783] an objection that a boundary delimitation would affect the rights of third States;[784] and an objection to jurisdiction on the basis that the applicant's claims related to acts or omissions that took place before the respondent came into existence as a State.[785] The Court also recorded the view expressed by a party that the objection that the alleged wrongful conduct took place outside its territory and therefore the Court lacked jurisdiction *ratione loci* to entertain the case did not possess an exclusively preliminary character.[786]

**204** If the Court finds that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, the principal proceedings will be resumed and the Court will fix the necessary time limits.[787] Any further pleadings are to deal with both the objections and the merits. It is therefore advisable for the respondent to raise any preliminary objection not in its counter-memorial, but in a separate submission. This will allow the respondent two shots at these inextricably linked questions.

[779] *Cf. Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 15.

[780] *Cf. Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, CR 2015/26, 5 October 2015, p. 64, para. 26 (Treves).

[781] Additionally, individual judges occasionally expressed their doubts as to the exclusively preliminary character of certain objections raised in other cases. *Cf. e.g.*, *Obligation to Negotiate Access to the Pacific Ocean*, Preliminary Objection, Sep. Op. Trindade, pp. 20–2, paras. 62–7; *Marshall Islands v. UK*, Preliminary Objections, ICJ Reports (2016), Diss. Op. Bedjaoui, pp. 1108, 1126 *et seq*.

[782] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425–6, para. 76 and *ibid.*, ICJ Reports (1986), pp. 14, 31–2, para. 43 (objection based upon the Vandenberg reservation required a determination of which States would be 'affected' by the judgment, which depended upon a decision on the merits).

[783] *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 28–9, para. 50 and pp. 115, 133–4, para. 49. For criticism of this wide interpretation of the notion of 'not exclusively preliminary', *cf. ibid.*, Joint Decl. Guillaume and Fleischauer, ICJ Reports (1998), pp. 47–50 and pp. 139–42, respectively.

[784] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 322–5, paras. 112–7.

[785] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 460, para. 130, and p. 466–7, para. 146; *cf.* also *ibid.*, Judgment, ICJ Reports (2015), pp. 3, 15, para. 9.

[786] *Cf. Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 81, para. 22. *Cf.* also *ibid.*, Sep. Op. Owada, p. 180, para. 28 (arguing that the objection that there was no dispute concerning the interpretation of the CERD also did not possess, in the circumstances of the case, an exclusively preliminary character). *Cf.* further *ibid.*, Decl. Skotnikov, p. 236, para. 6.

[787] Art. 79, para. 9 of the Rules.

### *4. Withdrawal of the Objections*

**205** If the preliminary objections are withdrawn before the Court can give its decision, it, or the President if the Court is not sitting, makes an order recording the discontinuance of the preliminary objection proceedings in accordance with Article 89 of the Rules of Court.[788] Because preliminary objections are treated as an incident of proceedings on the merits, and not as a separate case, the Court—contrary to the wording of Article 89—does not direct the removal of the case from the list of cases but simply records that the proceedings on the merits, which were temporarily suspended by the objection, are resumed and, if applicable, fixes time limits for the filing of further pleadings.[789]

## VII. Separate Proceedings on Jurisdiction and Admissibility Distinguished

**206** Incidental proceedings on preliminary objections must be distinguished from separate proceedings on questions of jurisdiction and admissibility or 'initial phase proceedings'. This type of proceedings originally had no foundation in the Statute or the Rules of Court and was developed through the practice of the Court. In cases where the parties agreed,[790] or where one of the parties indicated that it would not participate in the proceedings because it disputed the Court's jurisdiction or the admissibility of the application (but did not file preliminary objections),[791] the Court decided that the questions of jurisdiction and admissibility should be dealt with at a preliminary stage of the proceedings, and ordered separate pleadings as to the jurisdiction and admissibility.

**207** In December 2000, the Court added a new para. 2 to Article 79 of the Rules of Court which provides that 'following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately'. This change to the Rules was triggered by the Court's experience in the *Legality of Use of Force* cases, where the respondents requested that the questions of jurisdiction and admissibility should be determined separately before any proceedings on the merits; a request which was

[788] *Cf.* further Torres Bernárdez/Moïse Mbengue on Art. 48 MN 57–61; Wegen, Discontinuance and Withdrawal, MN 54–62.

