INTERNATIONAL LAW ASSOCIATION

PROCEDURE OF INTERNATIONAL COURTS AND TRIBUNALS

INTERIM REPORT

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I. Introduction

This is an Interim Report submitted by the Committee on the Procedure of International Courts and Tribunals ('the Committee') to the 78th Biennial Conference of the International Law Association. The mandate of the Committee is twofold: 1) to identify and analyse procedural issues arising in the practice of inter-State international courts and tribunals; and 2) to formulate proposals for procedural reform for the consideration of those courts and tribunals. Three broad areas of procedure were selected for consideration: 1) case management; 2) jurisdictional objections; and 3) evidence. Four fora were selected: 1) the International Court of Justice ('ICJ' or 'the Court'); 2) the International Tribunal for the Law of the Sea ('ITLOS' or 'the Tribunal'); 3) inter-State arbitration, particularly under the auspices of the Permanent Court of Arbitration ('PCA'); and 4) the World Trade Organization Dispute Settlement System ('DSS').

At its first meeting held on 20 January 2017 at the British Institute of International and Comparative Law in London, the Committee chose to publish its working documents in the interests of transparency, but to apply the 'Chatham House Rule' to its deliberations and to keep confidential the summary records of its meetings in order to encourage free debate. In line with its Mandate, the Committee decided to concentrate first on the ICJ and the ITLOS before shifting its focus to inter-State arbitration and the DSS, comparatively examining common issues while sequentially tailoring proposals to each institution. The Committee formed subgroups to investigate these common issues and wrote to the Registrars or Secretaries-General of the four institutions to solicit topics to examine. Replies were received from the institutions and the Committee has continued its dialogue with them.

At its second meeting of 22-23 September 2017 held at the Max Planck Institute for Procedural Law in Luxembourg, the Committee considered this Report at first reading and identified specific issues for further discussion by individual comment using virtual technology. At its third meeting of 16-17 March 2018 held at the Max Planck Institute in Luxembourg, the Committee examined and debated this Report at second reading. A third draft was adopted by the members without prejudice to their individual views on particular issues.[1] This was duly communicated it to ILA Headquarters on 1 May 2018 for submission to the Conference. For statistical purposes, the period of review is the past twenty years (from the judicial year 1997-1998 to that of 2016-2017) and the cut-off date is 1 September 2017.

The structure of this Report tracks the three aforementioned broad areas of inquiry. These are subdivided into specific topics, organised in a loosely chronological manner according to the sequence of contentious procedure and containing brief descriptions of problems identified and the solutions proposed. For background, analysis and citation underpinning these proposals, readers are referred to the Preliminary Report of 1 September 2017 published on the Committee webpage. For succinctness, the procedures and jurisprudence of the ICJ and the ITLOS are taken together, while acknowledging their institutional differences. Comparisons are drawn, where appropriate, with inter-State arbitration and the WTO DSS.

[1] The following members actively participated in the deliberations: Professor Alain Pellet, Professor Matthew Happold, Dr James Devaney, Professor Andrea Gattini, Professor Serena Forlati, Professor Lorenzo Gradoni, Dr Francisco Pascual-Vives, Professor Alfred Soons, Professor Chiara Giorgetti, Professor Jeffrey Dunoff, Professor Gabrielle Marceau, Professor Christian Tams, Professor Mariko Kawano, Ms Loretta Malintoppi, Ms Davinia Aziz, Mr Shashank Kumar, Dr Christopher Ward, Dr Enrique Hernández Sierra, Professor Makane Mbengue, Dr Illy Ousseni, Professor Paula Almeida, Professor Davorin Lapaš, Dr Joanna Gomula, Mr Stratis Georgilas, Dr Marina Trunk-Fedorova, Dr Stephan Wittich, Ms Alexia Solomou, Ms Maria Louca, Dr Noemi Gal-Or, Professor David Ruzie, Professor Stephan Schill, Professor Yuval Shany, Professor Manuel de Almeida Ribeiro, Professor Pereira Coutinho, Ms Louise Reilly, Professor Gilad Noam, Ms Etleva Haka, Professor Milenko Kreća.

As this Report is an interim one, the approach of the Committee has been to offer ideas for further debate; on certain issues, for example, multiple options are set out without preference. The proposals set out in this Report remain subject to review. The intent of this approach is to invite comments from the professional community with a view to enriching the further work of the Committee as it adopts conclusions for its Final Report in August 2020.

II. Case Management

A. Case Management Conferences

For the ICJ, the Committee propose the standardisation of timings for the existing practice of holding at least two case management conferences on procedural matters under the direction of the President.[2] Such conferences should be informal, using remote communication technology as appropriate, for speed and convenience. The Committee recommend that the first conference be held within one month of the initiation of proceedings and that another conference be held within one month of the closure of the written phase, initial deliberations having taken place beforehand to enable the President to consult. This would not preclude additional conferences at earlier stages to address procedural matters such as joinder of proceedings or the exercise of fact-finding powers. This reform could be codified by amendment to Article 31 of the ICJ Rules; the ITLOS could also consider a similar reform.

In line with the proposed reforms below, the first conference could deal with manyprocedural matters such as: 1) fixing of time-limits and page limits for written pleadings; 2) need for a jurisdiction and admissibility phase; 3) summary dismissal of application; 4) joinder of proceedings and/or parties; and/or 5) fact-finding and evidence, including requests for the production of evidence. The second conference could determine: 1) adoption of a list of issues, an agreed statement of facts, dates and speaking-times for the hearings; 2) applications to intervene and requests for copies of pleadings; 3) requests for the production of evidence; 4) organisation of evidence at the hearings; and/or 5) the exercise of fact-finding powers (i.e. – expert evidence, inquiries, site visits).

A. Summary Dismissal

Whereas Article 40(1) of the ICJ Statute vests parties with the right to file applications for summary dismissal, there is no right for applications to be admitted to the General List. After an application is entered onto the List, the Court may summarily dismiss it for manifest want of jurisdiction; this procedure has no textual basis in either the Statute or the Rules but has been invoked since the *Nuclear Tests Cases*.[3] A notable example of where the exercise of this power was both applied and withheld were *The Legality of the Use of Force Cases*.[4] The vagueness of the modalities for summary dismissal inhibits predictability.

The Committee propose that a new Article 38(5)*bis* be considered for inclusion in the ICJ Rules to codify removal from the List of a manifestly unmeritorious application or the summary dismissal of particular claims contained in an application for manifest lack of jurisdiction.[5] The new provision could specify that the application or particular claims must be manifestly lacking

[2] ICJ Rules, Arts 31, 54(1); ITLOS Rules, Art 45.
[3] *Nuclear Tests (New Zealand v. France)(Australia v. France)(Provisional Measures)(Order of 22 June 1973)* [1973] ICJ Rep. 99, 100 (para. 6); 135, 136-137 (para. 7), 141-142 (paras 32-34).
[4] *Legality of the Use of Force (Yugoslavia v. Spain)(Provisional Measure), Order of 2 June 1999,* [1999] ICJ Rep. 761, at 768-783 (paras 19-33); *Legality of the Use of Force (Yugoslavia v. United States of America)(Provisional Measure), Order of 2 June 1999,* [1999] ICJ Rep. 916, at 923-925 (paras 19-33).
[5] E.g. – *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Burundi)(Order of 30 January 2001)* [2001] ICJ Rep. 3, at 4.

in jurisdiction at the point of application[6] with a time-limit for requests to dismiss; the parties would submit brief comments at the first case management conference. Applications summarily dismissed could be capable of re-introduction.

