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: Procedure Before the Court

Article 43 is the fundamental norm on procedure in the Statute. The English version uses the terms 'procedure' and 'proceedings' while the French version uses the term 1

'procédure' throughout. Procedure is used as the more general term describing the mode of conducting proceedings before the Court.[1] In combining both oral and written phases of procedure the Court 'marries the key features of the common and civil law systems'[2] thus allowing States, according to their own legal traditions, to lay greater emphasis on either of the two phases of the proceedings. The combination of the two phases is the basis for the sound administration of international justice.[3]

2 The procedure outlined in Art. 43 is mandatory but the provision sets out only the general scheme of the Court's procedure in contentious cases. This scheme is characterized by the equality of the parties, the duality of the proceedings, the simplicity of the procedural rule and the flexibility in its application. The details are regulated in the Rules of Court and by the practice of the Court. Article 43 strikes a balance between providing a procedural framework for cases before the Court, and leaving the Court and the parties a certain liberty of action. Within the framework of this broad procedure it is open to the parties by agreement to propose special rules applicable to the particular case, subject to these rules being approved and adopted by the Court.[4]

3 When dealing with Art. 43, it should not be underestimated that all procedure before the Court is dominated by the fact that the litigants are sovereign States that do not lightly accept outside interference in their affairs, especially when that interference touches upon major if not vital interests of theirs.[5] Questions of procedure before the Court therefore, by definition, cannot be approached on the same basis as litigation before even the highest domestic court.

B. Historical Development

I. Arbitral Procedure

4 Article 43 is a broad codification of arbitral procedure as it has developed up to World War I. The origins of the provision may be traced to the First International Peace Conference at The Hague.[6] 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'. It provided:

> Art. 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.[7]

[1] On the terms *cf.* Hudson, *PCIJ*, pp. 547–558.

[2] 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, 27 October 1997, p. 4. On the dichotomy of legal systems behind the Court's procedure *cf.* Lachs, pp. 21, 23–27.

[3] For criticism of the differentiation between the two phases as improper *cf.* Elian, G., *The International Court of Justice* (1971), pp. 56–57.

[4] Art. 101 of the Rules. *Cf.* also *Free Zones of Upper Savoy and the District of Gex* (Switzerland/France), PCIJ, Series A, No. 22, p. 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').

[5] Rosenne, *Procedure*, p. 74.

[6] *Cf.* Guynat, pp. 312–315.

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

Discussion consists in the oral development before the Tribunal of the arguments of the parties.

Art. 40: Every document produced by one party must be communicated to the other party. . . .

Art. 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.

5 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':

Art. 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.

Art. 64: A certified copy of every document produced by one party must be communicated to the other party.

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

6 No such differences exist with regard to the Convention (XII) relative to the Creation of an International Prize Court, which was also signed at the Second Peace Conference but which never entered into force. Article 34 provides:

The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The Parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one Party must be communicated to the other Party through the medium of the Court.

II. The Statute of the PCIJ

7 The text of Art. 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 (Arts. 41–43) and was based on two provisions (Arts. 32 and 33) in a plan drawn up by five nations for the

establishment of a Permanent International Court (Five-Power-Plan)[8] which, in turn, had heavily drawn on Arts. 39, 40, 45 and Arts. 63, 64, 70 of the Hague Conventions of 1899 and 1907, respectively, and on Art. 34 of the Prize Court Convention.

8 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 is largely identical with today's Art. 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'.

9 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 Arts. 32–34 (on general aspects), Arts. 37–42 (on written proceedings) and Arts. 43–56 (on oral proceedings). In the 1936 Rules the relevant provisions could be found in Arts. 31, Arts. 39–46 and Arts. 47–60, respectively.

III. The Statute of the ICJ

1. Drafting of the Statute

10 The Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, dated 10 February 1944, found with respect to Art. 43 that it was 'desirable to regulate the oral proceedings before the Court in such a way as to avoid a general repetition of matters already covered by the written pleadings'.[12] However, it was felt that this was a matter for the discretion of the Court rather than for written rules. At the San Francisco Conference Art. 43 belonged to the articles which were at once adopted and which remained virtually unchanged.[13] The only modification concerned a change of terminology in para. 2: 'Court' was replaced with 'judges' and 'Cases' and 'Counter-Cases' became 'memorials' and 'counter-memorials'.[14]

2. Rules of Court

11 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 Art. 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 feeling that the Court should exercise greater control over the proceedings—both written and

[8] 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 *et seq.*, p. 211.

[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] Official Comments Relating to the Statute of the Proposed International Court of Justice, UNCIO, vol. XIV, p. 406.

[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, 813–814. The terms 'cases' and 'counter-cases' had already been substituted in the Rules in 1936; *cf.* PCIJ, Series D, No. 2, 3rd Add., p. 768.

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 adopt a series of amendments to its Rules in 1972 and 1978. 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 Shabtai Rosenne remarked, despite many changes of detail (some undoubtedly designed to check abuses of Court procedure that had crept in over the years), the essential characteristics of the procedure as it had evolved since 1922 remained.[16]

On 5 December 2000, the Court again amended two of its Rules of Court (Art. 79 relating to preliminary objections and Art. 80 relating to counter-claims). The amendments were aimed at shortening the duration of certain incidental proceedings, the proliferation of which has encumbered many cases, at clarifying the rules in force and at adapting them to reflect more closely the practice developed by the Court.[17] In the most recent amendment of the Rules of Court, on 14 April 2005, the Court deleted para. 3 of Art. 52 which concerned the procedure to be followed where the Registrar arranges for the printing of a pleading.[18] **12**

The relevant provisions on procedure can be found in Arts. 44–72, 79 and 80 of the 1978 Rules of Court, as amended on 5 December 2000. **13**

3. Notes to Parties and Practice Directions

The major increase in the number of cases referred to the Court, and the budgetary constraints it faced as a result of the United Nations' financial crisis, led the Court 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 co-operation 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.[19] The Note was subsequently modified to expedite proceedings on preliminary objections even more.[20] The Note is handed to the representatives of parties to new cases at their first meeting with the Registrar. **14**

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.[21] 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 'involve no alteration to the Statute or the Rules of Court, but are additional thereto'.[22] They indicate something that the Court requires the parties to do, not that it requests **15**

[15] UN Doc. A/RES/2723 (XXV) of 15 December 1970. *Cf.* also UN Doc. A/RES/2818 (XXVI) of 15 December 1971 and UN Doc. A/8382 and Add. 1–4. [16] Rosenne, *Procedure*, p. 74.

[17] ICJ Press Release 2001/1 of 12 January 2001. *Cf.* also Note by the Registry Indicating the Rules of Court (1978) Amended on 5 December 2000, available at http://www.icj-cij.org. On the amendments in general, *cf.* Rosenne, S., 'The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court', *Leiden J Int'l L* 14 (2001), pp. 77–87; Prager, D.W., 'The 2001 Amendments to the Rules of Procedure of the International Court of Justice', *LPICT* 1 (2002), pp. 155–187.

[18] ICJ Press Release No. 2005/9 of 14 April 2005.

[19] ICJ Press Releases No. 98/14 of 6 April 1998 and No. 2002/12 of 4 April 2002; also reproduced in UN Doc. A/53/326, 4 September 1998 (Annex). [20] ICJ Press Release No. 2001/1 of 12 January 2001.

[21] UN Doc. A/RES/54/108, 25 January 2000, para. 2. The resolution was adopted on 9 December 1999.

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

them to do.[23] 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'.[24]

16 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 a further three new ones.[25] Further 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. In addition, 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'.[26] The Court has put in place a mechanism for reviewing these directions at regular intervals.[27]

C. Procedure in the Principal Proceedings on the Merits

I. The Written Proceedings

1. Obligatory Nature

17 The written proceedings before both the full Court and the Chambers are obligatory and cannot be dispensed with by agreement between parties.[28] They are regulated in broad lines in Art. 43, paras. 2, 3 and 4 of the Statute, and, in detail, in Arts. 44–53 of the Rules of Court.

2. The Pleadings

a) Meaning

18 The term 'pleadings' as used in the Rules of Court refers to the written argument of the parties presented to the Court.[29] The term 'written pleadings' is used in the Rules of Court only once.[30] However, on its website the Court distinguishes between 'written pleadings' and 'oral pleadings'.[31] The pleadings in the principal proceedings include the initial pleadings (memorial and counter-memorial), the further pleadings (reply and rejoinder), and the additional pleading. Parties in the same interest may file common pleadings.[32]

19 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[33] as well

[23] Higgins, pp. 121, 124. [24] ICJ Press Release No. 2001/32 of 31 October 2001.

[25] ICJ Press Release No. 2002/12 of 4 April 2002. *Cf.* also Watts, A., 'New Practice Directions of the International Court of Justice', *LPICT* 1 (2002), pp. 247–256.

[26] ICJ Press Release No. 2004/30 of 30 July 2004. *Cf.* also Watts, A., 'The ICJ's Practice Directions of 30 July 2004', *LPICT* 3 (2004), pp. 385–394.

[27] *Cf.* the speech by President Guillaume to the UN General Assembly: UN Doc. A/56/PV.32, 30 October 2001, p. 8. [28] *Contra* Hudson, *PCIJ*, p. 552.

[29] 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. *Cf.* also Witenberg/Desrioux, p. 174. [30] Art. 80, para. 2 of the Rules.

[31] The term 'pleadings' used in Art. 39, para. 2 of the Statute includes both written and oral pleadings.

[32] *Cf. North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Pleadings, vol. II, p. 75; ICJ Yearbook (1968–1969), p. 111 where Denmark and the Netherlands filed a common rejoinder.

[33] *Cf.* Art. 85, para. 1, Art. 86, para. 1 of the Rules. The Court does not always clearly draw this distinction on its website. While in the case *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras: Nicaragua intervening) there are separate categories for 'written pleadings', 'intervention' and 'observation', in

as from the 'observations in writing' that may be submitted by an international governmental organization under Art. 69, para. 3 of the Rules of Court.[34] Similarly, a 'preliminary objection' and the 'written statement of . . . observations and submissions' on the objection do not qualify as pleadings in the strict sense although they are sometimes referred to as such by the Court.[35]

Pleadings must also be distinguished from 'informal aides-mémoires' in which **20** the parties, in a special procedure, present their positions on a particular question.[36] The parties are not obliged to submit such aides-mémoires which do not form part of proceedings governed by the Statute or the Rules of Court (which do not know of these documents). Unlike the submission of pleadings, the filing of such non-official documents does not constitute acceptance of the Court's jurisdiction. In practice such aides-mémoires are treated as 'quasi-pleadings'[37] and may be followed by oral hearings on the question in dispute. They are filed in the Registry and are transmitted to the other party by the Registrar.[38]

b) The Different Copies of a Pleading

The party filing a pleading must supply 127 copies of the pleading: the original, a **21** certified copy and 125 additional copies. 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 Art. 51, para. 1 of the Rules of Court) and to international organisations (in accordance with Art. 34, para. 3 of the Statute).

aa) The Original

The original of every pleading must be signed by the agent.[39] It must be accompanied by **22** certified copies of any relevant documents or necessary extracts thereof adduced in support of the contentions contained in the pleading. 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.[40] Unlike municipal courts, where certified copies are only admitted exceptionally and under certain specifically prescribed conditions, the Court

the *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon/Nigeria: Equatorial Guinea intervening) all documents are listed under 'written pleadings'.

[34] Observations were submitted, for example, by the ICAO in the *Case concerning the Aerial Incident of 3 July 1988* (Iran/United States of America), ICJ Reports (1996), pp. 9, 10. These observations need not and, if the parties are authorized to file a rejoinder, cannot be filed before the closure of the written proceedings (*cf.* Art. 69, para. 2 of the Rules). It suffices if they are filed before the opening of the oral proceedings in which they may be discussed; *contra* Dubisson, *CIJ*, p. 218. For further information on 'observations in writing' by international organizations *cf.* Dupuy on Art. 34 MN 10–17.

[35] *Cf. e.g. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libya Arab Jamahiriya/United States of America), ICJ Reports (1998), pp. 115, 119 (para. 10).

[36] *Cf. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests case* (New Zealand/France), ICJ Reports (1995), pp. 288, 293 (para. 15). On the 'unprecedented procedure' in this case, *cf. ibid.*, p. 321 (Diss. Op. Weeramantry).

[37] The aides-mémoires, for example, were made accessible to the public in accordance with Art. 53, para. 2 of the Rules of Court on the opening of the oral proceedings (ICJ Yearbook (1995–1996), p. 234).

[38] *Nuclear Tests (Request for Examination), supra*, fn. 36, ICJ Reports (1995), pp. 288, 293 (para.14), 294 (para.20). *Cf.* also CR 95/11, 11 September 1995, pp. 11–12. On the legal status of such informal documents in cases of non-appearing parties *cf.* further von Mangoldt/Zimmermann on Art. 53 MN 60–61.

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

[40] Art. 50, paras. 1 and 2 of the Rules. On the interpretation of Art. 50, para. 1 *cf.* Rosenne, *Law and Practice*, vol. III, pp. 1279–1280.

does not want to see the original. The only interest of the Court is the establishment of the existence of the original through an authentic and credible copy. Copies are certified by the agent. But the agent 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. 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 is to be accompanied by a certified translation into one of those languages.[41] For practical convenience, it is acceptable that the translation (into the language used for the pleading itself) of such a document constitutes 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.[42] The original of every pleading is kept by the Registry in the archives of the Court.[43]

bb) The Certified Copy

23 The original of every pleading must be accompanied by a certified copy of the pleading, all documents annexed, any translations, and the original-language texts of any translated documents, for communication by the Registry to the other party in accordance with Art. 43, para. 4.[44] Certification is made by the agent.[45]

cc) The Additional Copies

24 The parties must also submit the number of additional copies of the pleadings required by the Registry,[46] but without prejudice to an increase in that number should the need arise later.[47] Such a need may arise if one of the parties requires more than the customary number of copies placed at the disposal of the parties.[48] The number of additional copies required has increased steadily over the years. It was originally fixed at 'no less than 30 printed copies;'[49] in 1926 the number was increased to 40, in 1936 to 50, in 1950 to 75 and in 1960 to 100. Since 1963, the number of additional copies to be filed, in the first instance, has been 125. The parties may choose to file all 125 copies in paper form or 75 copies in paper form and 50 on 50 CD-ROM. In the latter case the agents of the parties are requested to ascertain from the Registry the electronic format of the pleadings to be filed on CD-ROM.[50] There is nothing in the Statute or the Rules to prevent the

[41] 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 (or German) for which either no translation was furnished or for which the translation was not certified; *cf.* preliminary objections of the French Republic, 5 July 2000 (available at http://www.icj-cij.org), p. 4 (para. 22).

[42] Art. 50, para. 3 of the Rules. *Cf.* also Note for the Parties Concerning the Preparation of Pleadings, 19 November 2004, para. 2.

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

[44] Art. 52, para. 1 of the Rules. *Cf.* also Art. 26, para. 1 (d) of the Rules, Art. 11 of the Instructions for the Registry and Note for the Parties Concerning the Preparation of Pleadings, 19 November 2004, para. 2.

[45] The Rules no longer require the Registrar to certify that a copy communicated to the other party is a true copy of the original filed with the Court. But *cf.* Art. 40, para. 2 of the 1936 Rules of Court.

[46] Originally, the number of copies was fixed by the President, *cf.* Art. 40, para. 1 of the 1946 Rules of Court.

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

[48] In practice, the Registry usually supplies the parties with some 20 copies. For cases where the parties were required to supply additional copies, *cf.* Eight Annual Report, PCIJ, Series E, No. 8, p. 259; Ninth Annual Reports, No. 9 (200 more), pp. 167–168 (50 more). In case of additional copies, these may be transmitted direct (without passing through the Registry); *cf.* Ninth Annual Reports, PCIJ, Series E, No. 9, p. 169.

[49] Art. 34 of the 1922 Rules of Court.

[50] *Cf.* Note for the Parties Concerning the Preparation of Pleadings, 19 November 2004, para. 1. The electronic format currently to be used is Microsoft Office Suite (Word) or any compatible format. Pleadings

Court from moving completely to 'paperless pleadings' as have some national courts. 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.[51] In practice, a copy of these documents will be deposited with the Registry where it may be consulted by the parties.[52] The additional copies need neither be signed nor certified correct. Although no longer expressly required by the Rules of Court, they usually bear the signature of the agent in print.[53] 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.

Since 1972, printing of the additional copies of a pleading is no longer obligatory.[54] **25**
Originally, the parties could ask the Registrar to arrange for the printing of a pleading and the agents of the parties were requested to ascertain from the Registry the conditions on which the Court may bear part of the cost of printing.[55] In recent years, States have hardly ever made use of this option; they have instead either arranged for printing themselves or have submitted the additional copies in other form.[56] The Court took note of this situation and, on 14 April 2005, deleted the provision of its Rules which concerned the procedure to be followed where the Registrar arranged for the printing of a pleading. The corresponding paragraph on the reimbursement of printing costs by the Court had already been deleted from the 'Notes for parties concerning the preparation of pleadings' in November 2004.[57]

dd) The Electronic Copy

Since the establishment of the Court's website in 1997, the Court has encouraged **26**
pleadings and documents to be provided in electronic form, formatted so as to facilitate placing them on the Court's website on the internet as well as entering them into its internal electronic document management system (EDMS), which provides immediate

on CD-ROM were first submitted by Nigeria in the *Land and Maritime Boundary between Cameroon and Nigeria case*.

[51] *Cf.* Notes for the Parties Concerning the Preparation of Pleadings, 19 November 2004, para. 1.

[52] *Cf. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*, Memorial Submitted by the State of Qatar (Merits), vol. I, 30 September 1996 (available at http://www.icj-cij.org), p. 8, fn. 19; p. 50, fn. 3; p. 51, fn. 6; p. 70, fn. 59; p. 71, fn. 66.

[53] *Cf.* Art. 40, para. 1 of the 1936 Rules.

[54] *Cf.* Art. 43, para. 1 of the 1972 Rules of Court. *Cf.* also ICJ Yearbook (1971–1972), p. 106.

[55] Art. 52, para. 3 of the 1978 Rules of Court (and note 1 thereto). For the practice under the 1978 Rules of Court, *cf.* ICJ Yearbook (1989–1990), p. 125.