[789] *U.S. Nationals in Morocco*, Order of 31 October 1951, ICJ Reports (1951), pp. 109–11 and *ICJ Yearbook* (1951–1952), p. 99.

[790] *Border and Transborder Armed Actions*, Order of 22 October 1986, ICJ Reports (1986), pp. 551, 552; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Order of 11 October 1991, ICJ Reports (1991), pp. 50–1; *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction, ICJ Reports (1998), pp. 432, 435–6, para. 4; *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 16, para. 4; *Armed Activities* (DRC v. Burundi), Order of 21 October 1999, ICJ Reports (1999), pp. 1018, 1019; *Armed Activities* (DRC v. Rwanda), Order of 21 October 1999, ICJ Reports (1999), pp. 1025, 1026. But *cf.* also *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 187, para. 41 (D), and *ibid.*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 395, para. 4.

[791] *Fisheries Jurisdiction* (UK v. Iceland), Order of 18 August 1972, ICJ Reports (1972), pp. 181, 182; *Fisheries Jurisdiction* (Germany v. Iceland), Order of 18 August 1972, ICJ Reports (1972), pp. 188, 189; *Pakistani POW*, ICJ Reports (1973), pp. 328, 330, para. 16; *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgments, ICJ Reports (1974), pp. 253, 255, para. 6 and pp. 457, 459, para. 6; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 5, para. 7; *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 259–60, paras. 4–5; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 556. para. 5; *Arbitral Award of 3 October 1899* (Guyana v. Venezuela), Order of 19 June 2018.

expressly opposed by the applicant.[792] The respondents were thus forced to raise preliminary objections.

Where questions of jurisdiction and admissibility are to be determined separately, the Court, after ascertaining the views of the parties, decides on the number (usually one)[793] and order of filing of the 'pleadings' as to jurisdiction and admissibility and fixes the time limits within which they are to be filed.[794] The Rules release the Court from the obligation to follow the standard order prescribed for cases begun by means of an application.[795] This has been reflected in practice, with both the party asserting jurisdiction and the party denying it having been ordered to file the first pleading, as well as to speak first during the oral proceedings.[796] **208**

## E. Evaluation

The central theme arising from the foregoing analysis is one of a permanent tension between the pressure to maintain the procedure flexible enough to accommodate the Court's sovereign clients, and the need to ensure that the proceedings remain fair and expedient. On the one hand, by adopting a deferential attitude towards the States, the Court increases the likelihood that its judgments will be accepted and followed by the parties.[797] There is little sense to dwell on technical and procedural formalities if doing so only serves to undermine the resolution of the dispute at hand.[798] It is something of a paradox that the Court's involvement may actually diffuse inter-State tensions and prevent escalation simply through its flexible management of a contentious case, while allowing the parties to the case to simultaneously seek an amicable settlement through extrajudicial means.[799] **209**

On the other hand, the increasing number of contentious inter-State disputes in the recent years, in combination with their growing factual and evidentiary complexity, have intensified the calls for procedural reforms at the Court.[800] The Court has responded to this need by instituting an ongoing review of its procedures and working methods and by adopting a series of Practice Directions to allow it to deal more effectively with its tight **210**

[792] *Cf. e.g.*, *Legality of Use of Force* (Serbia and Montenegro v. UK), Order of 30 June 1999, ICJ Reports (1999), pp. 1009–10 and *ICJ Yearbook* (1998–1999), p. 296.

[793] The only exception in that regard was *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, where the Court permitted the filing of a Reply and Rejoinder. A request by Spain for a second round of pleadings was denied in *Fisheries Jurisdiction* (Spain v. Canada).

[794] Art. 79, para. 3 of the Rules. *Cf.* also *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Order of 18 September 2002, ICJ Reports (2002), pp. 299, 300.

[795] Art. 79, para. 3 of the Rules.

[796] *Cf.* Prager, *supra*, fn. 18, pp. 168–77.

[797] *Cf.* Kolb, *ICJ*, p. 957; Higgins *et al.*, *Oppenheim's International Law: United Nations* (2017), pp. 1245–6.