The ITLOS position differs in that Article 294(1) of the UNCLOS provides for summary dismissal of abusive and/or ill-founded applications by an Article 287 body, on application or *proprio motu*. Article 96 of the ITLOS Rules specifies the procedure for the exercise of this power, providing for a time-limit of two months for *proprio motu* exercise (paragraph 3) and case-by-case fixing of deadlines by order for applications (paragraph 2), a time-limit of sixty days for written observations (paragraph 5) in addition to oral proceedings (paragraph 6).

B. Suspension of Proceedings

Parties before the ICJ and ITLOS may discontinue the proceedings at any point up to the date of the promulgation of the judgment on the merits, either by agreement or upon application in the absence of objection.[7] The permissive terms of the Rules ascribe to the Court and the Tribunal a 'ministerial function'.[8] Discontinuance of a case by settlement is an important function, as it can promote the satisfactory settlement of the dispute to which the contentious case contributes.

To facilitate settlement negotiations, the Committee suggest that the Court and the Tribunal consider amendments to Articles 88 of the ICJ Rules and 105 of the ITLOS Rules to create a procedure for time-limited suspension, which may be renewed by joint agreement.[9] To further this, the Court and the Tribunal could also consider the following measures: 1) exhorting the parties at the case management conference upon the closure of the written phase to consider entering into settlement negotiations prior to the scheduling of the oral hearings; or 2) the adoption of a formal 'conciliation procedure' [10] whereby the parties could enter into confidential negotiations upon the closure of the written phase to explore settlement. As parties may wish to keep secret the fact that they are negotiating, the Court or the Tribunal could also suspend the proceedings by a confidential order. These procedures could promote case settlement while enabling the Court and the Tribunal to manage their dockets.

[6] E.g. – *Case Concerning Legality of the Use of Force (Serbia and Montenegro v. United Kingdom)(Preliminary Objections)(Judgment)*, [2004] ICJ Rep. 1307, at 1322 (para. 34). See also, however, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)(Preliminary Objections)(Judgment)* [2008] ICJ Rep. 412, at 437-444 (paras 78-91); 'Document entitled "Application for revision of the Judgment of 26 February 2007 in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)"', ICJ Press Release No. 2017/12 (09 March 2017).

[7] ICJ Rules, Arts 88-89; ITLOS Rules, Arts 105-106.

[8] Wegen, 'Discontinuance and Withdrawal' in Zimmerman *et al.* (Eds), *The Statute of the International Court of Justice: A Commentary* (2012), 1447-1468, at 1450.

[9] No. 7 *Sustainable Conservation and Exploitation of Swordfish Stocks in the South-East Pacific (Chile v. European Community)(Order of 16 December 2009)*, at paras 9-14. In *Legality of the Use of Force*, to facilitate negotiations the Court granted two twelve-month extensions to the time-limit for observations on the preliminary objections, but ultimately proceeded to judgment. The WTO time-limit is twelve-months due to the case leaving the docket at the end of that period.

[10] E.g. – WTO Dispute Settlement Understanding, Art. 5.

C. Default

Following multiple high-profile inter-State arbitrations[11] and one ITLOS provisional measures proceedings,[12] the problem of default or 'non-participation' has again become topical.[13] Though Articles 53(2) ICJ Statute and 28 ITLOS Statute preclude default judgment, the term 'well-founded' does not (and, in practice, cannot) oblige the Court and the Tribunal to handle the proceedings in the same way as an ordinary case. Whereas parties are not obliged[14] to exercise their procedural rights, the Court cannot do so in their stead. The conduct of the defaulting party is based upon their rejection of the Article 36(6) ICJ Statute and Article 288(4) UNCLOS rule of *compétence de la compétence*, their treaty status notwithstanding.[15]

Whereas default cases remain relatively rare, they are typically high-profile and raise complex procedural problems. The Committee propose the following measures for default cases:

> 1) Acceleration of the proceedings by the full Court or Tribunal through the disposing of equal allocations of time for written pleadings and/or the omission of oral argument; and
>
> 2) acknowledgement of irregular communications from the defaulting party to the panel concerning procedural matters[16] in procedural orders and judgments while refusing to give weight to views expressed therein by the defaulting party on procedural matters (e.g. – on applications to intervene by third States) in light of the waiver by the defaulting party of the exercise of its procedural rights.[17]

These proposals could be adopted through judicial practice rather than Rules amendments and would not apply in the event of the defaulting party electing to participate.

D. Composition of the Panel

1. Chambers

Whilst there has been recurring debate concerning the desirability of *ad hoc* and standing chambers,[18] in practice they are infrequently used at the Court. Unlike *ad hoc* chambers,

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[11] PCA Case No. 2014-02 *The Arctic Sunrise Arbitration (The Netherlands v. Russia)(Award on Jurisdiction of 26 November 2014)*, at paras 9, 13, 19, 32; PCA Case No. 2013-19 *South China Sea Arbitration (The Philippines v. China)(Award on Jurisdiction and Admissibility of 29 October 2015)*, at paras 37-41, 112-129; PCA Case No. 2012-04 *Arbitration between Croatia and Slovenia (Croatia v. Slovenia)(Partial Award of 30 June 2016)*, at para. 37 *et seq*.

[12] No. 22 *The "Arctic Sunrise" Case (Netherlands v. Russia)(Provisional Measures)(Order of 22 November 2013)* [2013] ITLOS Rep. 230, at 232 (para. 9 *et seq*.). See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)(Judgment of 5 October 2016)*, at 5-6 (paras 3, 8).

[13] ICJ Statute, Art. 53; ITLOS Statute, Art. 28.

[14] Institut de Droit International, 'Non-Appearance before the International Court of Justice' (Resolution, 4th Commission, 1991), Preamble.

[15] See also UN Charter, Arts 2(2), 33(1), 94(1). This rule has been argued to not be 'absolute'; see, e.g. – Aguilar Mawdsley, 'La Jurisdicción Contenciosa de la Corte Internacional de Justicia' in *El derecho internacional en el mundo en transformación: Liber amicorum Eduardo Jiménez de Aréchaga* (1994)(Vol. II), 1099-1128 at 1126-1127. Mr. Walters (United States of America), 28 October 1986, U.N. Doc. S/PV.2718, pp. 44-46.

[16] This does not encompass 'position papers' or other published documents that contain the party's views on substantive matters.

[17] ICJ Statute, Art. 42(1); ICJ Rules, Arts 31, 40(1); ITLOS Rules, Arts 45, 52; *South China Sea Arbitration*, *supra* note 11, at paras 13-14, 17, 42, 51, 97-104, 142; *Arctic Sunrise Arbitration*, *supra* note 11, at para. 68. Should the parties settle the case in circumstances in which one party is in default, this should be recorded as unilateral discontinuance rather than by settlement – *United States Diplomatic and Consular Staff in Tehran (Order of 12 May 1981)* [1981] ICJ Rep. 45, 47.

[18] Calls for greater use of chambers were made in the *Counsel Survey* – Crawford and Keene, 'Editorial', 7(2) *Journal of International Dispute Settlement* (2016), 225-230, at 226, 229.

standing chambers based upon subject-matter have hitherto failed to take root.[19] Articles 26(2) of the ICJ Statute[20] and Section E of the ICJ Rules are silent on the composition of *ad hoc* chambers. Parties generally prefer to have influence on the composition of the panel, as evinced by the trend towards the greater use of arbitration in recent years (e.g. – per Annex VII of the UNCLOS) in spite of the greater financial expense entailed.[21] In the Special Agreement in the *Gulf of Maine Case*,[22] the Parties reserved for themselves the right to jointly nominate the members of the *ad hoc* Chamber and to discontinue the case if the Chamber were not so constituted; the Court accepted the Special Agreement and the Chamber was thus constituted.