[56] In former times the printing of documents was frequently arranged by the Registry; *cf. the references in the Court's Annual Reports: e.g.* PCIJ, Series E, No. 4, pp. 280–281; No. 5, p. 256; No. 6, pp. 291–292; No. 7, p. 294; No. 8, p. 260; No. 9, p. 168 and No. 16, p. 183.

[57] *Cf.* the Note for the Parties Concerning the Preparation of Pleadings, dated 19 November 2004. It is of interest to note that already in October 2001, President Guillaume had declared before the UN General Assembly that the Court had amended Art. 52, para. 3 of the Rules concerning the printing of pleadings (UN Doc. A/56/PV.32, 30 October 2001, p. 8). Art. 53, para. 3 was, however, formally deleted only on 14 April 2005; *cf.* ICJ Press Release No. 2005/9 of 14 April 2005.

access to case files and archive documentation to the members of the Court and its staff.[58] The filing of electronic copies does not suffice to meet timelimits fixed for the filing of a pleading.[59]

c) The Different Pleadings

aa) The Memorial

27 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.[60] 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.[61]

28 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:

(1) a statement of the relevant facts on which the claim is based
(2) a statement of law
(3) a short summary of the reasoning (in case of a single pleading by each party)[62]
(4) a statement of the party's submissions
(5) a list of every document in support of the arguments set forth: these documents shall be attached to the memorial.[63]

The memorial need not offer any evidence in support of the facts stated.[64] 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.

29 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 operative part of the judgement desired (*petitum*). They should not contain any reasoning or abstract propositions of law.[65] Alternative and subsidiary submissions may be presented. 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 claims presented in the application).[66] 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

[58] *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, 4 September 1998, p. 5 (para. 27).

[59] *Cf. Avena and Other Mexican Nationals* (Mexico/United States of America), ICJ Reports (2004), pp. 12, 15 (para. 6).

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

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

[62] *Cf.* Practice Direction II, para. 2, as at 30 July 2004. *Cf.* also subparagraph B of the Note Containing Recommendations to the Parties to New Cases, April 1998: '[A]ny summary of the reasoning of the parties at the conclusion of the written proceedings would be welcome.' The Note is reproduced in UN Doc. A/53/326, 4 September 1998 (Annex).

[63] *Cf.* Art. 49, para. 1 of the Rules. *Cf.* also Art. 40, para. 1 and Art. 42, para. 1 of the 1922 and 1936 Rules of Court, respectively.

[64] But *cf.* the French argument in the *Legality of Use of Force case* (Yugoslavia/France), Preliminary Objections of the French Republic, 5 July 2000 (available at http://www.icj-cij.org), p. 3 (para. 18).

[65] Fitzmaurice, *Law and Procedure*, vol. II, pp. 579–581. On the submissions in general, *cf.* Rosenne, *Law and Practice*, vol. III, pp. 1265–1272.

[66] *Cf. Certain Phosphate Lands in Nauru* (Nauru/Australia), ICJ Reports (1992), pp. 240, 265–267 (paras. 63–71); *Certain Norwegian Loans* (France/Norway), ICJ Reports (1957), pp. 9, 80–81 (Diss. Op. Read). But *cf.* also *Temple of Preah Vihear* (Cambodia/Thailand), ICJ Reports (1962), pp. 6, 36–37; *Fisheries Jurisdiction* (FRG/Iceland), ICJ Reports (1974), pp. 175, 203 (para. 72).

the framework within which the Court must reach its decision. 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 submissions.'[67] 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[68] or from interpreting the submissions.[69] The Court, however, has not always stayed within the parameters of the submissions.[70]

bb) The Counter-Memorial

30 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.[71] When drawing up its counter-memorial, a party is 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.[72] 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 list of documents in support of the arguments set forth: these documents shall be attached to the counter-memorial.[73]

cc) The Reply and Rejoinder

31 The 'further pleadings'[74] presented in the written proceedings are reply and rejoinder. They shall not merely repeat the party's contentions, but shall be directed to bringing out the issues that still divide them.[75] 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
(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

[67] *Cf. Request for Interpretation of the Judgment of November 20th 1950 in the Asylum case* (Colombia/Peru), ICJ Reports (1950), pp. 395, 402.

[68] *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo/Belgium), ICJ Reports (2002), 3, 18–19 (para. 43).

[69] *Cf. e.g. Monetary Gold Removed from Rome in 1943* (Italy/France, United Kingdom and United States of America), ICJ Reports (1954), pp. 19, 28.

[70] *Cf. e.g. Kasikili/Sedudu Island* (Botswana/Namibia), 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* (Iran/United States of America), ICJ Reports (2003) 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).

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

[72] *Cf.* Practice Direction II, para. 1, as at 30 July 2004. *Cf.* also subparagraph B of the Note Containing Recommendations to the Parties to New Cases, April 1998.

[73] *Cf.* Art. 49, para. 2, Art. 80, para. 2 of the Rules. *Cf.* also Art. 40, para. 2 and Art. 42, para. 2 of the 1922 and 1936 Rules of Court, respectively.

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

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

(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 list of documents in support of the arguments set forth: these documents shall be attached to the reply or rejoinder.[76]

dd) The Additional Pleading

32 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',[77] 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.[78] An additional pleading is necessary 'in order to ensure the strict equality between the Parties'.[79] A counter-claim is more than a mere defence on the merits; it seeks relief beyond the dismissal of the principal claim and to this extent constitutes a separate claim.[80] 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. The right of the respondent to the counter-claim to file an additional pleading was added to para. 2 of Art. 80 in the amendments to the Rules of Court of 5 December 2000 (which entered into force on 1 February 2001).

33 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.

d) The Formal Requirements of Pleadings

34 The Rules of Court are silent on the formal requirements of pleadings apart from specifying that all pleadings be dated.[81] Instead, in a footnote to Art. 52, the agents of the parties are requested to ascertain from the Registry the usual format of the pleadings.[82] The formal requirements for the pleadings are set out in a detailed, 21-page document entitled 'Rules for the Preparation of Typed and Printed Texts'. These specify, *inter alia*, the format of pleadings (19 x 26 cm),[83] the size of type, type face, the kind and colour of paper and cover, the layout, headings and sub-headings, quotations, footnotes,

[76] Art. 49 paras. 2 and 3 of the Rules and Practice Direction II, para. 2, as at 30 July 2004.

[77] *Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, ICJ Reports (1999), pp. 983, 986. This requirement seems necessary in order not to prolong proceedings unduly. On the 'question of delay', *cf.* Thirlway, H., 'Counterclaims Before the International Court of Justice: The *Genocide Convention* and the *Oil Platforms* Decisions', *Leiden J Int'l L* 12 (1999), pp. 197–229, pp. 223–224.

[78] An additional pleading was filed in the *Land and Maritime Boundary between Cameroon and Nigeria, Oil Platforms* and *Armed Activities on the Territory of the Congo* (Congo/Uganda) *cases*.

[79] *Cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Yugoslavia), ICJ Reports (1997), pp. 243, 260 (para. 42); *Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, ICJ Reports (1999), pp. 983, 986; *Oil Platforms, supra*, fn. 70, ICJ Reports (1998), pp. 190, 206 (para. 45); *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo/Uganda), ICJ Reports (2001), pp. 660, 681 (para. 50).

[80] *(Bosnian) Genocide case, supra*, fn. 79, ICJ Reports (1997), pp. 243, 256 (para. 27). For an analysis of the Court's practice regarding counter-claims *cf.* Yee on Art. 40 MN 137–154.

[81] Art. 52, para. 2 of the Rules. [82] Art. 52 of the Rules (and note 1 thereto).

[83] This format was first introduced in 1964 (ICJ Yearbook (1963–1964), p. 108) and has been frequently neglected in practice.

references, italics, abbreviations, numbers and dates, spelling, divisions and the use of capitals. These formal requirements should be respected; their purpose is to secure a certain degree of uniformity in the presentation of the pleadings, thus facilitating their handling and study.[84]

35 The pleadings (and annexed documents) must be submitted in one of the Court's two official languages, French and English, or in a combination thereof.[85] 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.[86] If the parties are agreed that the written proceedings shall be conducted wholly in one of the two official languages, the pleadings must be submitted only in that language.[87] 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.[88]

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.[89] The Court tends to 'take a broad view' in matters of form. 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'.[90] 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.[91]

e) The Number and Order of Pleadings

37 Article 43, para. 2 provides that the written proceedings shall consist of 'memorials and counter-memorials and, *if necessary*, replies.'[92] 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.[93] 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.[94] 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

[84] *Cf.* Note for the Parties Concerning the Preparation of Pleadings, 19 November 2004, para. 3.

[85] *Cf.* Art. 39, para. 1 and further Kohen on Art. 39 MN 24–26.

[86] Practice Direction IV, as at 30 July 2004. *Cf.* also subpara. D of the Note Containing Recommendations to the Parties to New Cases, April 1998.

[87] *E.g.* in the *Asylum case* and the *Frontier Dispute case* (Burkina Faso/Mali) 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 28–30.

[88] Art. 51, paras. 1 and 2 of the Rules. *Cf.* further Kohen on Art. 39 MN 35–39.

[89] *Cf.* Art. 14 of the Instructions for the Registry. For text of the Instructions *cf.* ICJ Yearbook (1946–1947), pp. 82–87, ICJ Yearbook (1949–1950), p. 74.

[90] *Cf. Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, p. 34; repeated, *inter alia*, in *Northern Cameroons* (Cameroon/United Kingdom), ICJ Reports (1963), pp. 15, 27–28; *(Bosnian) Genocide case, supra*, fn. 79, ICJ Reports (1996), pp. 595, 613 (para. 26).

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

[92] Emphasis added.

[93] *Cf.* PCIJ, Series D, No. 2, pp. 75, 77 and PCIJ, Series D, No. 2, 2nd Add., p. 95; Eighth Annual Report, PCIJ, Series E, No. 8, p. 261.

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

memorials and counter-memorials are the norm and that replies are envisaged as an exception only.[95]

38 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.[96] 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.[97] Usually, the Court will not lightly change an arrangement that appears finally to be convenient and acceptable to both parties.[98] 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.[99] The danger of a proliferation of interlocutory proceedings or 'mini-trials' on the necessity for replies so far has not materialized.[100]

aa) Cases Begun by Means of an Application

39 In cases begun 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. The 'Court *may* authorise 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.[101] There is no right of the parties to a further pleading. If the Court considers itself to be 'sufficiently informed . . . of the contentions of fact and law on which the Parties rely' it will not authorize the filing of further pleadings.[102] In April 2002, 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.'[103]

bb) Cases Begun by the Notification of a Special Agreement

40 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:
>
> (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;

[95] ICJ Yearbook (1971–1972), p. 106; ICJ Yearbook (1973–1974), p. 102; ICJ Yearbook (1977–1978), p. 103.
[96] *Cf.* Art. 31 of the Rules.
[97] Art. 44, paras. 1 and 2 of the Rules.
[98] Jennings, Sir R.Y., 'The Role of the International Court of Justice', *BYIL* 68 (1997), pp. 1–63, p. 10.
[99] Art. 44, para. 4 of the Rules.
[100] But *cf.* Rosenne, *Procedure*, pp. 103, 112. For the only case in which the Court had to make such a decision, *cf. Fisheries Jurisdiction* (Spain/Canada), ICJ Reports (1996), pp. 58 *et seq.*
[101] Art. 45, para. 2 of the Rules (emphasis added).
[102] *Fisheries Jurisdiction* (Spain/Canada), ICJ Reports (1996), pp. 58, 59 and ICJ Reports (1998), pp. 432, 436 (para. 6). But *cf. ibid.*, p. 587 (Diss. Op. Torres Bernárdez); as well as Higgins, *ICLQ* 50 (2001), pp. 121, 125.
[103] ICJ Press Release No. 2002/12 of 4 April 2002, Measure No. 1.

(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.[104]

In order to avoid one party gaining an advantage, the special agreement usually also provides that '[t]he 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.'[105] 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.[106]

If the special agreement contains no such provisions, and if the parties have not **41** subsequently agreed on the number and order of pleadings, Art. 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. Filing of the pleadings 'within the same time-limits' does not necessarily mean simultaneous filing of the pleadings. When adopting the predecessor of the present article, the Court deliberately rejected the expression 'simultaneously'. The formula chosen was understood not to exclude the idea of successive but identical time limits.[107] 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. 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.[108] 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, in accordance with Art. 46, para. 2 of the Rules of Court, to file their pleadings alternately.[109]

In April 2002, the Court encouraged parties to ensure that any provision in a special **42** agreement as to the number and order of pleadings should conform with the spirit of the measure taken by the Court with regard to cases begun by means of an application and, as a norm, should be limited to a single round of pleadings.[110]

[104] *Cf. e.g.* Art. 3, para. 2 of the Special Agreement between Indonesia and Malaysia in the case *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), ICJ Reports (2001), pp. 575, 579 (para. 1).

[105] *Cf. e.g.* Art. VI (3) of the Special Agreement between Canada and the United States in the case *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), ICJ Reports (1984), pp. 246, 255 (para. 3).

[106] PCIJ, Series D, No. 2, 3rd Add., p. 99.

[107] *Ibid.* For cases instituted by the notification of a special agreement where pleadings were presented successively *cf.* the Sixteenth Report, PCIJ, Series E, No. 16, p. 184.

[108] *Cf.* Bedjaoui, *Pace Yearbook of International Law* 3 (1991), pp. 29, 35–36.

[109] Note Containing Recommendations to the Parties to New Cases, April 1998, Point A. *Cf.* also the Statement by President Schwebel to the Sixth Committee of the UN General Assembly: UN Doc. A/C.6/52/SR.17, 30 October 1997, p. 3.

[110] ICJ Press Release No. 2002/12 of 4 April 2002, Measure No. 2. This is also the case in proceedings before the Chambers; *cf.* Art. 92, para. 1 of the Rules.

43 In its Practice Directions, the Court now expressly discourages the practice of simultaneous deposit of pleadings in cases brought by special agreement, and makes known its expectation that future special agreements contain provisions as to the number and order of pleadings, in accordance with Art. 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 will expect the parties to reach agreement to that effect, in accordance with Art. 46, para. 2 of the Rules of Court.[111]

f) The Time Limits for the Filing of Pleadings

aa) Fixing of Time Limits by the Court

44 The Court makes the necessary orders to determine the time limits within which the pleadings must be filed.[112] Time limits may be fixed in an order of the Court or, if the Court is not sitting, the President dealing exclusively with the question of time limits, or in an order of the Court indicating provisional measures.[113] Time limits have also been fixed in judgments on preliminary objections.[114] The Court may fix provisional or conditional time limits.[115] 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 of pleadings. 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.[116]

45 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 a meeting with the agents.[117] It is not admissible for the Court to fix time limits before the views of the parties have been ascertained. 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.[118] If the agent of the respondent is temporarily unable to attend a meeting 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.[119]

46 Time limits shall be as short as the character of the case permits.[120] They usually range from three to six months, but sometimes have been as much as one year. Even where relatively long time limits are asked for, it is difficult for the Court not to take account of

[111] Practice Direction I, as at 30 July 2004.

[112] Art. 44, para. 1 of the Rules. For further information *cf.* Torres Bernárdez on Art. 48 MN 27–31.

[113] *Cf. e.g. Nuclear Tests* (New Zealand/France), ICJ Reports (1973), pp. 135, 142 (para. 35).

[114] *Cf. e.g. Nottebohm* (Liechtenstein/Guatemala), ICJ Reports (1953), pp. 111, 124; *Right of Passage over Indian Territory* (Portugal/India), ICJ Reports (1957), pp. 125, 153.

[115] *Cf. e.g. Administration of the Prince of Pless (Prorogation)*, PCIJ, Series A/B, No. 57, pp. 167, 169.

[116] *Cf.* Art. 48 of the Rules.

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

[118] *Cf. Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (1995), pp. 83, 85; *United States Diplomatic and Consular Staff in Tehran* (United States of America/Iran), ICJ Reports (1979), pp. 23, 24; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient* (France/Lebanon), ICJ Reports (1959), pp. 260, 261–262; *Aerial Incident of July 27th, 1955* (United States of America/Bulgaria), ICJ Reports (1958), pp. 22, 23.

[119] *Cf. e.g. Aerial Incident of July 27th, 1955* (Israel/Bulgaria), ICJ Reports (1957), pp. 182, 184; ICJ Reports (1958), p. 7.

[120] Art. 48 of the Rules.

the wishes expressed by the parties, who are concerned to set forth their case at proper length and with due and proper care. 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 holidays customary at the seat of Court, and the state of its calendar. 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.[121] 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.'[122]

47 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.'[123] 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 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 the date of the order fixing the time limit for the reply. 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.[124]

48 In proceedings before a Chamber, the time limits for the filing of the first (and in principle only)[125] 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 is already constituted.[126] 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.[127] The same is true for the fixing of the time limits for any further pleading.[128]

bb) Agreement upon Time-Limits by the Parties

49 According to Art. 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. However, the Court is not bound by any agreement between the parties in regard to the time limits.[129] Article 43, para. 3 which

[121] *Cf. e.g. Interhandel* (Switzerland/United States of America), ICJ Reports (1957), pp. 122, 123 (Switzerland: 99 days; United States of America: 31 days). This discrepancy may be explained by the fact that the United States of America had indicated that it intended to raise preliminary objections.

[122] *Cf. e.g. Tehran Hostages, supra*, fn. 118, ICJ Reports (1979), pp. 23, 24.

[123] *(Bosnian) Genocide case, supra*, fn. 79, ICJ Reports (1997), pp. 243, 260 (para. 40); *Oil Platforms, supra*, fn. 70, ICJ Reports (1998), pp. 190, 205 (para. 43).

[124] *Cf. Oil Platforms, supra*, fn. 70, ICJ Reports (1998), pp. 190, 205–206 (para. 44) and p. 207 (para. 46) (the United States of America 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 of America. 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).

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

[126] Art. 92, para. 1 of the Rules. *Cf. e.g. Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1985), p. 10, and further Palchetti on Art. 26 MN 18–19.

[127] *Cf. Gulf of Maine, supra*, fn. 105, ICJ Reports (1982), p. 557.

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

[129] *Cf. e.g. Interhandel, supra*, fn. 121, ICJ Reports (1958), pp. 31, 32. *Cf.* also PCIJ, Series D, No. 2, 2nd Add., pp. 165–171, 175–176 and *ibid.*, 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. 64–67.

provides that 'communications shall be made . . . *within the time fixed by the Court*' 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.