[798] *Cf. e.g.*, *Free Zones*, PCIJ, Series A/B, No. 46, pp. 96, 155–6; *Bosnian Genocide*, Order of 17 December 1997, Sep. Op. Lauterpacht, ICJ Reports (1997), pp. 278, 284, para. 18; Speech by President Tomka to the Sixth Committee of the General Assembly, 31 October 2014, p. 1.

[799] For recent examples, *cf. e.g.*, *Aerial Herbicide Spraying*, Order of 13 September 2013, ICJ Reports (2013), pp. 278–9; *Certain Documents and Data*, Order of 11 June 2015, ICJ Reports (2015), pp. 572–5; *cf.* also Statement by President Tomka, '100 Years Peace Palace: Advancing the Framework for Peaceful Settlement of Disputes', 25 September 2013, pp. 2–3.

[800] See generally Bowett *et al.*, *ICJ*; Peck/Lee (1997); Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of Disputes', in Müller *et al.*, *ICJ*, pp. 83–116; Maggio, 'Process, Practice and Procedure of the International Court of Justice', *ASIL Proc.* 92 (1998), pp. 278–90; Higgins, *ICLQ* (2001), pp. 121–32; ICJ Registry (2006).

budget and congested docket.[801] It has been rightly noted that putting these reforms into practice requires the President of the Court to be not only willing and able to direct and influence the course of the proceedings but also successful at procuring the necessary support from the other members of the Court.[802] Ultimately, the Court seems to be headed in the right direction, which is confirmed by its growing output as well as by the generally positive reception of the recent initiatives.[803]

**211** Besides this recurring tension between deference and efficiency, the Court of today faces a new set of challenges and opportunities arising from the unprecedented technological growth that has marked the beginning of the twenty-first century. The ease of reproduction of text using digital means has aggravated the 'documentary overload' confronting the Court, which is no longer mainly a physical problem of storage and portability.[804] In addition, the proliferation of complex environmental and boundary disputes has strengthened the need for expert evidence and, in turn, the ability to assess complex technical and scientific facts by the Court.

**212** By and large, the Court has not only responded to these challenges effectively but it has also availed itself of the opportunities offered to it by the digital age. Admittedly, the Court's calls for the brevity of written and oral pleadings, issued through the new Practice Directions, have been met with rather mixed success. However, dealing with the volume of written proceedings has been greatly assisted by the introduction of electronic document management both in the Court's internal IT system and on its modern public-facing website.[805] The Court has also stood up to the challenges posed by the recent fact-intensive and science-heavy disputes such as the *Croatian Genocide* and *Whaling* cases and demonstrated thereby a clear ambition to be seen as 'an eminently educated, sophisticated and science-friendly judicial organ'.[806]

**213** Finally, it remains the case that the Court 'must periodically review its procedures to ensure that they meet the needs of the day'.[807] In this regard, the starting point for any future reforms should be the Court's unique position as the principal judicial organ of the United Nations, open to all States for the settlement of their disputes. It is not an arbitral tribunal set up for the resolution of a single dispute but rather a permanent institution that must bear in mind the interests of States in general. Therefore, any proposals of procedural reforms must maintain the Court's ability to offer timely justice to all who come to it. For its part, Article 43 of the Statute will continue to provide the outer boundaries for all such efforts.

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[801] *Cf.* Statement of President Schwebel to the 52nd session of the General Assembly in connection with the annual report of the ICJ, UN Doc. A/52/PV.36 (1997), pp. 4–5; *ICJ Yearbook* (2014–2015), p. 27.

[802] *Cf.* Rosenne, *ICJ Procedure*, p. 121; Quintana, *ICJ Litigation*, p. 350;

[803] *Cf.* also Miron, *JIDS* (2016), p. 393.

[804] *Cf.* Berman, 'Remarks by Frank Berman', *ASIL Proc.* 106 (2012), pp. 162–5.

[805] *Cf.* Report of the International Court of Justice, UN Doc. A/61/4 (2006), p. 14, para. 67.

[806] Speech by President Tomka at the Sixty-sixth Session of the International Law Commission, 22 July 2014, p. 9.

[807] Statement of President Schwebel to the 52nd session of the General Assembly in connection with the annual report of the ICJ, UN Doc. A/52/PV.36 (1997), p. 4.

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