The procedure for the selection of chamber panels is critical to parties' perceptions of impartiality.[23] The Committee propose the adoption of a new Article 90*bis* to Section E of the Rules whereby the Court would 'determine, in consultation with the parties, the Members who are to constitute the chamber'.[24] This approach tracks the existing approach in judicial practice, as the Court are unlikely to depart from the expressed preferences of parties. Whereas the Committee consider that a residual discretion ought to remain to overrule the parties (even if unlikely to be exercised in practice) it notes that Article 15(2) of the ITLOS Statute requires that a chamber be constituted with the 'approval' of the parties. This precludes harmonisation of the ICJ and ITLOS procedures to enable parties considering their choice of forum under Part XV of the UNCLOS to consider the two institutions, alongside arbitration, on equal terms with respect to composition of panel.

2. Judges ad hoc

The time-limit of 'no later than two months before the time-limit fixed for the Counter-Memorial'[25] for the communication of the identity of judge *ad hoc* to the Court and Tribunal is not synchronised with the revised time-limit for the filing of preliminary objections of three months after the filing of the Memorial at the Court and ninety days after the filing of the Application at the Tribunal. The Committee proposes that this time-limit be amended to fix the timing for notification of the identity of judges *ad hoc* as no earlier and no later than the time-limit for the filing of the Memorial on jurisdiction/admissibility or the merits. This would also synchronise it with the proposed time-limits for intervention.[26]

[19] ICJ Statute, Art. 26(1); ITLOS Statute, Art. 15. None of the three ITLOS standing chambers – whose composition is exclusively determined by the Tribunal – have been used to date: 1) Chamber for Fisheries Disputes (9 members); 2) Chamber for Marine Environment Disputes (9 members); 3) Chamber for Maritime Delimitation Disputes (11 members). The Chamber for Environmental Matters formed by the ICJ between 1993 and 2006 was likewise never utilised.

[20] Article 26(2) does, however, provide: 'The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.'

[21] Recent arbitral tribunals have comprised Members of both the ICJ and ITLOS –

[22] *Delimitation of the Maritime Boundary in the Gulf of Maine Case (Canada v. United States of America)(Merits)(Judgment)* [1984] ICJ Rep. 246, at 252 (para. 3); Special Agreement – Compromis, Arts I-III. This was the first-ever use of an *ad hoc* chamber in the history of the Court.

[23] *Frontier Dispute (Benin v. Niger)(Order of 27 November 2002)* [2002] ICJ Rep. 613, Declaration of Judge Oda, at 615; *Land, Island and Maritime Frontier (El Salvador v. Honduras, Nicaragua Intervening)(Application for Revision)(Order of 27 November 2002)* [2002] ICJ Rep. 618, Declaration of Judge Oda, at para. 5.

[24] Two of the five contentious cases brought before the Tribunal to date have featured *ad hoc* chambers composed of five judges – *Case Conerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union)*; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*.

[25] ICJ Rules, Art. 35(1); ITLOS Rules, Art. 19(1).

[26] Section II(F)(2), *infra*.

3. Joinder of Parties

The proposed amendment of Article 47 of the Rules on joinder[27] carries important implications for the composition of the panel.[28] Whereas the Court has previously joined multiple States as Co-Applicants per Article 31(5) of the ICJ Statute,[29] it has never joined multiple States as Co-Respondents. Where joinder is ordered, the joined parties must jointly select the judge *ad hoc* to sit on the panel; Article 37 of the ICJ Rules does not address the scenario of multiple joined parties each having nationals as Members of the Court.[30]

Neither Article 31(5) of the ICJ Statute nor Article 36 of the ICJ Rules addresses the problem of an imbalance in the composition of the panel where joinder is *not* effected. Inequalities in the composition of panels of parallel proceedings arose in the *Legality of the Use of Force Cases*[31] and *Nuclear Disarmament Cases*.[32] This scenario has not yet arisen at the ITLOS.

Due to the sensitivity of the composition of the panel, particularly in high-profile multilateral proceedings, a balanced panel is critical, notwithstanding that each Member of the Court or the Tribunal is obliged to be independent[33] and that judges do not necessarily vote for their States of nationality or nomination in practice. There are two potential methods of balancing: 1) enlargening the panel by allowing for more judges *ad hoc*; [34] or 2) shrinking the panel by requiring judges to withdraw.[35] The problem is further complicated by the right of Members of the Court and the Tribunal of the nationality of any of the parties to sit on the panel.[36]

The Committee propose amendment to Articles 36 of the ICJ Rules and 20 of the ITLOS Rules to prescribe mechanisms for balancing in cases of both joinder of parties and the hearing of cases in common where the parties have multiple nationals as Members of the Court or the

[27] Section II(F)(1), *infra*.
[28] *Contra Lockerbie*, *infra* note 69, Joint Declaration of Judges Bedjaoui, Guillaume and Ranjeva (at 40-43, para. 17). See also the rather vague conclusions of the Institut de Droit International, 'Judicial and Arbitral Settlement of International Disputes Involving More Than Two States' (Resolution, Berlin, 1999), at paras 5-6.
[29] E.g. – *South West Africa Cases (Ethiopia v. South Africa)(Liberia v. South Africa)(Joinder of Cases and Appointment of Judge* ad hoc*)(Order)* [1961] ICJ Rep. 13. See also *North Sea Continental Shelf Cases (Denmark v. Germany)(Germany v. Netherlands)(Order)* [1968] ICJ Rep. 9.
[30] The first case before the PCIJ saw four Applicants have nationals who were Members of the Court and who sat on the panel – *Case of the S.S. "Wimbledon" (Great Britain, France, Italy and Japan v. Germany)*, PCIJ Series A, No. 01, Judgment of 17 August 1923, at 15. This scenario had not been envisaged – PCIJ Rules of Court of 24 March 1922, PCIJ Series D, No. 01, Art. 4; 'Acts and Documents Concerning the Organisation of the Court: Preparation of the Rules of Court', PCIJ Series D, No. 2, 118-119, 455.
[31] *Legality of the Use of Force*, *supra* note 6, at 1314 (para. 16). The Court rejected the request for joinder and ruled that the judges *ad hoc* appointed by four of the Respondents (who had already sat on the panels in the provisional measures phase) would not be permitted to sit on the preliminary objections phase without prejudice to the merits phase; the Respondents still had a seeming advantage in that the seven panels included three Members of the Court who were nationals of Respondents, as opposed to one judge *ad hoc* appointed by the Applicant.
[32] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)(Judgment of 5 October 2016)*; *Nuclear Disarmament (Marshall Islands v. Pakistan)*, note 12, *supra*; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)(Judgment of 5 October 2016)*. Nationals of two of the three Respondents (India and the United Kingdom) were Members of the Court; as the proceedings were separate, the two judges sat on each of the three panels. The three Respondents opposed the same prayers for relief and raised the same jurisdictional objections. There was thus an apparent inequality between the Applicant and the Respondents; the Applications were dismissed in each case by a vote of 9-7.
[33] ICJ Statute, Art. 2; ITLOS Statute, Art. 2(1).
[34] *Legality of the Use of Force Cases*, *supra* note 6, Separate Opinion of Judge *ad hoc* Kreća, at 1439-1451 (paras 67-79), esp. 1446-1448 (paras 73-74. See, however, his distinction between 'parties of the same interest' and joinder at 1440-1442 (para. 69).
[35] ICJ Statute, Art. 24(3); ITLOS Statute, Art. 8.
[36] ICJ Statute, Art. 31(1); ITLOS Statute, Art. 17(1).