50 The fact that in 1972 the phrase 'which does not cause unjustified delay' replaced the words 'so far as is possible'[130] in the predecessor to Art. 48, para. 2 of the Rules of Court has been interpreted as an intimation of the Court's intention to try and accelerate the proceedings.[131] However, not much has changed in practice: the Court, as a rule, still defers to the wishes of the parties with regard to time limits.

cc) Requests for the Extension of Time Limits

51 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[132] to—in the case of successive requests—two years.[133] The request must be received before the expiry of the time limit; although the Court may decide upon it only afterwards.[134] 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.[135] Decisions on the extension of time limits are made by the Court or the President, if the Court is not sitting, in an order.[136] 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.[137] 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.[138] 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,[139] or it may make an extension even though the other party objects.[140] 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.[141] If the time limit for the filing of a

[130] *Cf.* Art. 37, para. 3 of the 1946 Rules of Court and Art. 40, para. 3 of the 1972 Rules of Court; the latter is identical with Art. 44, para. 2 of the present Rules of Court. [131] Rosenne, *Procedure*, p. 102.

[132] *Cf. Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (2001), pp. 40, 48 (para. 25) (time limit extended by five days); *Armed Activities* (DRC/Uganda), *supra*, fn. 79, ICJ Reports (2002), 604, 605. (time limit extended by seven days). *Cf.* also the table on deferment requests in Gross, L., 'The Time Element in the Contentious Proceedings in the International Court of Justice', *AJIL* 63 (1969), pp. 74–85.

[133] *Cf. e.g. Legality of the Use of Force* (Yugoslavia/United Kingdom), ICJ Reports (2001), pp. 34, 35 and ICJ Reports (2002), pp. 213, 214. For an overview of the longest running cases, *cf.* Singh, *ICJ*, p. 242.

[134] *Cf. Oil Platforms, supra*, fn. 70, ICJ Reports (1993), p. 35, 36.

[135] *Cf. Barcelona Traction, Light and Power Company, Limited (New Application: 1962)* (Belgium/Spain), ICJ Reports (1970), pp. 3, 30–31 (para. 27). [136] This has been the practice of the Court since 1928.

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

[138] *Fisheries case* (United Kingdom/Norway), ICJ Reports (1950), p. 62; *Right of Passage, supra*, fn. 114, ICJ Reports (1958), p. 40.

[139] *Cf. e.g.* the *Asylum case* (Colombia/Peru), ICJ Reports (1949), pp. 267, 268.

[140] *Cf. e.g. Asylum case, supra*, fn. 139, ICJ Reports (1950), pp. 125, 126; *Legal Status of Eastern Greenland*, PCIJ, Series C, No. 67, p. 4155

[141] *Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (1996), pp. 6, 7 (nine months requested, seven months granted); *Ahmadou Sadio Diallo* (Guinea/Congo), ICJ Reports (2000), pp. 146, 147. (nine months requested, six months and 12 days granted); *(Bosnian) Genocide case, supra*, fn. 79,

pleading by one party is extended, the other party will usually receive a similar extension for the filing of its pleading,[142] unless agreed otherwise by the parties[143] or unless the extension concerns the time limit for the filing of the final pleading in the case.

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. The justifications most commonly advanced are 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 or, simply, technical reasons. The Court has refused requests on account 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.[144] 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.[145] 52

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.[146] 53

dd) Non-Observance of Time Limits

The time limit for the filing of a pleading applies to all the copies of the pleading.[147] 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) which is regarded by the Court as the material date.[148] The date of receipt is noted on the pleading and a receipt upon a special form bearing this date and the number under which the document has been registered is given by the Registry to the party.[149] 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 or are not annexed in the form required (*e.g.* are not translated into one of the Court's official languages), the Court may, at the request of the party concerned, decide that any step taken after the expiration of the time limit fixed therefore shall be considered as valid, if it is satisfied that there is adequate justification for the request. The other party shall be 54

ICJ Reports (1998), pp. 743, 744. (three months requested, one month granted); *Legal Status of Eastern Greenland*, PCIJ, Series C, No. 67, p. 4155 and Eighth Annual Report, PCIJ, Series E, No. 8, p. 258 (six weeks requested, three weeks granted).

[142] *Cf. e.g. Oil Platforms, supra*, fn. 70, ICJ Reports (1993), pp. 35, 36; *(Bosnian) Genocide case, supra*, fn. 79, ICJ Reports (1998), pp. 3 *et seq.; Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia/Yugoslavia), ICJ Reports (2000), pp. 3, 4 and ICJ Reports (2000), pp. 108, 109. *Cf.* also PCIJ, Series E, No. 8, p. 258.

[143] *Cf. e.g. Vienna Convention on Consular Relations* (Paraguay/United States of America), ICJ Reports (1998), pp. 272 *et seq.*

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

[145] *Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, 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.

[146] *Cf. Legality of the Use of Force* (Yugoslavia/United Kingdom), ICJ Reports (2001), pp. 34, 35.

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

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

[149] Art. 13 of the Instructions for the Registry.

given an opportunity to state its views.[150] While belated filing of pleadings was common before the PCIJ, it is much less so before the ICJ. In no case has the Court punished a party for not filing its pleading within the time limit.

55 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.[151] 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. But an explanatory footnote was inserted at the appropriate place in the Court's volume of Pleadings.[152]

3. Documents in Support of the Contentions Contained in the Pleadings

a) Documents Annexed to the Pleadings

56 Any relevant documents adduced in support of the contentions contained in a pleading must be annexed to the pleading. 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. A copy of the whole document must be deposited in the Registry, unless it has been published and is readily available. A list of all documents annexed to a pleading must be furnished at the time the pleading is filed.[153] This is usually done in a letter by the agent to the Registrar.[154]

57 The term 'documents adduced in support of the contentions' includes both documents relied on and documents cited.[155] It does not include legal treatises[156] or decisions of the Court which are merely cited, but relates to documentary evidence such as maps and map-related materials, plans, sketches, photographs, satellite images, diplomatic correspondence, letters, memoranda, treaties, 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, minutes of meetings, transcripts of hearings of oral evidence before joint commissions, opinions, affidavits, articles and reports from newspapers, and articles from specialist books and journals.

58 The scope and quantity of documents annexed to the pleadings has grown dramatically since the first days of the PCIJ.[157] In numerous cases before the Court, the documents annexed to the pleadings have extended to between 5,000 and 7,000 printed pages.[158] Only a selection of the documents are printed which means that the number of

[150] Art. 44, para. 3 of the Rules. For pleadings considered as valid despite being filing late *cf. Avena case, supra*, fn. 59, Judgment of 31 March 2004, available at http://www.icj-cij.org, para. 6; *East Timor* (Portugal/Australia), ICJ Reports (1995), pp. 90, 93 (para. 5); *Interpretation of the Statute of the Memel Territory*, PCIJ, Series C, No. 59, p. 638. *Cf.* also the Court's Annual Reports PCIJ, Series E, No. 5, pp. 256–257; No. 7, p. 290; No. 8, p. 259; No. 9, pp. 168–169.

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

[152] *Cf. Corfu Channel case* (United Kingdom/Albania), Pleadings, vol. III, p. 204; vol. V, pp. 206–207 and ICJ Yearbook (1948–1949), p. 77; ICJ Yearbook (1956–1957), p. 108.

[153] Art. 50 of the Rules.

[154] *Cf. Maritime Delimitation and Territorial Questions, supra*, fn. 52, Memorial Submitted by the State of Qatar (Merits), vol. I, 30 September 1996, p. 11 [I.28] and Counter-Memorial Submitted by the State of Qatar (Merits), vol. I, 31 December 1997, p. 12 [I.42] (both available at http://www.icj-cij.org).

[155] *Cf.* PCIJ, Series D, No. 2, 3rd Add., pp. 101–102; Eighth Annual Report, PCIJ, Series E, No. 8, p. 261.

[156] PCIJ, Series D, No. 2, 3rd Add., p. 101.

[157] *Cf.* Highet, *AJIL* 81 (1987), pp. 1, 16–17.

[158] *Cf. e.g. Land and Maritime Boundary between Cameroon and Nigeria; Maritime Delimitation and Territorial Questions Between Qatar and Bahrain; Gabčíkovo-Nagymaros case; Military and Paramilitary*

pages of the original pleadings is considerably higher. The all-time record is still held by the *Barcelona Traction case* whose documentation amounted to some printed 18,000 pages.[159] 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 15 or more judges may be impressed by a spectrum of different arguments and approaches, not always predictable.[160] 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 (except in the rare cases where parties can file pleadings in both).[161] A case cannot be heard until its pleadings and documents are ready in both official languages. The backlog in translating pleadings and documents has at times prevented the Court from getting more cases ready for hearing. 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) into the other official language of the Court.[162] 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).[163] This would offer the parties the additional advantage of being able to control their own pleadings in both of the official languages (although problems could arise in the case of discrepancy between the two language versions). 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.[164]

Activities in and against Nicaragua; Gulf of Maine; Continental Shelf (Tunisia/Libya); *South West Africa* (Ethiopia/South Africa; Liberia/South Africa).

[159] ICJ Yearbook (1968–1969), p. 100. Bedjaoui, *Pace Yearbook of International Law* 3 (1991), pp. 29, 36–37 reports that the original pleadings weighed 25 kilograms and amounted to 66,776 pages in all, including the annexes.

[160] *Cf.* the Statement by President Schwebel to the Sixth Committee of the UN General Assembly: UN Doc. A/C.6/52/SR.17, 30 October 1997, p. 3. *Cf.* also Bedjaoui, *Pace Yearbook of International Law* 3 (1991), pp. 29, 38–39.

[161] This is a practice 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.

[162] Practice Direction III, as at 30 July 2004. *Cf.* also subpara. C of the Note Containing Recommendations to the Parties to New Cases, April 1998.

[163] 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. 132, pp. 298–299; as well as Highet, K., 'Presentation', in: Peck/Lee, pp. 127–147, pp. 133–134. Canada, for internal political reasons, submitted its counter-memorial in the *Fisheries Jurisdiction case* in both languages, *cf. Fisheries Jurisdiction case* (Spain/Canada), Pleadings, pp. 209 and 301.

[164] On the Secretary-General's Trust Fund, *cf.* Espósito on Art. 64 MN 10–17; Bekker, P.H.F., 'International Legal Aid in Practice: The ICJ Trust Fund', *AJIL* 87 (1993), pp. 659–668, Jennings, Sir R.Y.,

b) Additional Documents

59 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 reverse conclusion may be drawn from Art. 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.

c) Supplemental Documents

60 The Court may authorize the parties to file within a certain time limit 'supplemental documents' accompanied by a brief commentary on each document, limited to placing the document in question in the context of the written pleadings. The filing of supplemental documents *de facto* replaces a further round of written pleadings.[165] 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.

d) Further Documents

61 All documents submitted after the closure of the written proceedings are to be treated in accordance with Art. 56 of the Rules of Court, irrespective of whether they are labelled as 'additional documents'[166] or as 'supplemental documents'.[167] 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. The party desiring to produce a new document must file two certified copies and 125 additional copies in the Registry,[168] which is responsible for communicating it to the other party and informs the Court. 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.[169] In case of an objection, the Court, after hearing the parties, may, if it considers the document necessary, authorize its production.[170] Prior to the opening of the oral proceedings, 'hearing the parties' usually means giving them an opportunity to present their views in writing.[171] After the filing of the new document by

'The United Nations at Fifty: The International Court of Justice after Fifty Years', *AJIL* 89 (1995), pp. 493–505, pp. 500–501.

[165] *Cf. Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (2001), pp. 40, 47–48 (paras. 24–25).

[166] *Cf.* ICJ Yearbook (2001–2002), p. 296 ('additional Annex No. 130').

[167] *Cf. Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, ICJ Reports (1998), pp. 275, 280 (para. 12); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua/United States of America), ICJ Reports (1986), pp. 14, 18 (para. 12) and *ibid.*, Pleadings, vol. V, pp. 416–417 ('Supplemental Annexes' to the Memorial were treated as new documents to which Art. 56 of the Rules applied).

[168] *Cf. Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, pp. 750–751 (No. 99).

[169] *Cf. Nicaragua, supra*, fn. 167, ICJ Reports (1986), pp. 14, 18 (para. 12). *Cf.* also PCIJ, Series D, No. 2, 3rd Add., p. 823.

[170] Art. 56, para. 2 of the Rules. *Cf.* also *e.g. LaGrand case* (Germany/United States of America), ICJ Reports (2001), pp. 466, 470–471 (para. 6). *Cf.* further ICJ Yearbook (1954–1955), p. 96; as well as Tams/Rau on Art. 52 MN 15–21 for further comment.

[171] But *cf.* Thirlway, *supra*, fn. 78, *Leiden J Int'l L* 12 (1999), pp. 197, pp. 224–227.

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.[172] The authorization of new documents may be subject to certain conditions.[173] 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.[174] 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.[175]

The parties have frequently submitted new documents to the Court after the closure **62**
of the written proceedings and before the opening of the oral proceedings.[176] In 1953, the Court decided that, in future, agents will be reminded that the submission of new documents after the closure of the written proceedings is permissible only in exceptional circumstances.[177] It also indicated that it considers the submission of documents up to the eve of the oral proceedings incompatible with the orderly staging of the proceedings and respect for the principle of equality of the parties.[178] However, in order to encourage the parties to limit the number of documents annexed to the pleadings the Court stated in April 1998 in its 'Note containing recommendations to the parties of new cases' that: 'In order to ease their task at this stage of the proceedings, the Court will, acting by virtue of Art. 56 of the Rules of Court, more readily accept the production of additional documents during the period beginning with the close of the written proceedings and ending one month before the opening of the oral proceedings'.[179] This passage was later dropped again from the 'Note', as it might have had a counterproductive effect. Instead, in its Practice Direction IX, promulgated on 4 April 2002, the Court adopted new measures 'aimed at limiting the late filing of documents in accordance with Art. 56 of the Rules of Court'.[180] A party desiring to submit a new document after the closure of the written proceedings must now explain why it considers it necessary to include the document in the case file, and must indicate the reasons preventing the production of the document at an earlier stage. 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. 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. The other party, when

[172] *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (El Salvador/Honduras), ICJ Reports (2003), 392, 395 (para. 9).

[173] *Cf. Gabčíkovo-Nagymaros case* (Hungary/Slovakia), ICJ Reports (1997), pp. 7, 13 (para. 7); *Corfu Channel, supra*, fn. 152, ICJ Reports (1949), pp. 4, 8–9, and ICJ Yearbook (1948–1949), p. 77.

[174] Art. 56, para. 3 of the Rules. *Cf. e.g. Land, Island and Maritime Frontier Dispute case (Application for Revision), supra*, fn. 172, ICJ Reports (2003), 392, 395 (para. 9); *Land and Maritime Boundary between Cameroon and Nigeria*, supra, fn. 33, ICJ Reports (2002), 303, 315 (para. 22).

[175] *Cf. Gabčíkovo-Nagymaros case, supra*, fn. 173, ICJ Reports (1997), pp. 7, 13 (para. 7).

[176] For example, in the *Corfu Channel case* the United Kingdom submitted 77 and Albania six new documents; *cf.* ICJ Reports (1949), pp. 4, 133–138, 139. For further examples, *cf.* Rosenne, *Law and Practice*, vol. III, pp. 1302–1313.

[177] ICJ Yearbook (1953–1954), p. 114.

[178] ICJ Yearbook (1993–1994), p. 212.

[179] Note Containing Recommendations to the Parties to New Cases, Point C.

[180] Speech by President Shi Jiuyong to the General Assembly of the United Nations: UN Doc. A/58/PV.50, 31 October 2003, p. 5.

commenting upon a new document added to a case file under Art. 56, must confine the introduction of any further documents to what is strictly necessary and relevant to its comments on what is contained in this new document.[181]

e) Challenge to the Authenticity of Documents

63 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.[182] The certification by the agent of the copies of the documents annexed to the pleadings does not raise a presumption of their authenticity which must be rebutted by the party challenging it.[183] In the event of the authenticity of a document being challenged 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. In order for a party to be able to 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.[184]

64 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 know of preliminary objections to the authenticity of documents. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain case*, the Court did not order a further round of pleadings devoted exclusively to the authenticity of the disputed documents[185] but asked the parties to address the question in their regular pleadings on the merits, subject to the party having produced the documents submitting an interim report on their authenticity six months prior to the submission of these pleadings.[186]

4. Confidentiality of Pleadings and Documents

65 The pleadings and documents annexed 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.[187] Thus, the Court has objected to the publication by the parties, more particularly in the

[181] Practice Direction IX (promulgated on 4 April 2002), as at 30 July 2004.

[182] *Light Houses Case Between France and Greece*, PCIJ, Series C, No. 74, p. 220. *Cf.* also *Corfu Channel case, supra*, fn. 152, ICJ Reports (1949), pp. 4, 8 and *ibid.*, Pleadings, vol. IV, pp. 608–609.

[183] *Contra* Sandifer, pp. 282–284.

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

[185] *Contra* Mendelson, M., 'The Curious Case of *Qatar* v. *Bahrain* in the International Court of Justice', *BYIL* 72 (2001), pp. 183–211, 199 and on the contested documents in general, pp. 197–201.

[186] *Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (1998), pp. 243, 244–245. *Cf.* also the letters of Bahrain to the President of the ICJ dated 25 September 1997, 31 December 1997 and 26 March 1998 as well as the Interim Report of the State of Qatar of 30 September 1998, all available at http://www.icj-cij.org; as well as Torres Bernárdez on Art. 48 MN 35–41 for further details. *Cf.* also *Arbitral Award made by the King of Spain on 23 December 1906* (Honduras/Nicaragua), Pleadings, vol. II, pp. 164–165 and *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, p. 231, where the authenticity of a document was dealt with during the oral proceedings. For another example of 'doctored documents', *cf.* Highet, K., 'Evidence, the Chamber and the *ELSI* case, in *Fact-finding Before International Tribunals* (Lillich, R.B., ed., 1992), pp. 33–79, pp. 65–67.