Tribunal. Where joinder is ordered, the Members concerned would determine amongst themselves – potentially through the good offices of the President – which of them is to exercise their right to self-recuse 'for some special reason'.[37] Where cases are heard in common, each Member should sit on the panel before which the State of his nationality appears, but not on the other panels. Through these prescribed rules, panels would be automatically balanced without the need for a special decision during cases. This would also avoid very large panels resulting from the appointment of more judges *ad hoc*.[38]

E. Participation of Third States

Intervention entails the entry by a third State into pending proceedings without becoming party to them.[39] There are two forms of intervention: 1) Article 62 ICJ Statute intervention by application on the basis of a 'legal interest' in the case;[40] and 2) Article 63 ICJ Statute intervention by right of a party to a treaty.[41] Whereas an Article 62 intervenor 'does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court',[42] an Article 63 intervenor is bound by the construction of the treaty rendered by the judgment.

1. Joinder of Parties

Joinder of parties, as distinct from joinder of proceedings, arises when a State applies to join a case as a new party. As there is no textual basis for this, it has hitherto been treated by the Court as a form of Article 62 intervention ('intervention as party').[43] Intervention as party is subject to the consent of the (other) parties.[44] In the *Land and Maritime Dispute Case*, Honduras made two applications to intervene, as party and alternatively as non-party; the Court held that intervention as party requires both a jurisdictional basis at point of application and an engaged 'right' whereas intervention as non-party needs only a 'legal interest'.[45]

The distinction between joinder of a new party and intervention is that the former is premised upon rights or claims of the third State that are central to the proceedings,[46] whereas the latter

[37] ICJ Statute, Art. 24(1); ITLOS Statute, Art. 8(2).
[38] See also the use of the singular case 'a judge' – ibid.
[39] *Territorial and Maritime Dispute (Nicaragua v. Colombia)(Application by Honduras for Permission to Intervene)(Judgment)* [2011] ICJ Rep. 420, at 436 (para. 46).
[40] ICJ Statute, Art. 62; ICJ Rules, Art. 81; ITLOS Statute, Art. 31; ITLOS Rules, Art. 99.
[41] ICJ Statute, Art. 63; ICJ Rules, Art. 82; ITLOS Statute, Art. 32; ITLOS Rules, Art. 100.
[42] *Land Island and Maritime Frontier Dispute (El Salvador v. Honduras)(Application by Nicaragua for Permission to Intervene)(Judgment)* [1990] ICJ Rep. 92, at 136 (para. 102) cited in *Nicaragua v. Colombia (Application by Honduras for Permission to Intervene)*, *supra* note 39, at 432 (para. 29).
[43] In the *Land, Island and Maritime Frontier Dispute Case*, Nicaragua applied under Article 62 to intervene as a party, citing the indispensable third-party principle in support. The Chamber granted the application to intervene as non-party while rejecting the argument of Nicaragua that its legal interest formed part of the 'very subject matter of the decision' – *supra* note 42, at 122 (para. 73), 135 (para. 99).
[44] *El Salvador v. Honduras (Application by Nicaragua for Permission to Intervene)*, *supra* note 42, at 134-135 (para. 99); *Territorial and Maritime Dispute (Nicaragua v. Colombia)(Application of Honduras for Permission to Intervene)(Judgment)* [2011] ICJ Rep. 420, at 432 (para. 28).
[45] *Territorial and Maritime Dispute (Nicaragua v. Colombia)(Application of Honduras for Permission to Intervene)(Judgment)* [2011] ICJ Rep. 420, at 430-438 (paras 20-48). See also the Dissenting Opinion of Judge Donoghue (at 484-485, paras 34-38). See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)(Application of Costa Rica for Permission to Intervene)(Judgment)* [2011] ICJ Rep. 348.
[46] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)(Preliminary Objections)(Judgment)* [1954] ICJ Rep. 19, at 32. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)(Merits)* [2002] ICJ Rep. 303, at 421 (para. 238).

enables the participation of third States whose legal interests are ancillary to them.[47] If a third State were to be *entitled* to join the proceedings as party, the case cannot be heard without its consent.[48] The approach of Honduras in the *Land and Maritime Dispute Case* is understandable from the perspective of litigation strategy, yet conflates two discrete concepts: a *right* based on the indispensable third-party principle and a *legal interest* that is not.[49] This scenario could arise in the jurisdiction and admissibility phase, wherein the Court would either find that it lacks jurisdiction due to the rights of the third State being central to the case (*Monetary Gold*) or vice-versa (*Land, Island and Maritime Frontier Dispute*).

The Committee recommend that the Court amend Articles 47 and 81 of the ICJ Rules to clarify the distinction between joinder as party and intervention. Article 47 could provide that a State may invoke a right to join proceedings subject to two criteria: 1) a jurisdictional basis; and 2) an engaged legal right or claim. Should its application be granted, the State would acquire the status of a party, including the right to introduce new claims and to appoint a judge *ad hoc*, while being bound by the judgment. Article 81 could state that intervention requires only that the State demonstrate the existence of a legal interest in the case and that the intervenor is not entitled to the procedural rights of a party,[50] yet is also not bound by the judgment. New parties should also contribute to costs as required, whereas intervenors should not. Third States would thus have a bifurcated choice: 1) to join as a *party*; or 2) to intervene as a *non-party*.

To further this distinction, the Committee suggest that the Court remove the criterion of 'jurisdictional basis' currently specified by Article 81. Article 81 could also define the phrase 'precise object of the intervention' to make clear that it can include an interest in the development of the law, but not an application for a legal remedy. For example, a State asserting communal standing[51] would be a new party, whereas a State interested in the development of general international law at issue in the proceedings would be an intervenor.

Due to the jurisdictional implications of joinder of new parties, Article 47 of the ICJ Rules could stipulate a time-limit (e.g. – 60-90 days from the filing of application) for applications to join as new party. This would reflect the reality that a State applying to join is effectively raising a jurisdictional objection to the proceedings without their participation. Should the application be granted, the time-limit for the appointment of a judge *ad hoc* (if applicable) by the new party would accord with that for the other parties. Should the application be contested, it would be addressed as a jurisdiction/admissibility proceeding;[52] this approach would further sharpen the distinction between the rationales of intervention and joinder as new party.

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[47] E.g. – *Pulau Ligitan and Pulau Sipidan (Intervention)*, *infra* note 61, Separate Opinion of Judge *ad hoc* Weeramantry, at 643-647 (paras 24– 29). See also *Jurisdictional Immunities of the State (Germany v. Italy)(Application of Greece for Permission to Intervene)(Order of 4 July 2011)* [2011] ICJ Rep. 494, at 501-502 (paras 24-26).

[48] IDI Resolution, *supra* note 28, at paras 19-21. See further *Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. United States of America)(Jurisdiction and Admissibility)(Judgment)* [1984] ICJ Rep. 392, at 430-431; *East Timor (Portugal v. Australia)(Preliminary Objections)* [1995] ICJ Rep. 90, at 102.

[49] The definition of 'interest of a legal nature' in *Territorial and Maritime Dispute (Nicaragua v. Colombia)(Application by Costa Rica for Permission to Intervene)(Judgment of 4 May 2011)* [2011] ICJ Rep. 348, at 358 (para. 36).

[50] *Territorial and Maritime Dispute (Intervention)(Judgment)*, *supra* note 45, at 432 (para. 29), 434 (para. 37).

[51] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts 2001, Art. 48.

[52] The party applying to join should have the right to appoint a judge *ad hoc* in the jurisdiction/admissibility proceedings, as the judgment concerns an asserted right.

2. Intervention and *Amicus Curiae*

The Committee consider there to be persuasive policy grounds for enabling third States to submit their views on the 'general development of the law' (e.g. – a customary rule at issue in the case), not only to seek legal remedies. However, the Committee acknowledge the need for such a mechanism to be limited in order to keep the proceedings orderly and efficient. The Committee put forward two proposals: 1) lowering the threshold of 'legal interest' for the purpose of Article 62 intervention; and 2) the creation of a new mechanism (e.g. – '*amicus curiae*') distinct from intervention.

The first proposal could be enacted through judicial practice[53] in the application of Article 81(2)(a) of the ICJ Rules. A useful amendment to Article 85(3) of the ICJ Rules would render participation by Article 62 intervenors in the oral hearings subject to the decision of the Court rather than automatic. On this approach, the degree of participation of third States could be tailored to the intensivity of the 'legal interest' that they seek to assert: for example, a third State seeking to make its views known on relatively narrow and/or minor issues could be granted the right to intervene in writing only and potentially subject to a word limit.

As the second proposal would introduce a new category of participation, it could be legislated through a new Article 86*bis* in the ICJ Rules. Third States wishing to submit brief views on 'the development of the law' could be enabled to do so by right in writing only, filing their brief by the closure of the written phase. Though the Court would not be bound to take their briefs into account, this would be an alternative mechanism for third States to participate in the event that they fail to meet the time-limit for applications to intervene, as proposed below. *Amici curiae* would have no right to request access to the pleadings before their publication.

Since Article 31(3) of the ITLOS Statute renders judgments binding upon intervenors, it is not possible to completely distinguish between joinder and intervention in the ITLOS Rules. Nonetheless, the Committee advise that the Tribunal amend Article 103(3) of its Rules to afford intervenors the right to appoint judges *ad hoc* and to object to discontinuance, as the existing position makes intervention highly unattractive.[54] Since there is no practice on intervention at the Tribunal and it is unlikely that there will be such practice in the near future, adoption of an *amicus curiae* mechanism through adoption of a new Article 104*bis* to the ITLOS Rules would be particularly welcome to facilitate participation by third States (e.g. – to express views on particular provisions of the UNCLOS and/or custom).

Whilst several individuals expressed interest in expanding participation for non-State actors in the *Counsel Survey*,[55] recent practice indicates that there is no appetite for this even at the ITLOS,[56] which has no such constraint under its Statute. Whereas the Committee propose below that the Court call witnesses more pro-actively as a means of including non-State actors,

[53] The case-law of the Court is not clear-cut on the point, yet seems to suggest that 'legal interest' requires a link to a concrete and existent claim that is indirectly connected to the case – *Territorial and Maritime Dispute (Nicaragua v. Colombia)(Application by Honduras for Permission to Intervene)(Judgment)* [2011] ICJ Rep. 420, at 434 (para. 37).

[54] See, however, the requests by Benin and Togo for copies of the pleadings in the *Atlantic Ocean Case*, *infra* note 105, at paras 42, 46.

[55] Crawford and Keene, *supra* note 18, at 229.

[56] See further, e.g. – No. 22 *The "Arctic Sunrise" Case (Netherlands v. Russia)(Provisional Measures)(Order of 22 November 2013)* [2013] ITLOS Rep. 230, at 234 (paras 15-18); *Arctic Sunrise Arbitration*, *supra* note 11, at paras 35-40.

it has decided to keep under review the question of non-State actors as *amicus curiae* due to the debate concerning interpretation of Article 34 of the ICJ Statute.

3. Time-limits

The time-limits for Article 62 applications to intervene are the closure of the written phase at the Court[57] and thirty days after the Counter-Memorial becomes available at the Tribunal.[58] The position differs for Article 63 interventions, made by declaration,[59] which must be filed by the date fixed for the opening of the oral proceedings.[60] The Court has never rejected an application for tardiness.[61] The laxity of this deadline prolongs the merits proceedings by interjecting a deadline for the *commencement* of incidental proceedings at a juncture wherefrom the merits cannot proceed to the oral phase.

The mean average duration of the four Article 62 intervention proceedings in the period under review was eight months in total (four months written phase, one month oral phase and three months decision).[62] If granted, an additional delay (typically of 1-2 months) to the opening of the oral phase results from an additional round of written pleadings. An intervention arriving after what may be multiple rounds of pleadings spanning a number of years is likely to be regarded by the parties as an unwelcome interruption.

While remaining under review due to the potential for the content of the Application to be incomplete, the Committee suggest that Article 81(1) of the ICJ Rules could be amended to require applications to intervene to be filed in accordance with the time-limit for the filing of the Memorial. In the event that the Application is vague or incomplete, the Court could demand that the Applicant amend it to clarify it. Since applications and orders fixing time-limits for written pleadings are published by the Court through its website, a putative intervenor would have at least six months in which to consider their position. Should the application to intervene be granted, the time-limit for the filing of written observations could be fixed at six months to coincide with the filing of the Counter-Memorial. Alternatively, the third State could file a short brief as *amicus curiae*.

Should a party object to an Article 62 application, the Court could decide the matter concurrently with the progression of the case on the merits, omitting oral argument.[63] For example, the Court could fix a time-limit of two months for the filing of written pleadings and render its decision by the end of the following four months, synchronising with the filing of

[57] ICJ Rules, Art. 81(1).
[58] ITLOS Rules, Art. 67(1).
[59] Declarations of intervention may nonetheless be ruled inadmissible. See, e.g. – *Military and Paramilitary Activities in and around Nicaragua (Declaration of Intervention by El Salvador)(Order of 4 October 1984)* [1984] ICJ Rep. 215, at 216.
[60] Rules, Art. 82(1). *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening)(Declaration of Intervention by New Zealand)* [2013] ICJ Rep. 3, at 4 (declaration filed 20 November 2013, closure of written phase 9 March 2013).
[61] E.g. – *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v. Malaysia)(Intervention)(Judgment of 23 October 2001)* [2001] ICJ Rep. 575, at 583-586 (paras 19-26), esp. 585-586 (paras 21-23).
[62] Each of Article 62 applications to intervene within the period of review featured applications filed at a late stage, i.e. – shortly before the closure of the written stage.
[63] In the period under review, intervention proceedings generated a mean average of 103 pages of written pleadings (as opposed to 292 pages in preliminary objections cases and 1912 pages in merits cases) and a mean average of 7 hours of oral argument (versus 12 hours and 26 hours, respectively).

the Counter-Memorial. Should the application be granted, the intervenor could be provided with a short time-limit (e.g. – two months) in which to file its written observations and the parties could comment on them at the hearings. Were counter-claims to be filed, then the time-limit for applications to intervene could be two months thereafter; where the admissibility of the counter-claims and/or applications to intervene are contested, these could be decided by written argument in order to coincide with the filing of the Counter-Memorial.

Should the Court dismiss the application at the preliminary objections phase, no requests to intervene would arise. Were the Court to find the application to be admissible, the application to intervene could still be decided by the time-limit for the filing of the Counter-Memorial on the merits. The time-limit for the filing of Article 63 declarations could also be aligned with the Counter-Memorial rather than the opening date of the hearings,[64] thereby providing more time to parties to incorporate the pleadings of Article 63 intervenors into their oral arguments. In light of the differing rules on intervention at the Tribunal, there is no need for their time-limits to be revised.