[187] 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).

press, of the text, in whole or in part, of the documents of the written proceedings. In any case an agreement between the parties, duly notified to the Court, would be required.[188] The Rules of Court provide several exceptions to the requirement of confidentiality.

a) Availability of Pleadings to Third States

Cases before the Court usually 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.[189] No justification or special interest in the case is required for such a request.[190] 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.[191] The parties have, save in exceptional circumstances, a right to be informed of the name of the State asking for the pleadings.[192] 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 other State.[193] If a party, on being approached by the Court, declines to express an opinion on the question (for example, because it disputes the jurisdiction of the Court), the Court makes available the pleadings.[194] If the pleadings in a case are made available to a State, giving 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.[195] A State receiving the pleadings must maintain their confidential character until they are made generally available. 66

In the majority of cases the parties have raised no objection to the pleadings and documents annexed being made available to third States.[196] Whenever one or both parties have objected to the request, the Court has decided that the pleadings in the case and documents annexed will not, for the present, be made available to the requesting States.[197] However, the consent of the parties does not constitute a condition; it has been 67

[188] PCIJ, Series D, No. 2, 3rd Add., p. 822. *Cf.* also the *(Anglo-Norwegian) Fisheries case, supra*, fn. 138, Pleadings, vol. IV, p. 628 (No. 21) and *Aerial Incident of 27th July 1955* (United Kingdom/Bulgaria), Pleadings, p. 615 (No. 65).

[189] *E.g.*, in the *North Sea Continental Shelf cases* 14 States asked for the pleadings: ICJ Yearbook (1968–1969), p. 111.

[190] *Cf. e.g. Continental Shelf* (Tunisia/Libya), ICJ Reports (1981), pp. 3, 5 (para. 4), where Malta, the United States of America, Canada, the Netherlands, Argentina, and Venezuela had asked for the pleadings. *Contra* Fachiri, *supra*, fn. 184, p. 115.

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

[192] *Cf.* Sixteenth Report PCIJ, Series E, No. 16, pp. 184–185. Since 1937 it is the practice to inform the parties of the source of the request.

[193] PCIJ, Series D, No. 2, 3rd Add., p. 822.

[194] *Cf. e.g. Nuclear Tests* (Australia/France), ICJ Reports (1974), pp. 253, 255–256 (para. 9).

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

[196] *Cf.* ICJ Yearbook (1948–1949), p. 77; ICJ Yearbook (1949–1950), p. 98; ICJ Yearbook (1950–1951), pp. 96, 114; ICJ Yearbook (1959–1960), p. 127; ICJ Yearbook (1962–1963), pp. 122–123; ICJ Yearbook (1968–1969), p. 111; ICJ Yearbook (1972–1973), p. 141; ICJ Yearbook (1973–1974), pp. 125–126; ICJ Yearbook (2001–2002), p. 297.

[197] Requests were denied in: *Continental Shelf* (Tunisia/Libya), ICJ Reports (1981), pp. 3, 5 (para. 4) (request by Malta and five other States); *Continental Shelf* (Libya/Malta), ICJ Reports (1984), pp. 3, 5 (para. 4) (request by Italy); *Gulf of Maine, supra*, fn. 105, ICJ Reports (1984), pp. 246, 256 (para. 11) (request by the United Kingdom and Bangladesh); *Elettronica Sicula S.p.A. (ELSI)* (United States of America/Italy), Pleadings, vol. III, pp. 398–399 and 404 (request by Nicaragua); *Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Yearbook (1996–1997), p. 200 (request by two States); *Kasikili/Sedudu Island, supra*, fn. 70, ICJ Yearbook (1996–1997), p. 200 (request by one State); *Pulau Ligitan, supra*, fn. 104, ICJ Reports (2001), pp. 575, 580 (para. 6) (request by the Philippines); *Certain Property* (Liechtenstein/Germany), ICJ Yearbook (2001–2002), p. 297 (request by one State). *Cf.* also Fourteenth Annual Report, PCIJ, Series E, No. 14, p. 147; Sixteenth Report No. 16, p. 185.

observed that 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.[198] 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 Art. 53, 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.[199]

68 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 Art. 62 of the Statute. 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'. This is difficult to do if the pleadings and annexed documents of the case are not made available to it. It does not know precisely how its interests might be engaged by the case nor can it responsively advance particular claims.[200] 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. Practice shows that in all cases in which the pleadings were denied to a State its application to intervene was unsuccessful.[201] This situation is unsatisfactory and has been widely criticized.[202] It is argued that, in the interest of the sound administration of justice as well as on ground of procedural fairness, the Court should make available the pleadings and annexed documents to States considering intervention in the case, even though the parties object, unless the parties can demonstrate overriding security or other interests.[203]

b) Furnishing of Pleadings to Intervening States

69 If an application for permission to intervene under Art. 62 is granted or if an intervention under Art. 63 is admitted, copies of the pleadings and documents annexed are supplied to the intervening State.[204] 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

70 Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a

[198] *Cf.* Ninth Annual Report PCIJ, Series E, No. 9, p. 169; PCIJ, Series D, No. 2, 3rd Add., p. 822. *Cf.* also PCIJ, Series D, No. 1, pp. 205–206, 504–505 where it was observed that the decision lay entirely within the discretion of the Court.

[199] *Cf. e.g. Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 483–484 (No. 90); *Gulf of Maine, supra*, fn. 105, ICJ Reports (1984), pp. 246, 256 (para. 11); *Continental Shelf* (Libya/Malta), ICJ Reports (1985), pp. 13, 18 (para. 10).

[200] *Cf. Continental Shelf* (Tunisia/Libya), ICJ Reports (1981), p. 35 (Sep. Op. Schwebel) and the oral argument of the agent for Malta in the same case, Pleadings, vol. III, pp. 283–284, 285. *Cf.* also the statement of the Italian agent in *Continental Shelf* (Libya/Malta), Pleadings, vol. II, pp. 486–487.

[201] *Cf. Continental Shelf* (Tunisia/Libya), ICJ Reports (1981), pp. 3 *et seq.; Continental Shelf* (Libya/Malta), ICJ Reports (1984), pp. 3 *et seq.; Pulau Ligitan, supra*, fn. 104, ICJ Reports (2001), pp. 575 *et seq.*

[202] *Cf. Pulau Ligitan, supra*, fn. 104, CR 2001/1, 25 June 2001 (Reisman); Rosenne, *Law and Practice*, vol. III, p. 1289. *Cf.* also CPJI, Actes et documents, *supra*, fn. 129, pp. 152, 153 (Lord Finlay).

[203] Judge Oda has suggested an alternative route: if the pleadings are not made available to the 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, supra*, fn. 104, ICJ Reports (2001), pp. 609, 618–620, (paras. 13–17) (Diss. Op. Oda).

[204] Art. 85, para. 1, Art. 86, para. 1 of the Rules. *Cf. e.g. Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, ICJ Reports (1999), pp. 1029, 1035 (para. 17).

case before the Court, the Registrar communicates to it copies of all the pleadings and documents annexed.[205] 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 sees fit before the closure of the written proceedings.[206]

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.[207] 71

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'. Prior to the 1978 Rules, the pleadings could be made accessible to the public even before the opening of the oral proceedings.[208] The Court now usually makes the pleadings accessible to the public as from the opening of the oral proceedings.[209] '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 afford the parties only an opportunity of making their views known.[210] 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.[211] 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. 72

Access to the public is not restricted to the pleadings on the merits and the documents annexed. The Court also makes accessible to the public pleadings on jurisdiction and admissibility;[212] the preliminary objections and the written statements concerning the 73

[205] Art. 34, para. 3. *Cf.* also Art. 11 of the Instructions for the Registry; and Dupuy on Art. 34 MN 10–17 for further details on the Court's practice under Art. 34, para. 3.

[206] *Cf.* Art. 69, para. 2 of the Rules. *Cf.* also *Lockerbie, supra*, fn. 35, ICJ Reports (1998), pp. 9, 12 (para. 8) and CR 97/16, 13 October 1997.

[207] *Gulf of Maine, supra*, fn. 105, ICJ Reports (1984), pp. 165, 167 (para. 3) and ICJ Yearbook (1983–1984), pp. 143–144; *Corfu Channel, supra*, fn. 152, ICJ Reports (1948), pp. 124, 126; ICJ Reports (1949), pp. 237, 238.

[208] All Rules of Court since 1931 had provided that the pleadings could be made accessible to the public 'before the termination of the case'. For pleadings being made public before the opening of the oral proceedings, *cf. e.g. Barcelona Traction, supra*, fn. 135, ICJ Reports (1970), pp. 3, 7 (para. 6) and Pleadings, vol. VIII, pp. 5, 8. *Cf.* also ICJ Yearbook (1951–1952), p. 97.

[209] For a notable case where the pleadings were made accessible to the public only after the closure of the oral proceedings, *cf. Tehran Hostages, supra*, fn. 118, ICJ Reports (1980), pp. 3, 5 (para. 7) and ICJ Yearbook (1979–1980), p. 127.

[210] *Cf. Tehran Hostages, supra*, fn. 118, ICJ Reports (1980), pp. 3, 5 (para. 7). Compare also Art. 43, para. 3 of the 1931 Rules of Court which expressly stated that the Court may, 'with the consent of the parties', make the written pleadings accessible to the public.

[211] *Cf.* ICJ Yearbook (1972–1973), p. 141; ICJ Yearbook (1973–1974), p. 126. *Cf.* also *Lockerbie, supra*, fn. 35, ICJ Reports (1998), pp. 9, 13 (para. 11) and CR 97/16, 13 October 1997 ('Annexes will be made available to public at the same time with the exception of Number 16 of the United Kingdom Annexes').

[212] *Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (1994), pp. 112, 115 (para. 10).

observations and submissions on the objections, as well as the documents annexed thereto;[213] written statements of the intervening States and the written observations on these statements by the parties, as well as supporting documents;[214] and requests for provisional measures.[215] 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.[216]

74 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 (New York, Geneva, Brussels, *etc.*). It has also been the practice of the Court to put the pleadings (without any documents annexed to them) on its website (http://www.icj-cij.org)—since this was launched on 25 September 1997—at the opening of the oral proceedings or at a later stage, depending on the circumstances.

5. Closure of the Written Proceedings

75 The closure of the written proceedings is an important break in the procedure. The Rules of Court contain several provisions which establish the 'closure of the written proceedings' as the point after which certain actions are precluded.[217] The Court does not formally pronounce the closure of the written proceedings. The written proceedings come to a close 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.[218] If no pleading is filed by a party because 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.[219] The same applies if the Court does not accept a party's plea of *force majeure* as justifying its abstention from presenting a pleading.[220] 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.[221] This decision will not be rendered in the form of an order of the Court unless a new time limit for a further pleading is fixed.

[213] *Cf. e.g. Lockerbie, supra*, fn. 35, ICJ Reports (1998), pp. 115, 119 (para. 10).

[214] *Cf. Land, Island and Maritime Frontier Dispute, supra*, fn. 33, C 4/CR 90/1, 5 June 1990, p. 11; *Pulau Ligitan, supra*, fn. 104, ICJ Reports (2001), pp. 575, 581 (para. 10).

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

[216] *Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (2001), pp. 40, 48 (para. 27).

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

[218] ICJ Yearbook (1971–1972), p. 113. *Cf.* also PCIJ, Series D, No. 2, 3rd Add., pp. 117, 613–615.

[219] *Cf. Fisheries Jurisdiction* (United Kingdom/Iceland), ICJ Reports (1973), pp. 3, 5 (para. 5); *Nuclear Tests* (Australia/France), ICJ Reports (1974), pp. 253, 255 (para. 6); *Nuclear Tests* (New Zealand/France), ICJ Reports (1974), pp. 457, 459 (para. 6); *Aegean Sea Continental Shelf*, ICJ Reports (1978), pp. 3, 5 (para. 7); *Teheran Hostages, supra*, fn. 118, ICJ Reports (1980), pp. 3, 5 (para. 5).

[220] *Cf. The Electricity Company of Sofia and Bulgaria*, PCIJ Series A/B, No. 80, pp. 4, 8–9 and PCIJ, Series E, No. 16, p. 181.

[221] *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, ICJ Reports (1990), pp. 92, 98 (para. 12); *Continental Shelf* (Tunisia/Libya), ICJ Reports (1981), pp. 3, 6 (para. 5); *Continental Shelf* (Libya/Malta), ICJ Reports (1984), pp. 3, 6 (para. 5); *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 559 (para. 11).

II. The Oral Proceedings

Upon the closure of the written proceedings, the case is ready for the second phase of the procedure: the oral proceedings.[222] The 'oral proceedings' must be distinguished from the 'oral pleadings', a term unknown to the Statute and the Rules of Court but widely used by the Court, individual judges and the parties. The former is much broader in scope and, as Art. 43, para. 5 shows, includes the hearing of witnesses and experts as well as the oral observations by intervening States[223] and the oral presentation of information by international organizations.[224] The term 'oral pleadings', on the other hand, is limited to the oral statements on behalf of the parties. 76

The oral proceedings are held at the seat of the Court unless the Court considers it desirable to hold them somewhere else. Before deciding to hold them at a place other than The Hague, the Court must ascertain the views of the parties.[225] 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.[226] The public sittings are usually held from 10:00 a.m. to 1:00 p.m. and/or from 3:00 p.m. to 6:00 p.m. The Registrar causes the dates and times of public sittings to be published.[227] 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 its speech and suggests to the President that the Court might wish at this point to take its short adjournment. 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. 77

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.[228] The oral proceedings themselves 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.[229] 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'.[230] 78

[222] On the oral proceedings, *cf.* Guynat, pp. 312–323; Witenberg/Desrioux, pp. 218–225; Jennings, *supra*, fn. 98, *BYIL* 68 (1997), pp. 1, 13–19.

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

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

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

[226] Art. 46; and *cf.* von Schorlemer on Art. 46 MN 18–25 for comment on the Court's practice. For closed sittings *cf. Continental Shelf* (Tunisia/Libya), ICJ Reports (1982), pp. 18, 25 (para. 12) and Pleadings, vol. V, p. 289 and ICJ Yearbook (1981–1982), p. 144; *Temple of Preah Vihear, supra*, fn. 66, ICJ Reports (1962), pp. 6, 9 and Pleadings, vol. II, p. 129. In both cases a film was shown to the Court *in camera. Cf.* also the *South West Africa cases* (Ethiopia/South Africa) (Liberia/South Africa), Pleadings, vol. VIII, p. 6.

[227] *Cf.* Art. 12, para. 2 of the Instructions for the Registry.

[228] *Cf.* the *(Bosnian) Genocide case, supra*, fn. 79, where the oral proceedings were scheduled to open on 27 February 2006; the written proceedings came to a close on 22 February 1999. *Cf.* ICJ Press Release No. 2004/37 of 8 December 2004.

[229] Other cases with 50 or more public sitting include the *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, and *Barcelona Traction, supra*, fn. 135. For further information *cf.* von Schorlemer on Art. 46 MN 20.

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

79 The content of the oral proceedings is regulated in broad lines in Art. 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.[231] The details are set out in Arts. 54–72 of the Rules of Court.

1. Obligatory Nature

80 Article 43, para. 1 prescribes a procedure in 'two parts: written and oral'. The parties thus cannot renounce in advance the oral proceedings.[232] The Court, acting on a proposal of the parties under Art. 101 of the Rules of Court, cannot decide to dispense with the oral proceedings.[233] Suggestions to that effect by the parties have not been acted upon by the Court.[234]

81 Article 43—both with regard to the requirement of memorials and counter-memorials and the requirement of oral proceedings—only applies to the principal proceedings on the merits before the full Court. According to the Rules of Court and the Court's practice, oral proceedings are not required in proceedings before a Chamber;[235] in incidental proceedings concerning the indication of provisional measures *proprio motu*,[236] preliminary objections,[237] the admissibility of counter-claims,[238] the question whether the Court or a Chamber should decide on an application for permission to intervene,[239] and, with some qualification, applications for permission to intervene or declarations of intervention;[240] or in proceedings on the revision or interpretation of a judgment.[241] 'Hearing' the parties or the State seeking to intervene in these cases does not necessarily mean full oral proceedings.[242] The principle of *audiatur et altera pars* can

[231] *Cf.* also Art. 58, para. 1 of the Rules which provides that the Court shall determine whether the parties should present arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

[232] *Cf.* PCIJ, Series D, No. 2, p. 58.

[233] Scerni, pp. 561, 597–599; Dubisson, *CIJ*, p. 219. *Contra* Hudson, *PCIJ*, p. 562. PCIJ, Series D, No. 2, p. 140 is misleading as it refers to proceedings before the Chamber of summary procedure which becomes clear from the reference to the previous meeting which dealt with the Chamber procedure; *cf. ibid.*, pp. 100–102.

[234] Such a suggestion was made by the parties, *e.g.*, in *Haya de la Torre* (Colombia/Peru), Pleadings, p. 210. *Cf.* also ICJ Yearbook (1950–1951), p. 106; ICJ Yearbook (1956–1957), p. 89.

[235] Art. 92, para. 3 of the Rules. *Cf. Treaty of Neuilly, Article 179, Annex, Paragraph 4*, PCIJ, Series A, No. 3, p. 5.

[236] Art. 75, para. 1 of the Rules. *Cf. LaGrand, supra*, fn. 170, ICJ Reports (1999), pp. 9, 14 (para. 21). But *cf.* also *ibid.*, p. 21 (Sep. Op. Schwebel, expressing reservations about this practice). *Cf.* further Oellers-Frahm on Art. 41 MN 49–50.

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

[238] Art. 80, para. 3 of the Rules. *Cf. Oil Platforms, supra*, fn. 70, ICJ Reports (1998), pp. 190, 203 (para. 31); but *cf.* also *ibid.*, p. 215 (Sep. Op. Oda, questioning the practice of not having oral hearings); *(Bosnian) Genocide case, supra*, fn. 79, ICJ Reports (1997), pp. 243, 256 (para. 25); but *cf.* also *ibid.*, p. 276 (Sep. Op. Koroma).

[239] *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, ICJ Reports (1990), pp. 3, 4. *Cf.* also Zimmermann, A., '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. 646–660.

[240] Art. 84, para. 2 of the Rules. *Cf. Nicaragua, supra*, fn. 167, ICJ Reports (1984), pp. 215, 216. But *cf. ibid.*, p. 219 (para. 4) (Sep. Op. Ruda, Mosler, Ago, Jennings, de Lacharrière), p. 220 (Sep. Op. Oda), p. 231 (Diss. Op. Schwebel) 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' (ICJ Reports (1986), pp. 158, 170–171).