4. Access to Pleadings

Successful intervenors have the automatic right to view all pleadings per Article 85(1) of the ICJ Rules. Though there is 'no inextricable link' between the two procedures,[65] a potential intervenor may apply to be furnished with the written pleadings and documents filed by the parties. Whereas the clause 'to a State entitled to appear before it' in Article 53 of the ICJ Rules suggests that pleadings should be provided *after* intervention is granted,[66] in practice the Court grants access to the pleadings beforehand unless one of the parties objects.[67] In light of the proposed change to the time-limit for applications to intervene, the Committee suggest that third States decide whether to intervene by reference to the Application. In the event that an Application is vague concerning the essence of the case (e.g. – the prayer for relief) the Court could demand clarification or further detail to enable all concerned, including third States, to grasp the case and to take their decisions accordingly. Should an applicant request an extension to the time-limit for the filing of the Memorial in response to such a demand, then the Court could grant the extension within the range proposed below.

F. Joinder of Proceedings

Whereas joinder entails the formal merger of multiple proceedings, the Court and the Tribunal may also direct that the written or oral proceedings, including the calling of witnesses, be conducted in common without ordering joinder.[68] Joinder of proceedings may also be effected with joinder of parties where one or more applicants bring claims against one or more respondents.[69] In theory, joinder of proceedings promotes both procedural economy and the

[64] ICJ Rules, Art. 82(1).
[65] *Pulau Litigan (Intervention)*, *supra* note 61, at 585 (para. 22).
[66] By contrast, see ITLOS Rules, Art. 104(1).
[67] E.g. – *Territorial and Maritime Dispute (Application of Costa Rica to Intervene)*, *infra* note 45, at 354 (paras 7, 10, 12). See also *South China Sea Arbitration*, *supra* note 11, at paras 46-48.
[68] ICJ Rules, Art. 47; ITLOS Rules, Art. 47.
[69] E.g. – *South West Africa Cases*; *Legality of the Use of Force Cases*; *Nuclear Disarmament Cases*; Cases Nos 3 and 4 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)(Provisional Measures)(Order of 27 August 1999)*, at paras 2, 5, 9-14. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)(Preliminary Objections)(Judgment)* [1998] ICJ Rep. 9, Joint Declaration of Judges Bedjaoui, Guillaume and Ranjeva, at 32-34 (paras 1-7), 44-45 (para. 21).

equality of parties; the directing of common procedural action, however, does not promote equality due to the possibility of differing procedures (e.g. – composition of the panel) and outcomes in proceedings conducted in parallel on substantively similar subject-matter.[70]

1. Joinder of Bilateral Proceedings

Joinder of bilateral proceedings arises where the substantive issues of two cases featuring the same two parties are connected. After the problems encountered in the *Certain Activities/Construction of a Road Cases* in which joinder was ultimately ordered while the counterclaims were ruled inadmissible,[71] a welcome turn in recent practice was the prompt joinder of the *Maritime Delimitation/Land Boundary Cases*.[72] As the rationalisation of the modalities of joinder of bilateral proceedings in relation to counter-claims would be a valuable reform, the Committee propose the amendment of Article 47 for this purpose.

In light of the proposed reform to counter-claims below, the Committee suggest that the test for joinder of bilateral proceedings be harmonised with the test for counter-claims. On this approach, a respondent wishing to introduce claims that have general links (e.g. – a shared factual matrix) but not a 'direct connection' to ongoing proceedings would be able to apply to do so through joinder, subject to jurisdiction and admissibility. This would state that the Court order joinder of two or more proceedings, *proprio motu* or upon application, subject to the same criteria of 'connectivity' and time-limit as for counter-claims. In aligning the procedures for joinder of bilateral proceedings and counter-claims, the incentive for the indirect introduction of counter-claims via new application would be removed.

2. Joinder of Multilateral Proceedings

Joinder of multilateral proceedings entails the merger of multiple, similar applications by multiple applicants and/or against multiple respondents. Whilst the Committee opine that this change would benefit procedural economy and equality, it would require a solution to the problem of the composition of the panel, as proposed above. An additional problem arising in cases of joinder involving multiple parties is access to pleadings.[73] In the view of the Committee, the principle of equality demands automatic right of access of each party to pleadings in the joinder of proceedings. For example, in a situation where State A is the Applicant and States B, C and D are the Respondents, State A has automatic access to pleadings submitted by States B, C and D and is thus able to take into account the pleadings of States C and D when preparing its arguments in its case against State B. States B, C and D would thus be in a disadvantageous situation if it has no access to the pleadings submitted by the other Respodents. Where joinder is not effected, this should as a matter of principle be due to substantive differences between the applications, not the reluctance of a party.

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[70] In the *Fisheries Jurisdiction Cases*, the Court decided 9-5 not to join the proceedings the due to the objections of the Applicants (Germany and the United Kingdom) – *Fisheries Jurisdiction (Germany v. Iceland)(Merits)(Judgment)* [1974] ICJ Rep.175, at 177 (para. 8).

[71] Section II(H), *infra*.

[72] *Maritime Delimitation in the Caribbean Sea (Costa Rica v. Nicaragua)/Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)(Order of 2 February 2017).* The Application in the first case was introduced by Costa Rica on 25 February 2014, the written phase closed and Court-appointed expert opinions in progress when the second Application was filed by Costa Rica on 25 January 2017 with a request for joinder and short time-limits of six weeks; Nicaragua requested a time-limit of six months and the prior release of the expert opinions. The Court promptly joined the two proceedings and fixed time-limits of six weeks without the prior release of the opinions; this enabled the oral phase for the joined proceedings to be held from 3 to 13 July 2017.

[73] E.g. – *Nuclear Disarmament (Marshall Islands v. Pakistan)*, *supra* note 12, at para. 6.

G. Counter-claims

Counter-claims concern the filing by the respondent of claims that are 'directly connected' to the subject-matter of the claims brought by the applicant.[74] Although there has been a rise in counter-claims in the period under review, recent experience has shown that the procedure can unduly prolong proceedings.[75] In the *Certain Activities/Construction of a Road Cases*,[76] incidental proceedings (including an additional round of written pleadings on the merits authorised by the Court) concerning the admissibility of counter-claims added 42 months and 5444 pages of written pleadings to the case. The Court joined the two cases as they were based upon similar facts[77] and rejected the admissibility of the counter-claims for failing the test of 'direct connection' to the original Application.[78]

The directness of the link between the counter-claims and the Application was also problematic in earlier cases.[79] Even though the direct connection test did not need to be applied in the *Jurisdictional Immunities Case (Germany v. Italy)*, the sequential nature of the procedure added 7 months to the case.[80] Most recently, the Court admitted two of the counter-claims and rejected two of the counter-claims presented in the *Sovereign Rights and Maritime Spaces in the Caribbean Sea Case*, though each of the claims related to the same factual matrix, based upon whether the counter-claims were of the same character of 'sovereign rights' as the claims.[81] Due to the greater frequency of counter-claims and problems arising in practice, the Committee consider rationalisation of this area to be a valuable potential reform at the ICJ, though the lack of practice at the ITLOS renders it less pressing to that institution.

The Committee propose amendment to Article 80(1) to delete the word 'directly' from the requirement of connection to the original claim: by relaxing this criterion, counter-claims such as those brought in the *Construction of a Road Case* and the *Sovereign Rights and Maritime Spaces in the Caribbean Sea Case* would be more easily accommodated, thus narrowing the scope for objection and delay.[82]

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[74] ICJ Rules, Art. 80(1); ITLOS Rules, Art. 98. See also, e.g. – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))(Counter-Claims)* [1997] ICJ Rep. 243, at 256 (para. 27).

[75] E.g. – *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)(Merits)(Judgment)* [2005] ICJ Rep. 168, at 176-177 (paras 5-10).

[76] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)/Construction of a Road along the San Juan River (Nicaragua v. Costa Rica)(Merits)(Judgment)* [2015] ICJ Rep. 665.

[77] *Certain Activities (Joinder of Proceedings)(Order of 17 April 2013)* [2013] ICJ Rep. 166, at 170-171 (paras 19-24).

[78] *Certain Activities/Construction of a Road (Counter-Claims)(Order of 18 April 2013)* [2013] ICJ Rep. 200, at 209 (para. 24), 211-215 (paras 30-38). See also the Declaration of Judge *ad hoc* Guillaume, *ibidem*, at 220-221 (paras 15-17).

[79] *Oil Platforms (Iran v. United States of America)(Counter-Claim)(Order)* [1998] ICJ Rep. 190, at 203-205 (paras 33-39); *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)(Counter-Claims)(Order)* [2001] ICJ Rep. at 678-682 (paras 35-45); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)(Counter-Claims)(Order)* [1997] ICJ Rep. 243, at 258-259 (paras 33-36).

[80] *Jurisdictional Immunities of a State (Germany v. Italy)(Counter-Claim)(Order of 6 July 2010)* [2010] ICJ Rep. 310, at 311-313 (paras 3-6), 316 (para. 16), 320-321 (para. 30); Dissenting Opinion of Judge Cançado Trinidade, *ibidem*, at 332-342 (paras 4-40).

[81] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Order of 15 November 2017, #

[82] This would also remove the otiose discretion of the Court – never exercised – to reject otherwise admissible counter-claims – Murphy, 'Counter-Claims' in Zimmerman, *supra* note 8, 1000-1025, at 1005.

In addition, the Committee propose that Article 80(2) of the ICJ Rules be amended to align the time-limit for the filing of counter-claims with the time-limit for the filing of the Memorial (on jurisdiction/admissibility or the merits, as the case may be).[83] These measures would eliminate the incentive to introduce counter-claims via new application, constrain the deployment of counter-claims as a tactic to gain a time advantage for the preparation of pleadings and compress the incidental proceedings by disposing of them concurrent with the progression of the merits. This would also synchronise with the proposed timings for intervention.

H. Costs Orders

Whereas the default position concerning the costs of the *parties* is that each shall bear their own, the Court may depart from this.[84] The Statutes and the Rules are silent on the question of the recoupement from the parties of actual costs incurred by the *Court* or by the *Tribunal*.[85] Costs orders could serve a useful function in financing extraordinary expenses that are impossible to predict.

1. Party Costs

Neither the Court nor the Tribunal has ever granted a request to exercise their power to depart from the general rule;[86] arbitral tribunals have also invariably followed the default rule.[87] In *Croatia v. Slovenia*, the Arbitral Tribunal reserved the question of costs in its Partial Award[88] – prompted by serious procedural misconduct by Slovenia and the denunciation of the arbitration by Croatia – but did not depart from the general rule in the Final Award.[89] Whilst there are sound policy reasons to exercise the power to deter and to sanction procedural misconduct, the reticence of international courts and tribunals in their judicial practice suggests this to be unlikely. The Committee advise the Court and the Tribunal to give reasons for decisions not to apply the power in order to progressively develop the jurisprudence.

2. Court Costs

By contrast, the Court has ordered parties to bear actual costs. Most notably, in *Gabćikovo-Nagymaros Project*, the parties proposed to jointly bear the costs of the site visit (principally

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[83] This would also preclude the introduction of counter-claims in a second round of pleadings, the admissibility of which remains an open question – *Pulp Mills on the River Uruguay (Argentina v. Uruguay)(Merits)(Judgment)* [2010] ICJ Rep. 14, at 105 (paras 279-280).

[84] ICJ Statute, Art. 64; ICJ Rules, Art. 97; ITLOS Statute, Art. 34; ITLOS Rules, Art. 125. Whereas Article 294 of the UNCLOS does not specify the consequences of a finding of an 'abuse of legal process', a costs order may be considered to be one logical outcome.

[85] Article 33 of the ICJ Statute provides that the expenses of the Court shall be borne by the by the United Nations, but this does not proscribe the generation of income from other sources, which are credited to the budget of the Court, though UN rules require any year-end surplus to be credited to the UN general budget rather than rolled over – Espósito, 'Article 33' in Zimmerman, *supra* note 8, 563-570, at 569-570.

[86] Espósito, 'Article 64' in Zimmerman *et al.*, *supra* note 8,, 1598-1604, at 1598-1602, 1604. See further, e.g. – *Amadou Sadio Diallo (Guinea v. DRC)(Compensation)(Judgment)* [2012] ICJ Rep. 324, at 344 (paras 58-60); Separate Opinion of Judge *ad hoc* Mahiou, at 402 (para. 20); *The M/V Saiga (No. 2) Case*, *infra* note 105, at paras 181-182; *The M/V Virginia Case*, *infra* note 105, at paras 449-451; *Certain Activities/Construction of a Road*, *supra* note 76,Joint Declaration of Judges Tomka, Greenwood, Sebutinde and Judge *ad hoc* Dugard.

[87] E.g. – PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom) (Award of 18 March 2015)*, at paras 545-546; Cases Nos A15(IV) and A24 *Islamic Republic of Iran v. United States of America (Award of 2 July 2014)*, at paras 233-236, 294(j).

[88] *Arbitration between Croatia and Slovenia*, *supra* note 11, at paras 229-230.

[89] PCA Case No. 2012-04 *Arbitration between Croatia and Slovenia (Award of 29 June 2017)*, at paras 1143-1144. See also PCA Case No. 2012-5 *Ecuador v. USA*, Award of 29 September 2012, at paras 230-232

travel and accommodation) undertaken by the Court.[90] Whereas this was done at a time of prodigious financial strain amidst the UN budgetary crises, this precedent could catalyse the greater use of fact-finding powers by diminishing the need to apply to the General Assembly for funds. The experience of arbitration indicates that justified costs orders enabling the use of fact-finding powers is well-received by parties in that there is a correlation between perceived procedural economy and their willingness to fund an arbitral tribunal, even at greater expense.

The Committee propose amendments to Articles 97 of the ICJ Rules and 125 of the ITLOS Rules) to stipulate that the Court and Tribunal may at any time order the parties to proportionately bear extraordinary costs of proceedings (e.g. – site visits, expert opinions, inquiries) incurred by it on a case-by-case basis. Parties relying upon the UN Secretary-General's Trust Fund would be exempt from costs orders.

I. Written Phase of Pleadings

The filing of verbose written pleadings is a recurring problem at the Court. [91] Statistical analysis of the period under review shows calls for their reduction to be well-founded:

- The mean average duration of the written stage was 12 months in 12 preliminary objections cases and 31 months in 22 merits cases;
- The mean average length of a representative sampling of memorials was 121 pages in 11 preliminary objections cases and 473 pages in 24 merits cases;
- The total mass of pleadings was a mean average of 311 pages in 11 preliminary objections cases and 1995 pages in 24 merits cases.

The record of proceedings over the past fifteen years proves that the Practice Directions have not inculcated greater succinctness. Since the written phase of pleadings is an important cause of cost and delay and its place as the first phase necessarily impacts upon the progress of the subsequent phases, the Committee considers reform in this area to be critical.