[241] Art. 98, para. 4, Art. 99, para. 4. *Cf. Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, (Nigeria/Cameroon), ICJ Reports (1999), pp. 31, 33 (para. 5). But *cf.* also *ibid.*, pp. 54–56 (Diss. Op. Ajibola). *Cf.* further CR 99/3, 17 February 1999.

[242] For criticism of the dispensation with oral proceedings in incidental proceedings *cf.* Rosenne, *AJIL* 94 (2000), pp. 307, 308–312.

be complied with by the Court not just by holding oral proceedings but also by giving the parties an opportunity of presenting their views to the Court in writing or, in exceptional cases, orally in meetings with the President.[243]

2. Organization of the Oral Proceedings

a) Opening of the Oral Proceedings

Upon the closure of the written proceedings, the case is ready for hearing. In principle, **82** cases are heard in the order in which they become ready for the hearing. But 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.[244] 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.[245]

After ascertaining the views of the parties and, if applicable, the intervening State, the **83** Court, or the President if the Court is not sitting, fixes the date and time for the opening of the oral proceedings. The Court 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.[246] The date for the opening of the oral proceedings may be fixed even before the written proceedings have been concluded.[247] Article 56, para. 5 of the Rules of Court provides that the production of further documents after the closure of the written proceedings shall not in itself constitute a ground for delaying the opening or the course of the oral proceedings.

The Court, or the President if the Court is not sitting, may also decide, if occasion **84** should arise, that the opening or the continuance of the oral proceedings be postponed.[248] 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[249] and the subject matter of the hearings (jurisdiction and admissibility or merits),[250] as well as the interest of parties in other cases which might have to be advanced.[251] 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',[252] in order to enable the diplomatic negotiations

[243] *Cf. LaGrand, supra*, fn. 170, ICJ Reports (1999), pp. 9, 13 (para. 12).

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

[245] *Cf.* Sixteenth Report, PCIJ, Series E, No. 16, p. 186. For exceptions, *cf.* Guyomar, *Commentaire*, p. 356; Rosenne, *Law and Practice*, vol. III, pp. 1327–1328.

[246] *The Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 80, p. 4.

[247] The contrary view expressed in PCIJ, Series D, No. 2, 3rd Add., p. 821 has been overtaken by the Court's practice.

[248] Art. 54, paras. 1 and 3 of the Rules. This provision was first included in the 1936 Rules of Court in Art. 47, para. 2.

[249] *Nottebohm, supra*, fn. 114, 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).

[250] *Aegean Sea, supra*, fn. 219, ICJ Reports (1978), pp. 3, 6 (para. 9) and ICJ Yearbook (1978–1979), p. 118; *Right of Passage, supra*, fn. 114, Pleadings, vol. V, p. 293.

[251] PCIJ, Series D, No. 2, 3rd Add., p. 555.

[252] *Norwegian Loans, supra*, fn. 66, ICJ Reports (1956), pp. 20, 21.

engaged by the parties to be conducted in an atmosphere of calm,[253] while it has been less inclined to do so if such a request was exclusively based on the personal convenience of agents and counsel.[254] 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.[255] Considering that the Court adopts its judicial calendar well in advance (currently the Court announces its schedule for the next three 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.[256]

85 The 'opening of the oral proceedings' constitutes another break in the procedure.[257] 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 the case[258] 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) Number of Rounds of Oral Argument

86 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.[259] The second round, if any, should be brief.[260] 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,[261] if their testimony is not integrated into the oral arguments of the parties.[262] 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

[253] *Armed Activities* (DRC/Uganda), *supra*, fn. 79, ICJ Press Release No. 2003/39 of 7 November 2003 (the Court acceded to Congo's request which was made five days before the oral proceedings were scheduled to open).

[254] Eighth Annual Report, PCIJ, Series E, No. 8, pp. 263–264.

[255] *Cf. Aerial Incident of 3 July 1988, supra*, fn. 34, ICJ Reports (1996), pp. 9, 10.

[256] In November 2004, Congo and Uganda asked the Court to adjourn the hearings until April 2004, hearings were rescheduled for April 2005; *cf. Armed Activities* (DRC/Uganda), *supra*, fn. 79, ICJ Press Releases No. 2003/39 of 7 November 2003 and No. 2004/36 of 6 December 2004. *Cf.* also Prager, D.W., 'Procedural Developments at the International Court of Justice', *LPICT* 3 (2004), pp. 125–142, p. 128.

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

[258] For comment *cf.* Dugard on Art. 13 MN 13–18.

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

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

[261] This was the case, for example, in *Corfu Channel, Temple of Preah Vihear* and *South West Africa; cf.* ICJ Yearbook (1948–1949), p. 78; ICJ Yearbook (1961–1962), p. 89.

[262] *Cf. e.g. ELSI, supra*, fn. 197, Pleadings, vol. III, pp. 25–30, 37–64, 122–131, 239–245, 300–304, 313–325.

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.

c) Order of Speaking

The order in which the parties are heard is settled by the Court after ascertaining the views of the parties.[263] The Court will usually give effect to any agreement between the parties as to the order of speaking. 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.[264] **87**

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[265] or, in the case of simultaneous filing of the pleadings, in the alphabetical order of the names of the parties.[266] There have, however, been two exceptions to this rule: (a) when the last pleading has been deposited by one party only, the Court has at the hearing called first on the representative of the other party; (b) when there have been several parties in the same interest on one side, the Court has so arranged that at no stage of the oral arguments should the representative of these parties be in a position to speak both before and after the other party. In the same contingency, and subject to the same condition, the Court has allowed counsel for parties in the same interest to decide for themselves on the order in which they want to make their statements.[267] **88**

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.[268] This also applies to cases in which preliminary objections have been joined to the merits.[269] 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.[270] Parties in the same interest may address the Court in common.[271] 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.[272] If the respondent has made a counter-claim, the applicant is given an opportunity in each round of the oral **89**

[263] Art. 58, para. 2 of the Rules.

[264] For further detail on the burden of proof *cf.* Kolb, General Principles, MN 53–57.

[265] *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.

[266] The French names of States are employed for this purpose unless the parties have agreed that the proceedings shall be conducted entirely in English. *Cf.* Sixteenth Report, PCIJ, Series E, No. 16, pp. 188–189.

[267] PCIJ, Series D, No. 2, 3rd Add., p. 824. [268] ICJ Yearbook (1953–1954), p. 115.

[269] ICJ Yearbook (1968–1969), p. 111. [270] Eighth Annual Report, PCIJ, Series E, No. 8, p. 266.

[271] *South West Africa, supra*, fn. 226, Pleadings, vol. VIII, pp. 2, 106; *North Sea Continental Shelf, supra*, fn. 32, 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.

[272] *Cf.* the *Cases concerning Legality of Use of Force*, ICJ Press Release No. 99/19 of 7 May 1999 and No. 99/20 of 12 May 1999 and the *Lockerbie cases, supra*, fn. 35, CR 92/2, 26 March 1992 to CR 92/5, 28 March 1992.

arguments to reply to the counter-claim. The Court is thus addressed in the following sequence: applicant—respondent—applicant replying to the counter-claim.[273]

90 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,[274] new documents were referred to,[275] oral replies were given to questions asked by the Court or a judge,[276] or the other party changed or amended its final submissions as originally formulated in the first round of oral argument or in the pleadings.[277] 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.[278]

91 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.[279]

d) Number of Counsel and Advocates

92 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.[280] The all-time record in this respect is held by Cameroon in the *Land and Maritime Boundary case* which had 15 persons address the Court on its behalf.[281] This applies to both rounds of oral argument.[282] The Court has limited the number of persons allowed to speak in reply in only one case.[283] 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.

3. Oral Argument by Representatives of the Parties

a) Persons Addressing the Court on Behalf of the Parties

93 In practice, the persons appearing before the Court 'as representatives of the parties' are not limited to the persons mentioned in Art. 43, para. 5. The Court has been addressed on behalf of the parties by agents (including co-agents, deputy-agents, additional and acting agents),[284] high government officials (such as Foreign Ministers and in one case

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

[274] *Cf. Diversion of Water from the Meuse*, PCIJ, Series C, No. 81, pp. 228–229 and 502.

[275] *Cf.* PCIJ, Series D, No. 2, 3rd Add., p. 823.

[276] *Barcelona Traction, supra*, fn. 135, Pleadings, vol. X, pp. 667–668 and ICJ Yearbook (1968–1969), p. 112.

[277] *Cf. The Pajzs, Czáky, Esterházy case*, PCIJ, Series C, No. 80, p. 412 and pp. 695–697. *Cf.* also the Sixteenth Report PCIJ, Series E, No. 16, p. 191.

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

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

[280] *Legal Status of Eastern Greenland*, PCIJ, Series C, No. 69, p. 18. *Cf.* also PCIJ, Series D, No. 2, 3rd Add., p. 184; Third Annual Report, PCIJ, Series E, No. 3, p. 204; No. 9, pp. 169–170. *Cf.* also Witenberg/Desrioux, p. 225.

[281] The delegations of the parties are even bigger; in the *Gulf of Maine case, supra*, fn. 105, the parties managed to parade 80 agents, advocates, counsel, experts and advisers before the Court.

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

[283] PCIJ, Series D, No. 2, 3rd Add., pp. 184, 824.

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

even by a Prime Minster[285]), counsel and advocates,[286] experts, as well by technical and other advisers.[287] The parties are free to choose whomever they want to appear on their behalf.

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 may also act as counsel and advocate and may examine witnesses and experts.[288] A person whose appointment as agent is invalid may nevertheless appear before the Court in the capacity of counsel for the party which he represents.[289] There are, however, two tasks that are reserved to the agent: it is for the agent to read the party's final submissions[290] and to make or, at least, authorize any other statement during the oral proceedings binding upon the party in questions of procedure.[291] **94**

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 'expert-witnesses' called by the parties to give an opinion to the Court.[292] Only the latter come within the scope of Arts. 57, 58, 63, 64 and 65 of the Rules of Court and have to make the solemn declaration to be made by 'experts' under Art. 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[293] and may address the Court at any time the party chooses (unlike expert-witnesses whose appearance is subject to a decision of the Court);[294] questions can be put to them by the Court or individual judges;[295] they may not be cross-examined by the other party and their statements cannot be treated as evidence.[296] **95**

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: **96**

> 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.

[285] *Cf. Anglo-Iranian Oil Co.* (United Kingdom/Iran), ICJ Reports (1952), pp. 93, 94; *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, ICJ Reports (1992), pp. 351, 354.

[286] These terms are used interchangeably; there does not seem to be a difference between the two. For comment on the use of terminology *cf.* Berman on Art. 42 MN 12.

[287] *Cf. e.g. ELSI, supra*, fn. 197, ICJ Reports (1989), pp. 15, 16–18 (para. 7); Pleadings, vol. III, pp. 65, 72, 300 and ICJ Yearbook (1988–1989), p. 162; *(Anglo-Norwegian) Fisheries, supra*, fn. 138, ICJ Reports (1951), pp. 116, 119.

[288] Art. 65 of the Rules.

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

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

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

[292] ICJ Yearbook (1981–1982), p. 144; ICJ Yearbook (1983–1984), p. 143; ICJ Yearbook (1988–1989), p. 162; ICJ Yearbook (1996–1997), p. 201. On 'expert-witnesses', *cf. infra*, MN 95, and further Tams on Art. 51 MN 2–3.

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

[294] *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 519–520 (No. 105).

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

[296] *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 518–519 (No. 102).

This rule has probably been more honoured in the breach than the observance so that the Court recently felt compelled to remind parties that it 'requires full compliance with these provisions and observation of the requisite degree of brevity'.[297] In practice, the hearings have become a continuation of the pleadings by other means. 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 frequent reference is made.[298] 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 totally unjustified, it is suspected) that some judges may not have fully studied the written pleadings and that they are working from the concise verbatim record of the hearings and not from the voluminous pleadings. 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 they have been abandoned.

97 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.[299] In April 2002, the Court announced that it intends 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.[300] Up to this announcement, the Court had largely refrained from giving any instructions as to the content of the oral argument, and there seems to be a difficulty 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 dealt with.[301] It is suggested that the power should be used only when the Court reaches the conclusion that a certain point has been 'fully argued' by the parties.

98 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 Art. 43 of the Statute or Art. 56 of the Rules of Court, unless the document is part of a publication readily available'. This provision was first introduced in 1972 in response to a frequent practice by counsel, especially in the *South West Africa cases*,[302] to

[297] Practice Direction VI, para. 2, as at 30 July 2004.

[298] 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 between Cameroon and Nigeria, supra*, fn. 33, CR 2002/15 (translation), 11 March 2002, pp. 4–6 (paras. 9–15). The oral argument is frequently referred to by counsel as a 'dialogue of the deaf' (CR 2002/16, 11 March 2002, p. 47; CR 2001/10 (translation), 19 October 2001; CR 2001/11 (translation), 19 October 2001; CR 93/27, 6 July 1993, p. 40).

[299] Art. 61, para. 1 of the Rules. This rule was first introduced in Art. 57, para. 1 of the 1972 Rules. *Cf.* also the *(Bosnian) Genocide case, supra*, fn. 79, CR 93/12, 1 April 1993, p. 10.

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

[301] Bedjaoui, *Pace Yearbook of International Law* 3 (1991), pp. 29, 44; Crawford, J., 'Comment', in Peck/Lee, pp. 151–152; Dupuy, R.J., 'La réforme du règlement de la Cour Internationale de Justice', *AFDI* 18 (1972), pp. 265–283, pp. 279–280. *Cf.* also Tams on Art. 49 MN 8–13 for further details on the possibilities of the Court to direct proceedings.

[302] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, pp. 460, 461; vol. XI, p. 220.

quote extensively from documents not previously filed and thus, by reading them into the verbatim record, to introduce them through the backdoor.[303] The Court has held that it is not enough for a document to be part of a publication that is readily available; it must be available there in one of the official languages of the Court.[304] Any new document not part of a publication readily available may only be referred to in accordance with Art. 56 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 Art. 56, para.1 of the Rules of Court if it has previously been supplied with a copy of the document through the Registrar.[305] 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 30 copies (20 for the members of the Court, and 10 for the party opposite).[306] 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.

c) Use of Visual and Other Aids

The parties may, with the permission of the Court, use audio-visual and other aids to **99**
support and illustrate their oral argument.[307] 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 show videotapes and films.[308] It will probably not be long before the Court sees its first Power Point presentation. The Registry may help the parties to obtain the necessary projection equipment: the expenses incurred are charged to the parties.[309] The other party in each case must be given an opportunity to submit observations on the aids used.[310] If a film is to be shown, it must be communicated in advance to the Court and the other party, through the intermediary of the Registry; if this is not done, the showing of the film must be postponed until this

[303] 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. Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, PCIJ, Series A/B, No. 61, pp. 208, 214–216.

[304] *Cf. ELSI supra*, fn. 197, 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.

[305] *Cf. ELSI, supra*, fn. 197, Pleadings, vol. III, p. 178. On Art. 56 of the Rules *cf. supra*, MN 61–62, as well as Tams/Rau on Art. 52 MN 15–21.

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

[307] A wall-map was used for the first time in *Legal Status of Eastern Greenland, cf.* PCIJ, Series C, No. 66, p. 2594.

[308] Films were shown in *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, p. 289; *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, p. 432; *Gabčíkovo-Nagymaros supra*, fn. 173, ICJ Reports (1997), pp. 7, 13 (para. 8); *Kasikili/Sedudu Island, supra*, fn. 70, ICJ Reports (1999), pp. 1045, 1052 (para. 8) and CR 99/2, 16 February 1999; *Maritime Delimitation and Territorial Questions, supra*, fn. 52, CR 2000/13, 13 June 2000 and ICJ Yearbook (1999–2000), p. 273; *Pulau Ligitan, supra*, fn. 104, CR 2002/30, 6 June 2002, pp. 19–21. In *Gulf of Maine, supra*, fn. 105, 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. 328–333, 341–342, 352–356, 372 and ICJ Yearbook (1983–1984), p. 143.

[309] ICJ Yearbook (1985–1986), pp. 168–169.

[310] Sixteenth Report, PCIJ, Series E, No. 16, pp. 195–196

requirement has been complied with.[311] Showing the film to the other party at The Hague prior to its being shown to the Court is not sufficient.[312] The commentary over the film is reproduced as part of the verbatim records of the hearing.

100 The parties may show a film if it has been filed together with the pleadings pursuant to Art. 50, para. 1 of the Rules of Court,[313] unless the Court decides against its projection. If a film has not been deposited in the Registry before the closure of the written proceedings it will be necessary to determine whether it is a 'document' within the meaning of Art. 56 of the Rules of Court. In this case, if the other party objects to the projection of the film, it may be shown only if the Court considers its projection 'necessary' and expressly authorizes it.[314] It has been argued by a party that a film constitutes a document,[315] and the Court's President has referred to a film about the place in dispute as 'un document'.[316] The Registrar has listed the question of whether a film may be shown under the heading 'Submission of new documents'.[317] It is argued that whether or not films are documents in the sense of Art. 56 depends on the film in question. The distinguishing feature should be whether the film has any probative evidentiary value of its own, *i.e.* whether it is to prove a certain fact,[318] or whether its only purpose is to support counsel's presentation and to assist the Court in forming a fuller appreciation of the facts. In the latter case, the film (and other visual aids) must be considered as part of the counsel's oral presentation ('un element de la plaidoirie').[319] This also seems in line with the purpose of Art. 56 to protect the other party against any surprises.

d) Questions to the Parties

101 'Hearing by the Court' in Art. 43, para. 5 includes the putting of questions to the representatives of the parties. Questions and requests for explanations may be put by the

[311] *Cf. Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, CR 2002/8, 28 February 2002, p. 30 and CR 2002/9, 1 March 2002 (translation), p. 2.

[312] *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 481, 487–491 (Nos. 84, 99, 100, 101, 105), in particular, the decision of the Court, p. 492 (No. 106).

[313] 20 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, available at http://www.icj-cij.org, p. 50 (footnote 4).

[314] *Cf.* Art. 56, para. 2 of the Rules.

[315] *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 488–490 (No. 101) and p. 497 (No. 117). Libya argued that the film constituted a document because it contained tendentious and argumentative captions, data of various kinds. On films as evidence, *cf.* also *Gulf of Maine, supra*, fn. 105, Pleadings, vol. VII, pp. 328–357 (Nos. 68, 70, 72, 83, 88, 90, 91).

[316] *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, p. 432. It should, however, be noted that the film in question had been annexed to the Reply of Cambodia; *cf.* Pleadings, vol. I, p. xxi (Annex LXV b).

[317] ICJ Yearbook (1983–1984), p. 143.

[318] *Cf. e.g. Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Yugoslavia), CR 2002/43, 7 November 2002, p. 27, where a video film was referred to, to prove that a person had made a statement on TV.

[319] *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 491–492 (No. 105). The Court seems to have accepted Tunisia's position when, despite Libya's objection, it allowed the film to be shown subject to certain conditions. Libya withdrew its objections only some time thereafter. *Cf. ibid.*, p. 492 (No. 106). *Cf.* also *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'. *Cf.* also ICJ Yearbook (1953–1954), p. 113 where a distinction is made between documents and 'works of reference'.

[320] *Cf.* Art. 61, para. 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.

Court and by individual judges (including the judges *ad hoc*).[320] If a judge is prevented from attending by illness or other serious reasons, the President may allow the Registrar to read the question.[321] 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.[322] Regular use has been made of this right only since 1965.[323] Questions are usually put to the parties at the end of a round of oral arguments or at the end of the oral proceedings. 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.[324] 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.[325]

Questions have been put by one party to the other in the course of the oral pro- **102**
ceedings 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, it becomes one of the Court to which Art. 49 applies.[326]

e) Final Submissions

Article 60, para. 2 of the Rules of Court provides that 'at the conclusion of the last **103**
statement made by a party at the hearing, its agent, without recapitulation of the argument, shall read that party's final submissions'.[327] 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.[328] These statements have a tendency to be exactly what Art. 60, para. 2 of the Rules of Court tries to avoid: a recapitulation of the party's argument.[329] The agent does not have to read the party's final submissions in full if he 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.[330] 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.[331]

[321] *Cf. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission of Human Rights*, CR 98/17, 10 December 1998, p. 53.

[322] Art. 1, para. (iii) of the Resolution concerning the internal judicial practice of the Court, adopted on 12 April 1976.

[323] *Cf.* ICJ (ed.), *The International Court of Justice* (4th edn., 1996), p. 55.

[324] Art. 61, para. 4 of the Rules. *Cf.* also ICJ Yearbook (1972–1973), pp. 141–142.

[325] Art. 72 of the Rules. *Cf. e.g. ELSI, supra*, fn. 197, Pleadings, vol III, p. 371.

[326] *Cf.* Tams on Art. 49 MN 16, and, for an example, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf* (Tunisia/Libya), Pleadings, pp. 171 and 189. But note that Tunisia did not regard itself bound to reply to the question.

[327] 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.

[328] *Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, CR 2002/15 (translation), 11 March 2002, p. 2.

[329] *Cf. e.g. Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, 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').

[330] *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).

[331] *Barcelona Traction, supra*, fn. 135, Pleadings, vol. X, pp. 350, 351–364, 365, 669 and 754 (No. 127).

104 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, made a short summary of their position, called 'formal conclusions',[332] and which has been treated by the Court similar to the submissions of a party.[333]

f) Languages Used in Oral Argument

105 Oral argument may be presented in either of the two official languages of the Court, unless the parties have agreed that the case be conducted in one language only.[334] It is not required that all argument be in a single language, nor that all a party's representatives use the same language. 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.[335]

4. Oral Evidence by Witnesses and Experts

a) Right of the Parties to Produce Oral Evidence

106 The parties in contentious proceedings have the right to produce all evidence before the Court by the calling of witnesses and experts. A party must be left to exercise this right as it thinks fit, subject to the provisions of the Court's Statute and Rules. Any attempts to shorten the length of the oral proceedings must find its limits in the right of the parties to adduce all evidence bearing on the matter before the Court.[336] The Court cannot exclude such evidence, unless it is irrelevant or otherwise inadmissible.[337] The right of calling witnesses and experts to testify personally cannot be curtailed by an order of the Court that the party should embody the evidence of witnesses or experts in a properly authenticated deposition or written statement, which would then constitute a full and complete statement of the evidence which such witnesses or experts would have adduced if personally in Court. 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.[338] Such a procedure may be adopted only if the parties agree to it.[339] The parties may also agree not to call any

[332] *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, C 4/CR 91/49, 13 June 1991, pp. 46–47.

[333] *Cf. Land, Island and Maritime Frontier Dispute, supra*, fn. 33, ICJ Reports (1992), pp. 351, 379 (para. 26).

[334] On that possibility *cf.* Kohen on Art. 39 MN 28–30.

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

[336] *Cf.* Art. 48 which distinguishes between the Court's power to decide 'the time in which each party must conclude its arguments' and its power 'to make all arrangements connected with the taking of evidence'. It should also be noted that so far all suggestions to shorten the oral proceedings concerned the 'oral statements made on behalf of the parties', not the taking of evidence.

[337] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 514.

[338] *Cf. South West Africa, supra*, fn. 226, 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. South West Africa, supra*, fn. 226, Pleadings, vol. IX, pp. 122–123.

[339] *Cf. e.g. Kasikili/Sedudu Island, supra*, fn. 70, where a Joint Team of Technical Experts had examined 73 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.

witnesses or experts but, in view of Art. 62, para. 1 of the Rules of Court, such an agreement will not be binding on the Court.[340]

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.[341] Faced with the prospect of a party calling hundreds of witnesses, the Court recently carried out a detailed study of the practical issues involved in hearing a large number of witnesses.[342] The way forward seems to make better use of Art. 63, para. 2 of the Rules of Court which allow 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 Art. 50, or entrust the parties to take the testimony.[343] **107**

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,[344] 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.[345] **108**

b) Persons Giving Oral Evidence

aa) Witnesses

Witnesses give evidence on *matters of fact* within their personal knowledge. They may be called either by a party or by the Court.[346] 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 is supposed to testify.[347] While the Court has never called a witness on its own initiative, the parties have called witnesses on several occasions.[348] 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 **109**

[340] For such an agreement *cf. Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (1994), pp. 112, 114 (para. 8).

[341] In the *South West Africa cases (supra*, fn. 226), 39 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.

[342] Speech by President Guillaume to the UN General Assembly: UN Doc. A/56/PV.32, 30 October 2001, p. 8. Serbia and Montenegro had indicated that it would call hundreds of witnesses in the merits phase of the *(Bosnian) Genocide case, supra*, fn. 79.

[343] *Cf.* PCIJ, Series D, No. 2, 3rd Add., pp. 216–227, 770, 825, 873 and Series D, No. 2, pp. 145–146.

[344] For an analysis by the Court of the expert evidence produced however, *cf. Corfu Channel, supra*, fn. 152, ICJ Reports (1949), pp. 4, 16–17.

[345] *Cf.* Bedjaoui, *Pace Yearbook of International Law* 3 (1991), pp. 29, 45–46; Highet, *AJIL* 81 (1987), pp. 1, 22, and on oral evidence in general, *ibid.*, pp. 20–28.

[346] Art. 62 of the Rules.

[347] *Corfu Channel, supra*, fn. 152, Pleadings, vol. III, p. 250 and ICJ Yearbook (1948–1949), p. 78.

[348] Witness (and experts) were heard in *Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 425–694; vol. IV, pp. 9–468; *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, pp. 331–442; *South West Africa, supra*, fn. 226, Pleadings, vol. X, pp. 88–182, 238–558; vol. XI, pp. 3–708; vol. XII, pp. 3–66; *ELSI, supra*, fn. 197, Pleadings, vol. III, pp. 25–30, 37–64, 122–131, 239–245, 300–304, 313–325. Witnesses only were heard in *Nicaragua, supra*, fn. 167, Pleadings, vol. V, pp. 12–102; *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, Pleadings, vol. VII and C 4/CR 91/34, 29 May 1991.

their statement and may be subjected to cross-examination.[349] Witnesses are not obliged, should the contingency arise, to violate professional secrecy.[350] They have to make the solemn declaration to speak the truth set out in Art. 64 (a) of the Rules of Court. The declaration may be made in a language other than English or French.[351]

110 Witnesses who appear at the instance of the Court are, where appropriate, paid out of the funds of the Court.[352] For that purpose, the Registrar obtains statements of their expenses and causes the amount due to be paid to them.[353] Witnesses called by the parties are paid by the parties.

bb) Experts

111 Experts *express an opinion* upon certain facts on the basis of their special knowledge. The expert position of a person is not limited to that person's field of normal professional qualification. A person can be an expert in any field in which he reveals a special knowledge which is far in excess of that which is normally held by a lay person. 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.[354] Experts may be called both by the Court and the parties.[355] Experts called by a party are more like witnesses than experts in the proper sense of the term, which justifies speaking of these experts as 'witness-experts'.[356] They are usually part of the party's delegation. 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 him 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.[357] The designation of a person as an 'expert' in the party's list of delegation is not determinative of its status in the proceedings. Only the statements of persons having made the solemn declaration to be made by experts laid down in Art. 64 (b) of the Rules of Court are treated as evidence by the Court.[358] Counsel or advisers of a party who, albeit inadvertently, make this declaration, are treated as experts and are therefore available for

[349] *ELSI, supra*, fn. 197, ICJ Reports (1989), pp. 15, 19 (para. 8) and Pleadings, vol. III, pp. 301, 304, 313. In that case the witness will not declare that he 'will speak the truth' but that he has 'spoken the truth'. *Cf.* also Highet, in *Fact-Finding Before International Tribunals, supra*, fn. 186, pp. 33, 64–65.

[350] PCIJ, Series D, p. 211; PCIJ, Series D, No. 2, 3rd Add., pp. 132, 826; PCIJ Series E, No. 3, p. 212.

[351] *Cf. e.g. Land, Island and Maritime Frontier Dispute, supra*, fn. 33, C 4/CR 91/34, 29 May 1991, p. 10.

[352] Art. 68 of the Rules.

[353] Art. 18 of the Instructions for the Registry.

[354] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 515.

[355] Experts (and witnesses) were called by the parties in *Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 425–694; vol. IV, pp. 9–468; *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, pp. 331–442; *South West Africa, supra*, fn. 226, Pleadings, vol. X, pp. 88–182, 238–558; vol. XI, pp. 3–708; vol. XII, pp. 3–66; *ELSI, supra*, fn. 197, Pleadings, vol. III, pp. 25–30, 37–64, 122–131, 239–245, 300–304, 313–325. Experts only were called in *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, pp. 182–198; *Gulf of Maine, supra*, fn. 105, Pleadings, vol. VI, pp. 393–435; *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 197–282.

[356] This notion of 'expert' is evidently far from the continental European definition of an expert. *Cf.* Favoreu, L., 'Récusation et administration de law preuve devant la Cour internationale de justice. A propos des Affaires du Sud-Ouest Africain (Fond)', *AFDI* 11 (1965), pp. 233–277, pp. 264–265.

[357] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 123.

[358] 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, supra*, fn. 152, ICJ Reports (1947–1948), pp. 124, 126; ICJ Reports (1949), pp. 237, 238 and ICJ Yearbook (1948–1949), p. 79; ICJ Yearbook (1959–1960), p. 133.

cross-examination by the opposite party.[359] Experts of a party who are also acting as witnesses of the same party must make both declarations, that for experts and that for witnesses.[360] It is for the party calling a person to determine which declarations he should make.[361] A person who has made both declarations is not required to indicate, as he goes along, whether he is speaking as a witness or as an expert; it is inevitable that a person who is giving evidence as an expert will both deal with facts and express an opinion upon the facts.[362] A person who has made the declaration under Art. 64 of the Rules of Court in a case does not have to repeat that declaration when he is called to testify again.[363]

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 *voire dire* for the purpose of establishing its expertise.[364] 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 *voire dire*.[365] Objections to the qualification of an expert may be raised only 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.[366] **112**

Expenses of experts who appear at the instance of the Court are, where appropriate, to be paid out of the funds of the Court; expenses of experts designated by the parties are to be paid for by the parties. **113**

c) Information on the Oral Evidence to Be Produced

The procedure for the production of oral evidence is laid down in Art. 57 of the Rules of Court which provides that: **114**

> 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.[367]

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.[368] It is, however, not necessary, if not impossible, to inform the party opposite in detail what a witness's evidence is going to be.[369] The parties may

[359] *ELSI, supra*, fn. 197, Pleadings, vol. III, pp. 242, 245 and ICJ Yearbook (1988–1989), pp. 161–162.
[360] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 430–431; *South West Africa, supra*, fn. 226, Pleadings, vol. VIII, p. 58. *Cf.* also ICJ Yearbook (1948–1949), p. 78; ICJ Yearbook (1961–1962), p. 90.
[361] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. XI, p. 455.
[362] *South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 123.
[363] *ELSI, supra*, fn. 197, Pleadings, vol. III, pp. 319, 320.
[364] 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 'voire dire', a French term meaning 'to speak the truth'.
[365] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, pp. 340–341, 345.
[366] *Cf. ibid.*, Pleadings, vol. X, pp. 335, 336, 340–341, 342; vol. XI, p. 456–457.
[367] *Cf.* also Art. 11 of the Instructions for the Registry.
[368] *Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 519–520 (No. 105).
[369] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, pp. 137–138.

indicate that their list is to be regarded as provisional.[370] If the information provided about a witness or expert is not sufficient the other party may request that fuller details be supplied.[371] The Court has 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 has been supplied less than a week before the opening of the hearings;[372] the hearing of the first witnesses and experts was not much thereafter.[373] This practice is regrettable as it deprives the other party of a proper opportunity to establish the credentials of experts and witnesses and to prepare for their cross-examination.[374]

115 If at any time during the hearing a party wishes to call a witness or expert whose name has not been included in the list communicated to the Court pursuant to Art. 57 of the Rules, it must so inform the Court and the other party, and must supply the information required by Art. 57. In this case, the witness or expert 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.[375]

d) Procedure for the Obtaining of Oral Evidence

116 The Statute and the Rules of Court are silent on the procedure to be followed for the hearing of witnesses and experts.[376] The rules of procedure for the obtaining of 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;[377] the procedure for the examination of witnesses and experts rather represents a combination of the procedure in common law and civil law countries.[378] 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.[379]

117 The following procedure for the obtaining of oral evidence has developed in the practice of the Court.[380] The party calling witnesses and experts should, for the convenience of the Court and the other party, either announce in court or inform the other

[370] ICJ Yearbook (1964–1965), p. 88.

[371] *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, C 4/CR 91/34, 29 May 1991, p. 10.

[372] *Cf. Nicaragua, supra*, fn. 167, Pleadings, vol. V, pp. 3, 12, 413–415 (No. 128): two days; *Land, Island and Maritime Frontier Dispute, supra*, fn. 33, 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.

[373] In the *ELSI case (supra*, fn. 197) the first witness was heard only 11 days after the submission of the required information; *cf.* 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.* Pleadings, vol. V, pp. 182, 495 (No. 113), 496–497 (No. 116).

[374] *Cf. Continental Shelf* (Libya/Malta), Pleadings, vol. IV, pp. 519–520 (No. 105).

[375] *Cf.* Art. 63, para. 1 of the Rules. *Cf.* also *Arbitral Award of 31 July 1989* (Guinea-Bissau/Senegal), 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.

[376] *Cf.* Art. 58, para. 2 of the Rules.

[377] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 123.

[378] Sandifer, p. 307.

[379] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, p. 427; *South West Africa, supra*, fn. 226, Pleadings, vol. XI, pp. 460–461; 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, 27 October 1997, p. 4.

[380] The following description of the procedure is based on *Continental Shelf* (Tunisia/Libya), Pleadings, vol. V, p. 496 (No. 115) and p. 182; *South West Africa, supra*, fn. 226, Pleadings, vol. VIII, pp. 46,

party of the witnesses and experts that it intends to call on the following day.[381] If a witness or expert called by a party intends to refer to documents which have not previously been before the Court, the party should inform the other party of the particular documents at the same time as it informs the other party as to the nature of the evidence to be given.[382] Witnesses and experts must, as a rule, remain outside the courtroom before giving evidence.[383] 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 them giving evidence, when no objection has been raised by the other party.[384] Before experts or witnesses takes their place at the rostrum, the President asks the agent or counsel of the party calling the person to indicate to the Court, 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. The person then makes the solemn declaration laid down in Art. 64 of the Rules of Court.

Experts and witnesses are first questioned by one of the representatives of the party **118**
calling them. This may be the agent, a counsel, a technical adviser or an expert counsel (but not another witness-expert).[385] It is for the party concerned to decide in which order it wants to call its experts and witnesses. This sequence must not be identical with the list of witnesses and experts which the party has communicated to the Registrar in accordance with Art. 57 of the Rules of Court.[386] The party is also free in the type of questions it puts to a witness or expert, and in the length of time it spends conducting the examination.

On completion of the examination-in-chief, the other party (but not the intervening **119**
State) is entitled to cross-examine. The question of whether or not to cross-examine is a matter for the party. The cross-examination of a witness or 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 may include questions as to his qualifications as an expert and questions to the substance of his 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 in chief.[387] It is permissible during cross-examination to read to an expert the views of other experts in the field, in order to test his credibility or possible bias. In this case, the expert should be given a copy of the document that is read to him, but any document supplied may not show counsel's observation on the side.[388] The views of others, however, do not in themselves become evidence of the truth or correctness of these views. If the expert agrees

58; vol. X, p. 182 and vol. XI, pp. 454–455, 456, 564; *Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 426–427.

[381] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. VIII, p. 56.

[382] *Cf. South West Africa, supra*, fn. 226, Pleadings vol. X, p. 130. [383] Art. 65 of the Rules.

[384] *Cf. South West Africa, supra*, fn. 226, Pleadings vol. X, pp. 355, 387; *Corfu Channel, supra*, fn. 152, Pleadings, vol. V, p. 220.

[385] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 429–430, 690–691. *Cf.* also Art. 65 of the Rules.

[386] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 173, 174, 184, 474–476: *South West Africa, supra*, fn. 226, Pleadings, vol. VIII, p. 56.

[387] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. XI, p. 564.

[388] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. XI, pp. 298, 566–567.

with somebody else's view which is put to him 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 his own view. But if the expert disagrees with the view put to him, 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 his expertise could not be tested by the party opposite. 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 answers, in his demeanour, or in other circumstances which may afford the Court some guidance as to what weight is to be attached to his evidence.[389]

120 The Court and members of the Court usually put questions to the experts and witnesses after the cross-examination; on occasions, they have done so only at the end of the examinations.[390] The President has also frequently asked (additional, clarifying) questions during the examination of witnesses and experts by counsel.

121 After the cross-examination and after the questions by the Court, the party who calls the witness or 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.

122 After the re-examination, the opposite side once again may be given an opportunity to put any further questions to the witness.[391] 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.[392] After the last examination by the parties, the experts and witnesses are usually asked to remain available (generally for another day) for possible further questions by the Court or its members, following their study of the evidence in the verbatim record. After they have been released, witnesses and experts may stay in the courtroom when other witnesses and experts are being heard, unless directed otherwise by Court.[393]

123 The Court gives the parties wide latitude in putting questions to the witnesses and experts. Objections raised by a party to questions put by the other party to a witness or expert have largely been unsuccessful. Objections may be raised against 'leading questions' which suggest to the witness the answer which counsel is hoping to receive,[394] questions concerning facts of which the witness has no knowledge, or questions concerning a legal interpretation or requiring a legal conclusion,[395] 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.[396] If, on any

[389] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. XII, pp. 357–359, 418–420.

[390] *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, pp. 434–442. *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. VIII, p. 58.

[391] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, pp. 519–520, 655–656; *South West Africa, supra*, fn. 226, Pleadings, vol. XI, p. 67.

[392] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, p. 185 and vol. IV, p. 231.

[393] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, p. 520; *South West Africa, supra*, fn. 226, Pleadings, vol. VIII, p. 58. *Cf.* also ICJ Yearbook (1985–1986), p. 168.

[394] *Corfu Channel, supra*, fn. 152, Pleadings, vol. III, p. 186; *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, pp. 332–333, 361; *South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 123.

[395] *Cf. ibid.*, Pleadings, vol. XI, pp. 26, 556, 586.

[396] *Temple of Preah Vihear, supra*, fn. 66, Pleadings, vol. II, pp. 365–366; *South West Africa*, Pleadings, vol. X, p. 178.

particular matter, the person who is giving an expert opinion has not qualified as an expert, again objection may be taken to it.[397] 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.[398] Objections to evidence or the relevance of evidence must be made in open Court and not by correspondence to the Registry.[399] 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, the value of the evidence may fall to nil or fall to little.[400]

124 Counsel may interrupt the examination of a witness or expert by counsel opposite at any time if questions put to the witness or expert and his answers are wrongly or not fully translated,[401] if statements put to the witness or expert are incorrectly or incompletely cited, or if the witness's or expert's own previous evidence is mis-reported by counsel examining him, if counsel questioning the expert or witness puts several questions to him at once rolled up into one statement,[402] or if the witness or expert is not answering the questions put to him. The President may interfere both with the questioning of witnesses and 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.[403]

e) Languages Used for Oral Evidence

125 Experts and witnesses may provide evidence in languages other than English and French.[404] The party calling the expert or witness must make the necessary arrangements for the statement of its expert or witness to be interpreted into one of the two official languages of the Court. The interpretation into the first official language is made consecutively by the party's interpreter. This interpretation is translated simultaneously into the other official language by the Court's interpreters.[405] 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.[406]

5. Documents Part of the Oral Proceedings

126 In addition to any new documents which the parties want to submit in the course of the oral proceedings in accordance with Art. 56 of the Rules of Court and any further documents which the Court and individual judges may ask the parties to supply,[407] there are certain kinds of documents that may be considered documents peculiar to the oral proceedings.

[397] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 123.
[398] *Cf. ibid.*, Pleadings, vol. XI, p. 600–601.
[399] *Cf. ibid.*, Pleadings, vol. VIII, p. 60.
[400] *Cf. ibid.*, Pleadings, vol. X, pp. 107, 122, 123, 349; vol. XI, pp. 460–461, 646.
[401] *Cf. Corfu Channel, supra*, fn. 152, Pleadings, vol. III, p. 506; vol. IV, p. 275.
[402] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. XI, pp. 297–298.
[403] *Cf. e.g. ibid.*, Pleadings, vol. XI, pp. 201, 451.
[404] *Cf.* Art. 70, para. 2 of the Rules and further Kohen on Art. 39 MN 24–25, 38–39.
[405] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. VIII, p. 58.
[406] *Cf.* Art. 17, para. 2 of the Instructions for the Registry. *Cf.* also ICJ Yearbook (1948–1949), p. 80; ICJ Yearbook (1985–1986), p. 168; ICJ Yearbook (1990–1991), p. 179.
[407] For such document requests by the Court and individual judges *cf. e.g. North Sea Continental Shelf, supra*, fn. 32, Pleadings, vol. II, pp. 162, 212 and ICJ Yearbook (1968–1969), p. 112.

a) Documents in Illustration of Oral Evidence

127 New documents may be introduced into the proceedings at the oral stage by way of a witness or expert referring to them during their testimony. Experts have frequently supported their opinions by reading into the record newspaper cuttings, 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. The party calling witnesses and experts has presented to them documents (such as plans, maps, marine charts, or an album of photographs); a copy of which, however, must be handed first to the other party.[408] These documents have subsequently been filed with the Registry. Such documents are not put in evidence as 'further documents' in the sense of Art. 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.[409] It is for the Court to decide what value it wants to attach to these documents.

128 A document referred to by a witness or 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 witness to decide. The party cross-examining may ask the witness anything it wishes about the document itself, but it does not thereby become part of the documentation.[410]

b) Documents in the Judges' Folders

129 The Court has asked 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.[411] The parties have responded to this request by preparing 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 time-lines 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, 30 copies (20 for the members of the Court, and 10 for the party opposite) are provided to the Registry prior to the hearing in which they are used.[412] The judges' folders prepared by the parties to illustrate their oral argument are not reproduced in the 'ICJ Pleadings' series.

130 No new documents may be produced in the judges' folder unless the procedure in Art. 56 of the Rules of Court is complied with.[413] If a new document is produced in

[408] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. X, p. 340.

[409] *Cf. Land, Island and Maritime Frontier Dispute, supra*, fn. 33, C 4/CR 91/34, 29 May 1991, p. 23. On Art. 56 of the Rules *cf. supra*, MN 61–62.

[410] *Cf. South West Africa, supra*, fn. 226, Pleadings, vol. XI, p. 191, 200.

[411] *Border and Transborder Armed Actions* (Nicaragua/Honduras), Pleadings, vol. II, p. 83.

[412] *Cf. e.g. Continental Shelf* (Tunisia/Libya), Pleadings V, pp. 494–495 (No. 112), p. 500 (No. 125).

[413] On that procedure *cf. supra*, MN 61–62.

the judges' folders, the other party must, as the new document has been communicated to it through the Registry, lodge a formal objection if it does not want to be held to have given its consent to the production of the document. Even if the other party has no objection to the production of the new document, it should point to the fact that the document in question is new and reserve its right under Art. 56, para. 3 of the Rules of Court to comment upon the new document and to submit documents in support of its comments if need be.

c) 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. 131

d) Thematic Index to Written and Oral Proceedings

In recent years, parties have also adopted the practice of submitting 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.[414] 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. They are not allowed to contain any comment whatsoever. 132

6. Closure of the 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 it might need.[415] The 'closure of the oral proceedings' is another important cut-off date in the procedure, after which certain actions are precluded.[416] Since 1978, the Rules of Court provide in Art. 72 for the possibility of the oral proceedings being re-opened in order to give the parties, if necessary, an opportunity to comment orally on replies given by the other party to questions put to it by the Court or by individual judges. 133

D. Procedure in Incidental Proceedings on Preliminary Objections

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 134

[414] *Maritime Delimitation and Territorial Questions, supra*, fn. 52, 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 between Cameroon and Nigeria, supra*, fn. 33, CR 2002/25 (translation), 21 March 2002, pp. 28–43 (Thematic index to the written pleadings and oral argument of the Republic of Cameroon).

[415] Art. 54, para. 1; and *cf.* Fassbender on Art. 54 MN 9–10; Berman on Art. 42 MN 8. From the Court's jurisprudence *cf. e.g. Fisheries Jurisdiction* (Spain/Canada), Pleadings, p. 629.

[416] *Cf.* Art. 69, para. 1, Art. 74, para. 3 of the Rules of Court. On the jurisprudence of the PCIJ and the first decision of the ICJ with respect to preliminary objections, *cf.* Degan, V.D., 'Preliminary Objections in the Hague Court's Contentious Procedure: A Re-Examination', *IJIL* 10 (1970), pp. 425–458.

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. Between 1946 and 2004, preliminary objections were raised, or considered by the Court to have been raised, in 39 cases.[417] In recent years, in particular, the Court has seen a proliferation of preliminary objections, most of them well-founded but some coming close to an abuse of the process of the Court. The Statute is silent on the question of preliminary objections. A provision on this matter was first included in the Rules of Court in 1926,[418] and it is now regulated in Art. 79 of the Rules.

I. Requirements for Preliminary Objections

1. Form of the Objections

135 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'. It is a matter for consideration by the Court whether a communication constitutes a preliminary objection within the meaning of Art. 79 of the Rules or a refusal, amounting to a default, to appear before the Court.[419] 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.[420]

136 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

[417] Preliminary objections were raised in *Corfu Channel; Rights of Nationals of the United States of America in Morocco* (not decided, objections later withdrawn); *Ambatielos; Anglo-Iranian Oil Co.; Nottebohm* (objection was not formally raised but treated by Court as such); *Monetary Gold Removed from Rome in 1943; Certain Norwegian Loans; Right of Passage over Indian Territory; Interhandel; Aerial Incident of 27 July 1955* (Israel/Bulgaria); *Aerial Incident of 27 July 1955* (United States of America/Bulgaria) (not decided, case discontinued); *Barcelona Traction, Light and Power Company, Ltd.* (not decided, case discontinued); *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient* (not decided, case discontinued); *Temple of Preah Vihear; South West Africa; Northern Cameroons; Trial of Pakistani Prisoners of War* (objection was not formally raised but treated by Court as such); *Nicaragua* (objection was not formally raised but treated by 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); *Certain Phosphate Lands in Nauru; Oil Platforms; Lockerbie* (Libyan Arab Jamahiriya/United Kingdom); *Lockerbie* (Libyan Arab Jamahiriya/United States of America); *Genocide* (Bosnia and Herzegovina/Yugoslavia), *Land and Maritime Boundary between Cameroon and Nigeria; Legality of Use of Force* (Serbia and Montenegro/Belgium); *Legality of Use of Force* (Serbia and Montenegro/Canada); *Legality of Use of Force* (Serbia and Montenegro/France); *Legality of Use of Force* (Serbia and Montenegro/Germany); *Legality of Use of Force* (Serbia and Montenegro/Italy); *Legality of Use of Force* (Serbia and Montenegro/Netherlands); *Legality of Use of Force* (Serbia and Montenegro/Portugal); *Legality of Use of Force* (Serbia and Montenegro/United Kingdom); *Genocide* (Croatia/Yugoslavia), *Certain Property; Ahmadou Sadio Dillo; Territorial and Maritime Dispute* (Nicaragua/Colombia).

[418] Art. 38 of the 1926 Rules of Court.

[419] On the latter, *cf.* von Mangoldt/Zimmermann on Art. 53, *passim*.

[420] *Cf. Nottebohm, supra*, fn. 114, ICJ Reports (1953), p. 7 and 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. 162–169. *Cf.* also *Nicaragua, supra*, fn. 167, ICJ Reports (1984), pp. 392, 425 (para. 76) and ICJ Reports (1984), pp. 169, 187 (para. 7); *Trial of Pakistani Prisoners of War* (Pakistan/India), ICJ Reports (1973), pp. 328, 329–330 (para. 16).

merits. A preliminary objection must not necessarily be made in a self-contained document. As the wording of Art. 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.[421]

2. Possible Objectors

According to Art. 79, para. 1 of the Rules, preliminary objections may be raised both by the respondent and by 'a party other than the respondent'. 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 filing a preliminary objection in special circumstances. The raising of a question of jurisdiction by the applicant is not equivalent to a notice of discontinuance of the proceedings.[422] However, the expression '*party* other than the respondent' is limited to the applicant and a State permitted to intervene as a party;[423] a State permitted to intervene under Art. 62 or Art. 63 as a kind of *amicus*[424] does not qualify as a *party* and is thus not entitled to file a preliminary objection.[425] **137**

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 preliminary objection; such an objection will usually concern the interpretation of the special agreement.[426] **138**

3. Grounds of Preliminary Objection

Preliminary objections may be based on three different grounds: lack of jurisdiction, inadmissibility of the application, or any other objection of a preliminary character.[427] Neither the Court nor the parties have always made a clear distinction between the various grounds. It is, however, important to make such a distinction as paras. 2, 3 and 8 of Art. 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. **139**

Objections to the jurisdiction of the Court may be based on the claim that the applicant does not have access to the Court under Art. 35, paras. 1 and 2 of the Statute, because it is not a party to the Statute of the Court nor in any other way entitled to institute proceedings before the Court. The Court may lack jurisdiction (*ratione* **140**

[421] *Cf. The Pajzs, Csáky, Esterházy case* (Preliminary Objections), PCIJ, Series A/B, No. 66, pp. 4, 7–9 and PCIJ, Series E, No. 16, p. 177 concerning a document entitled 'Counter-Memorial . . . including the formal submission of an objection . . . '; *Northern Cameroons, supra*, fn. 90, ICJ Reports (1963), pp. 15, 17.

[422] *Cf. Monetary Gold, supra*, fn. 69, ICJ Reports (1954), pp. 19, 30 and ICJ Yearbook (1953–1954), p. 118.

[423] *Cf.* Villani, U., 'Preliminary Objections in the New Rules of the International Court of Justice', *Ital. Yb. of Internat L* 1 (1975), pp. 206–221, p. 211 (author's fn. 12).

[424] *Cf. Land, Island and Maritime Frontier Dispute, supra*, fn. 33, ICJ Reports (1990), pp. 90, 135–136 (para. 99).

[425] *Contra* Thirlway, 'Law and Procedure, Part Twelve', p. 33, 128 (author's fn. 333). For further information about the status of intervening States *cf.* Chinkin on Art. 62 MN 75–85; *id.* on Art. 63 MN 40 and 51–52.

[426] *Cf. The Borchgrave case* Preliminary Objections, PCIJ, Series A/B, No. 72, pp. 158, 160–161 and PCIJ, Series D, No. 2, 3rd Add., p. 820.

[427] On the various grounds for objections, *cf.* Abi-Saab, pp. 49–200; Herczegh, pp. 406–420. For further comment on Art. 79 of the Rules *cf.* Tomuschat on Art. 36 MN 102 *et seq.*

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 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, for example, it falls within the domestic jurisdiction of the party); or that the dispute is covered by a reservation of the applicant's declaration.

141 'Admissibility' is not defined in the Rules.[428] An application can be inadmissible on a number of grounds. The respondent may, for example, 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 no longer has any object, *i.e.* is moot, relates to a non-existent right or duty, or is not of a legal nature within the meaning of the Statute;[429] 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; 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.

142 The third ground serves as a catch-all provision and leaves the Court broad discretion to dispose of a case before any further proceedings on the merits. The respondent may, for example, argue that the dispute brought before the Court involves other aspects of which it is not seized; 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.[430]

4. Timing for Making Objections

143 On 5 December 2000, the Court amended para. 1 of Art. 79 of the Rules in order to shorten the period of time within which preliminary objections can be raised. While until then, the respondent could file such objections 'within the time-limit fixed for the delivery of [its] Counter-Memorial', it now has to do so 'as soon as possible, and not later than three months after the delivery of the Memorial.'[431] Any other party may still file its preliminary objections within the time limit fixed for the delivery of its 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.[432]

[428] *Cf.* further Tomuschat on Art. 36 MN 113 *et seq.*

[429] For comment on these issues *cf.* Tomuschat on Art. 36 MN 8–18.

[430] The classification in MN 140–142 is largely based on ICJ (ed.), *The International Court of Justice* (4th edn., 1996), p. 58.

[431] The new rule was first applied in *Certain Property, supra*, fn. 197, ICJ Reports (2001), pp. 565, 566, where the Court expressly noted that its Art. 79, para. 1 of its Rules, in its version applicable with effect from 1 February 2001, would be applicable.

[432] *Aerial Incident of 3 July 1988, supra*, fn.34, ICJ Reports (1989), pp. 132, 134. *Cf.* also the views of the parties in that case, Pleadings, vol. II, pp. 631–639. In the *Interhandel case, supra*, fn. 121, the United States

5. Waiver of the Right to Make Objections

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.[433] 144

II. Effects of Preliminary Objections

1. Incidental Proceedings on the Objections

According to Art. 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, a party automatically brings about the suspension of the proceedings on the merits only by labelling and filing an objection expressly as a preliminary one. 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.[434] 145

Originally, the submission of a preliminary objection was assimilated to the institution of new, separate proceedings and treated like an application.[435] In 1952, the Court decided that in future preliminary objections would only be treated as a distinct phase of the proceedings on the merits, and no longer as an entirely separate case. In consequence, 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.[436] Secondly, the document raising a preliminary objection which often deals with matters closely affecting the merits of the case, unlike an application, will not be distributed to all States parties to the Statute of the Court and will be treated as a confidential document, like all other pleadings. Thirdly, preliminary objections will not be entered in the General List with a separate number. Fourthly, judges *ad hoc* appointed to hear cases on the merits need not make a new solemn declaration for the hearing of the preliminary objection.[437] 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.[438] 146

2. Hearing of Objections within the Framework of the Merits

If the parties agree that a formal preliminary objection lodged by one of them under Art. 79, para. 1 of the Rules be heard and determined within the framework of the merits, the 147

filed a preliminary objection ten days after the filing of the application, *cf.* Pleadings, p. 77. For the view that preliminary objections must be filed 'after' the presentation of the memorial, *cf. e.g. Fisheries Jurisdiction* (United Kingdom/Iceland), ICJ Reports (1972), pp. 181, 185 (paras. 4–5) (Joint Diss. Op. Bengzon and Jiménez de Aréchaga). But *cf.* also Jiménez de Aréchaga, *AJIL* 67 (1973), pp. 1, 19.

[433] *Arrest Warrant, supra*, fn. 68, ICJ Reports (2001), pp. 559, 562.

[434] *Barcelona Traction, supra*, fn. 135, ICJ Reports (1964), pp. 6, 43. On suspension as an automatic consequence *cf.* also Villani, *supra*, fn. 423, pp. 206, 210–211.

[435] For the situation until 1952 *cf.* the Sixteenth Report, PCIJ, Series E, No. 16, pp. 178, 179, 190.

[436] For the number of copies *cf.* above MN 21.

[437] Further on this issue *cf.* Khan on Art. 20 MN 7–8.

[438] ICJ Yearbook (1953–1954), p. 118 and ICJ Yearbook (1954–1955), p. 98. For critical comment *cf.* Dugard on Art. 13 MN 15–18.

Court must join the objections to the merits.[439] This provision was added to the Rules of Court in 1972. However, prior to this addition, the Court, taking into account the understanding of the parties, had already joined preliminary objections to the merits.[440]

III. Incidental Written Proceedings

1. Written Statement of Preliminary Objection

148 The written statement of preliminary objections is the first pleading submitted in the incidental proceedings.[441] The statement is to be filed by the objector within the time limit set out in Art. 79, para. 1 of the Rules. It shall contain:

(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

149 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 to 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.[442] Article 79, para. 5 of the Rules sets out content requirements, symmetrical to those for the preliminary objections.[443] The statement of observations and submissions shall contain:

(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.

[439] Art. 79, para. 1 of the Rules. This was done in the *ELSI* and *East Timor cases*.

[440] *Norwegian Loans, supra*, fn. 66, ICJ Reports (1956), pp. 73, 74.

[441] Art. 79, para. 7 of the Rules refers to the preliminary objection as one of the 'pleadings'.

[442] *Anglo-Iranian Oil Co., supra*, fn. 285, ICJ Reports (1952), pp. 13, 14. *Cf.* also Prager, *supra*, fn. 17, pp. 155, 174.

[443] *Cf. supra*, MN 148. Judge *ad hoc* Kreča speaks of 'asymmetrical relations' between paras. 4 and 5 of Art. 79 Rules of Court. 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. *Cf.* para. 54 of his separate opinion appended to the judgment of 15 December 2004 in the *Legality of the Use of Force case* (available at http://www.icj-cij.org).

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 without undue delay. The Practice Directions now prescribe that the time limit shall generally not exceed four months *from the date of the filing of the preliminary objections*.[444]

3. Further Written Statements

The Court may authorize the objector, under Art. 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.[445] **150**

IV. Incidental Oral Proceedings

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.[446] In practice, however, the Court has never rendered a decision on preliminary objections without holding oral hearings. **151**

Oral proceedings are conducted on the same lines as proceedings on the merits. The party which raised the objections is called upon to speak first.[447] 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.[448] The Court, more than once, has had occasion to request the parties to confine their arguments to the objections.[449] **152**

V. Disposal of Preliminary Objections

1. Upholding of the Objections

The Court disposes of the preliminary objections in the form of a judgment.[450] 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 **153**

[444] Practice Direction V (as amended on 30 July 2004), as at 30 July 2004 (text in italic indicates amendment). The four-month time limit was initially introduced in January 2001 (ICJ Press Release No. 2001/1 of 12 January 2001). The amendment was to clarify that the four-month period runs from the date of the filing of the preliminary objections.

[445] *Cf. Phosphates in Morocco* Preliminary Objections, PCIJ, Series A/B, No. 74, pp. 10, 20–21; Series C, No. 85, pp. 1373–1374 and Sixteenth Report, PCIJ, Series E, No. 16, p. 189.

[446] ICJ Yearbook (1951–1952), p. 99 (with regard to *Rights of National of the United States of America in Morocco*; there were in fact no oral proceedings as the preliminary objections were withdrawn).

[447] ICJ Yearbook (1977–1978), p. 107. *Cf.* also PCIJ, Series E, No. 3, p. 207; PCIJ, Series D, No. 2, 3rd Add., p. 824.

[448] Art. 79, para. 8 of the Rules. *Cf.* also Practice Direction VI (para. 2) as at 30 July 2004, and subparagraph F of the Note Containing Recommendations to the Parties to New Cases, as modified in January 2001.

[449] *Cf. e.g. Anglo-Iranian Oil Co., supra*, fn. 285, ICJ Pleadings, p. 499; *Ambatielos* (Greece/United Kingdom), Pleadings, p. 304.

[450] Art. 79, para. 9 of the Rules.

claims untouched.[451] The case may be resumed later, once the ground on which the preliminary objection was upheld no longer applies (for example, where domestic remedies have been exhausted to no avail).

2. Rejection of the Objections

154 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.[452] 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.[453] 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.[454] The rejection of an objection to jurisdiction signifies that the Court has jurisdiction; this however does not preclude subsequent argument as to the scope of that jurisdiction[455] or a subsequent challenge to jurisdiction on other grounds.[456]

3. Declaration that the Objections Are Not Exclusively Preliminary

155 Originally, the Court could either 'give its decision on the objection or . . . join [all or part of] the objection to the merits.'[457] Joinder of the preliminary objections to the merits was to be decided whenever the interests of the good administration of justice so required, whenever any decision on the preliminary objections would raise 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.[458] The Court availed itself of this possibility on several occasions.[459]

156 In 1972, the possibility to join an objection to the merits was deleted from the Rules of Court.[460] 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. This was regarded as an unnecessary prolongation of an expensive and time-consuming procedure.[461] Under Art. 79, para. 9 of the present Rules, the Court can no

[451] *Cf. e.g. Nauru, supra*, fn. 66, ICJ Reports (1992), pp. 240, 268–269 (para. 72 (3)).

[452] Art. 79, para. 9 of the Rules. [453] Torres Bernárdez on Art. 48 MN 31.

[454] 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, in Peck/Lee, *supra*, fn. 163, pp. 127, 135.

[455] *Cf. Fisheries Jurisdiction* (Federal Republic of Germany/Iceland), ICJ Reports (1974), pp. 175, 189–190 (paras. 34–40)

[456] For the problem of a possible implicit waiver of further objections to jurisdiction, *cf. Rights of Minorities in Upper Silesia (Minority Schools)*, PCIJ, Series A, No. 15, pp. 22–26.

[457] This provision was first introduced in Art. 62, para. 5 of the 1936 Rules of Court.

[458] *The Panevezys-Saldutiskis Railway case*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 53, 56.

[459] *Cf. Barcelona Traction, supra*, fn. 135, ICJ Reports (1964), pp. 6, 47 (third and fourth objection joined, others rejected); *Right of Passage, supra*, fn. 114, 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 Objections, PCIJ Series A/B, No. 66, pp. 4, 9; *The Losinger & Co. case*, Preliminary Objection, PCIJ, Series A/B, No. 67, pp. 15, 25; *The Panevezys-Saldutiskis Railway case*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 53, 56. [460] On the change to the Rules, *cf. Villani, supra*, fn. 423, pp. 206, 214–219.

[461] *Cf. Nicaragua, supra*, fn. 167, ICJ Reports (1986), pp. 14, 30 (para. 39).

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.'[462] But, the change of the Rules in 1972 was intended to be not just cosmetic but substantive.[463] Under the old Rules, the Court would order a joinder whenever 'the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended . . .), or without prejudging the merits before these have been fully argued.'[464] This is no longer necessary. According to Art. 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 the merits) in order to enable it to determine its jurisdiction at the preliminary state of the proceedings. Rather than carrying the preliminary objections over into the merits phase, questions of fact and law touching the merits are now brought forward into the jurisdictional phase, to dispose of the objections at the earliest possible stage in the proceedings. It was suggested by one of the judges involved in the revision of the Rules that, in view of Art. 79, para. 8, any objection to the jurisdiction of the Court was, by definition, one which always possessed an exclusively preliminary character which 'must' be resolved in the incidental proceedings.[465] However, this is going too far. While the Court may hear argument at the preliminary stage of the proceedings on questions of fact and law touching the merits, it may not decide or prejudge the merits or some part thereof at that stage.[466] Thus, under the present Rules, objections should be decided at the preliminary stage wherever reasonably possible: *in dubio preliminarium eligendum*. 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 three occasions. Not of an exclusively preliminary character were, in the circumstances of the cases, declared to be: an objection to jurisdiction based on a multilateral treaty reservation,[467] an objection based on the mootness of the claim on the basis of events subsequent to the filing of the application,[468] and an objection that a boundary delimitation would affect the rights of third States.[469]

If the Court finds that an objection does not possess, in the circumstances of the case, **157**
an exclusively preliminary character, the principal proceedings will be resumed and the Court will fix the necessary time limits. Any further pleadings are to deal with both the objections and the merits. It is therefore advisable for the respondent to raise any

[462] On how to establish whether an objection has an exclusively preliminary character, *cf.* Thirlway, 'Law and Procedure, Part Twelve', pp. 37, 144–157.

[463] *Cf.* Jiménez de Aréchaga, *AJIL* 67 (1973), pp. 1, 16.

[464] *Barcelona Traction, supra*, fn. 135, ICJ Reports (1964), pp. 6, 43.

[465] Lachs, pp. 21, 31 with regard to Art. 67, para. 6 of the 1972 Rules.

[466] *Cf.* Jiménez Aréchaga, *AJIL* 67 (1973), pp. 1, 12–13, 17; Dupuy, *supra*, fn. 301, pp. 265, 276.

[467] *Nicaragua, supra*, fn. 167, ICJ Reports (1984), pp. 392, 425 (para. 76) and *ibid.*, ICJ Reports (1986), pp. 14, 31 (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).

[468] *Lockerbie*, *supra*, fn. 35, ICJ Reports (1998), pp. 9, 28–29 (para. 50) and *ibid.*, pp. 115, 133–134 (para. 49). For criticism of this wide interpretation of the notion of 'not exclusively preliminary', *cf. ibid.*, pp. 47–50 and pp. 139–142, respectively (joint declarations of Judges Guillaume and Fleischauer).

[469] *Land and Maritime Boundary between Cameroon and Nigeria, supra*, fn. 33, ICJ Reports (1998), pp. 275, 322–325 (paras. 112–117).

preliminary objection not in its counter-memorial, but in a separate document. This will allow the respondent two shots at these inextricably linked questions.

4. Withdrawal of the Objections

158 If the preliminary objections are withdrawn before the Court can give its decision, the Court, or if it is not sitting its President, makes an order recording the discontinuance of the preliminary objection proceedings in accordance with Art. 89 of the Rules of Court.[470] As 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 Art. 89—does not direct the removal of the case from the list but simply records that the proceedings on the merits, suspended by the objection, are resumed and, if applicable, fix time limits for the filing of further pleadings.[471]

VI. Separate Proceedings on Jurisdiction and Admissibility Distinguished

159 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,[472] 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),[473] 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.

160 In December 2000, the Court added a new para. 2 to Art. 79 of the Rules 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 expressly opposed by the applicant.[474] The respondents were thus forced to raise preliminary objections.

[470] *Cf.* further Torres Bernárdez on Art. 48 MN 57–61; Wegen, Discontinuance, MN 54–62.

[471] *Rights of Nationals of the United States of America in Morocco* (France/United States of America), ICJ Reports (1951), p. 109 and ICJ Yearbook (1951–1952), p. 99. *Cf.* also *The Borchgrave case supra*, fn.426. PCIJ, Series A/B, No. 72, pp. 158, 170 (noting the withdrawal of the second preliminary objection).

[472] *Border and Transborder Armed Actions, supra*, fn. 411, ICJ Reports (1986), pp. 551, 552; *Maritime Delimitation and Territorial Questions, supra*, fn. 52, ICJ Reports (1991), p. 50; *Fisheries Jurisdiction* (Spain/Canada), ICJ Reports (1998), p. 432, 435 (para. 4); *Aerial Incident of 10 August 1999* (Pakistan/India), ICJ Reports (2000), pp. 12, 16 (para. 4); *Armed Activities on the Territory of the Congo* (Congo/Burundi), ICJ Reports (1999), pp. 1018, 1019; *Armed Activities on the Territory of the Congo* (Congo/Rwanda), ICJ Reports (1999), pp. 1025, 1026. But *cf.* also *Nicaragua, supra*, fn. 167, ICJ Reports (1984), pp. 169, 187 (para. 41[D]) and ICJ Reports (1984), pp. 392, 395 (para. 4).

[473] *Fisheries Jurisdiction* (United Kingdom/Iceland), ICJ Reports (1972), pp. 181, 182 and *Fisheries Jurisdiction* (Federal Republic of Germany/Iceland), ICJ Reports (1972), pp. 188, 189; *Pakistani Prisoners of War, supra*, fn. 420, ICJ Reports (1973), pp. 328, 330 (para. 16); *Nuclear Tests* (Australia/France), ICJ Reports (1974), pp. 253, 255 (para. 6); *Nuclear Tests* (New Zealand/France), ICJ Reports (1974), pp. 457, 459 (para. 6); *Aegean Sea, supra*, fn. 219, ICJ Reports (1978), pp. 3, 5 (para. 7).

[474] *Cf. e.g. Legality of the Use of Force* (Yugoslavia/United Kingdom), ICJ Reports (1999), p. 1009; ICJ Yearbook (1998–1999), p. 296.

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)[475] and order of filing of the 'pleadings' as to jurisdiction and admissibility and fixes the time limits within which they are to be filed.[476] The order has been variable. Both the party asserting jurisdiction and the party denying it have been ordered to file the first pleading (and have been ordered to speak first during the oral proceedings).[477] **161**

E. Evaluation

In the mid-1990s, on the occasion of the Court's fiftieth anniversary and triggered by the increased number of cases before it, reform of the Court's procedure became a major issue in the academic debate and was moved high up on the Court's agenda.[478] Many suggestions, some more realistic and helpful than others, have been made to increase the effectiveness and productivity of the Court, its so-called 'throughput'. Some of these proposals have now found their way into the new Practice Directions and in the recent amendments of the Rules of Court, others are still awaiting their realization. The Court's handling of procedural questions within the confines of Art. 43 is, however, only one factor bearing upon its throughput. Budgetary constraints and, above all, the co-operation of the parties in the functioning of justice are not to be neglected: it is, after all, the parties who request extended periods for the filing of their pleadings and frequently ask for extension of the time limits fixed, it is they who present voluminous pleadings, amounting on occasion to several thousand pages, it is they who may call witnesses and experts to testify before the Court, and it is they who make lengthy and repetitive presentations. **162**

The problem with any suggestions to improve the Court's procedure is the diversity of cases before the Court; what may be appropriate for 'single-issue-cases', such as those on consular protection, may not be appropriate for a highly complex, multi-faceted boundary dispute. Suggestions such as fixed six-month time limits for the filing of pleadings; the limitation of the number of pleadings; maximum page limits for memorials and counter-memorials of, for instance, 200 pages and for any further pleadings of, for example, 150 pages; strict time limits of half-an-hour or so for the oral presentation by individual agents and counsel seem largely impracticable.[479] The basic flaw with all these suggestions is that they cannot be formulated as rigid rules; even their proponents **163**

[475] The only exception in that regard was *Maritime Delimitation and Territorial Questions, supra*, fn. 52, where the Court permitted the filing of a Reply and Rejoinder. A request by Spain for a second round of pleadings was denied in the *Fisheries Jurisdiction case* (Spain/Canada).

[476] Art. 79, para. 3 of the Rules.

[477] *Cf.* Prager, *supra*, fn. 17, pp. 155, 168–177.

[478] *Cf. e.g.* Bowett, D.W., *et al.*, 'The International Court of Justice: Efficiency of Procedure and Working Methods. Report of the Study Group established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law', *ICLQ* 45 (1996), Supplement; republished with additions as Bowett, D.W. *et al., The International Court of Justice. Process, Practice and Procedure* (1997); Peck/Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997); Couvreur, P., 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of Disputes', in Muller *et al. ICJ*, pp. 83–116; 'Process, Practice and Procedure of the International Court of Justice', *ASIL Proc.* 92 (1998), pp. 278–290; Orrego Vicuña, F./Pinto, C., 'The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century', in *The Centennial of the First International Peace Conference. Reports and Conclusions* (Kalshoven, F., ed., 2000), pp. 261–418.

[479] For these and other suggestions, *cf.* Highet, in Peck/Lee, *supra*, fn. 163, pp. 127, 131–134, 141–142.

provide for exceptions in 'exceptional circumstances' or limit them from the outset to 'normal circumstances'. The parties, however, will always argue that their situation or case is 'truly exceptional'. Would the Court ever deny an extension of a time limit if a settlement or discontinuance was in the offing? Another problem with some of the proposals is that they draw on experience in the US Supreme Court or the European Court of Justice. It is, however, important to compare like with like.[480] Cases before these courts will normally be in effect on appeal from another court, which has already dealt with the factual and evidential side. All these cases before the ICJ on the other hand are of first instance and do not only require an analysis of the law but also an establishment of the relevant facts.

164 When considering changes to the Court's procedure, it should not be underestimated that the parties before the Court are sovereign States. It has been suggested that it was 'time to move away . . . from undue deference to the litigants by virtue of their rank as sovereign States' and that the Court 'should change the legal culture that underlies its dealings with its clients.'[481] The problem with this suggestion is that the Court's 'clients' are just not normal clients. Moving too fast and too far may leave the Court without many clients as in the 1960s and 1970s. The settlement of inter-State disputes by the Court is as much a judicial as a political process. This must be borne in mind, for example, when considering the length and value of oral proceedings, with their recital of prepared speeches that more often than not repeat what is already in the pleadings. Any undue limitation of the oral proceedings will deny the parties their 'day in court'. In more than one sense, justice must not only be done, it must be *seen and heard* to be done.[482] Especially in disputes that touch upon sensitive domestic political issues (such as territorial disputes or disputes touching upon the question of the death penalty), the speeches are as much addressed to the members of the Court as they are to the wider audience at home. Only if the parties (and the general public at home) are convinced that they were able to present their case fully and in the best way possible to convince the judges (both orally and in writing), will they be prepared to accept and carry out a final judgment that does not go in their favour. Another aspect that is often neglected is the fact that the Court's procedure and its stately pace affords governments the possibility of being able to put off the solution to a thorny political problem for as long as desired, or at least gives them a certain 'cooling-off period'. The Court, however, is not an arbitral tribunal set up to settle a particular dispute only, it is the principal judicial organ of the United Nations, open to all States for the settlement of their disputes. It thus has to bear in mind not just the interests of the parties to a particular case, but of States in general. The Court must be able to offer timely justice to all who come to it. It is this circle of different interests any future changes to the procedure of the Court must square.

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[480] Jennings, *supra*, fn. 98, pp. 1, 13–14.
[481] Higgins, pp. 121, 124.
[482] *Cf.* Jennings, *supra*, fn. 98, pp. 1, 14–15.