1. Simultaneous Filing

Simultaneous filing of pleadings, a peculiar feature of special agreement cases, continues.[92] Each of three cases introduced after the adoption of Practice Direction I has featured simultaneous filing with three rounds of pleadings in the first two cases and two rounds in the third (which also envisaged the possibility of a third round).[93] As the practice of simultaneous filing is inefficient, the Committee call for its abolition through amendment of Article 46(1) of the ICJ Rules and Article 61 of the ITLOS Rules to prescribe that the order of pleadings in

[90] *Gabćikovo-Nagymaros Project (Hungary v. Slovakia)(Order of 5 February 1997)* [1997] ICJ Rep. 3, at 5. For a site visit example from inter-State arbitration, see further, e.g. – PCA Case No. 2010-16 *Maritime Delimitation in the Bay of Bengal (Bangladesh v. India)(Award of 7 July 2014)* at paras 18-26.
[91] ICJ Rules, Arts 49(3), 60; ICJ Practice Directions I, III.
[92] ICJ Rules, Art. 46(1); ITLOS Rules, Art. 61.
[93] *Frontier Dispute (Benin v. Niger)*, filed on 3 May 2002; *Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, filed on 24 July 2003; *Frontier Dispute (Burkina Faso v. Niger)*, filed on 21 July 2010. See also *Sustainable Conservation and Exploitation of Swordfish Stocks in the South-East Pacific (Chile v. European Community)(Order of 20 December 2000)*, at para. 2.

cases brought by special agreement be determined by lot. The party to plead first in the written phase would be the party to plead first in the oral phase, unless the parties agree otherwise.[94]

2. Time-limits

Time-limits for the filing of the first round of pleadings are generally fixed by the Court after the President has ascertained the views of the parties at the first case management conference, though there is no standard time-limit.[95] The 1972 amendments to Articles 40 and 41 were intended to address 'the leniency shown by the Court in fixing time-limits and in granting extensions of those time-limits' by putting 'prospective litigants on notice concerning the firmer stand to be taken by the Court in the future in fixing and enforcing time-limits.'[96] This aim has not been realised in practice: in the period under review, the mean averages of time-limits fixed were, respectively, 11 months in 34 merits cases and 6 months in 16 preliminary objections/jurisdiction cases.[97]

In comparison, the Tribunal adopted the 'six-month rule' proposed at the fiftieth anniversary ICJ colloquium.[98] Time-limits are usually calculated from the date of the order, not from the date of the initiation of proceedings. In the period under review, the six-month rule has been respected by parties and the Tribunal not only in the fixing of time-limits but also in the granting of extensions: save in the *Swordfish Case* in which proceedings were suspended to facilitate settlement negotiations, time-limits even as extended have never exceeded six months.[99] Consequently, this innovation may be judged a success.

Whilst there are compelling arguments for the adoption of the 'six-month rule' by the Court, there are also grounds for the preservation of an element of flexibility, as there may be logistical difficulties (e.g. – obtaining documentary evidence) justifying limited extensions. The Committee accordingly suggest the amendment of Article 44(1) of the Rules to establish a range of standardised time-limits, which could include an exception under the control of the Court. Practice suggests that ranges of 4-6 months for jurisdiction and admissibility and 6-9 months for the merits pleadings are appropriate. The Committee also advise the amendment of Articles 44 of the ICJ Rules and 59(1) of the ITLOS Rules to clarify that time runs from the date of application, not from the date of the Order, to reflect the fact that applicants can work on the Memorial from the point of application, if not beforehand.

Whilst the Court can reject requests for extensions, it invariably grants them in practice. In the period under review, extensions were granted in 9 merits cases with a cumulative total of 130 months (ranging from 1 to 36 months) and in 4 preliminary objections/jurisdiction proceedings with a cumulative total of 42 months (ranging from 3 to 24 months). This produces a mean average of 13 months for merits cases and 11 months for preliminary objections cases, though this disguises considerable variability both in the length of individual extensions and the total extended time across cases. Whereas no great harm is done by short extensions (e.g. – 1

[94] Whereas the parties may not impose simultaneity upon the Court, they may jointly propose to displace the proposed rule in favour of simultanaeity, subject to the approval of the Court or Tribunal – ICJ Rules, Art. 101; ITLOS Rules, Art. 48.
[95] ICJ Rules, Arts 44(1); 48.
[96] Jiménez de Aréchaga, 'Amendments to the Rules of Procedure of the International Court of Justice', 67 *American Journal of International Law* (1973), 1 at 5-6.
[97] The norm of 4 months envisaged by Practice Direction V has been realised in recent practice.
[98] ITLOS Rules, Art. 59(1).
[99] This has applied even to the more complex delimitation cases of *Bay of Bengal* and *Atlantic Ocean*.

month[100]), repeated and lengthy extensions[101] are inefficient. It is noteworthy that the ITLOS has taken a strict line in including extensions within the 'six month rule'. The Committee advise a more moderate approach through the amendment of Article 44 of the Rules to introduce a cap upon extensions; at this stage, a length of three months appears to be appropriate. Parties wishing to explore settlement negotiations should do so through the mechanism of suspension (whether by a published or *in camera* order) rather than time-limit extensions.

3. Number and Length of Pleadings

Whereas the Court announced in 2002 that one round was thereafter to be considered the norm per Article 45(1) of the Rules, it has authorised additional rounds in 21 cases in the period under review. In spite of the terms of Article 60(2) of the ITLOS Rules, two rounds of equal length have featured in each of the 5 contentious cases at the Tribunal. In precluding further delay (e.g. – extensions) a single round yields copious efficiency benefits by reducing the mass of pleadings and accelerating the closure of the written phase.[102] The Committee accordingly advise that Articles 45(2) of the ICJ Rules and 60(2) of the ITLOS Rules be redacted so as to abolish multiple rounds, apart from incidental proceedings (e.g. – intervention, counterclaims). If the parties agree on the necessity of a second round, they may jointly propose it to the Court or the Tribunal[103]. To curb the length of pleadings, the Committee propose that Articles 44 of the ICJ Rules and 63 of the ITLOS Rules be amended to provide for the fixing of *word* limits on a case-by-case basis (potentially including annexes) to be fixed following consultation with the parties at the first case management conference. Based on the statistical data in the period under review, the ranges could be 100-150 pages (converted to words) for jurisdiction and admissibility and 250-350 pages for the merits (potentially including annexes).

4. Closure

There is no provision in the Rules defining closure, though a number of procedural events (e.g. – submission of documents; initial deliberations; applications to intervene) depend on it. In practice, closure eventuates *either* with the filing of the final written pleading or the expiration of its time-limit, *or* by a decision of the Court where it has 'reserved the subsequent procedure for further decision' or a Special Agreement envisages for the possibility of a further round of pleadings upon decision of the Court. To provide clarity for the parties, the Committee suggest that Articles 54(1) of the ICJ Rules and 60 of the ITLOS Rules be amended to define closure as coinciding with the expiry of the time-limit for the filing of the Counter-Memorial.

5. Late Filing of Documents

Since the adoption in 2002 of Practice Direction IX, problems concerning the filing of documents between the closure of the written phase and the opening of the oral phase have

[100] E.g. – *Avena (Mexico v. United States of America)*; *Black Sea (Romania v. Ukraine).*
[101] E.g. – *Legality of the Use of Force Cases*; *Arrest Warrant (DRC v. Belgium)*; *Certain Criminal Proceedings in France (Republic of the Congo v. France).*
[102] E.g. – *Certain Criminal Proceedings in France (Republic of the Congo v. France)(Order of 16 November 2010)* [2010] ICJ Rep. 635, at 636-637; *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening)(Merits)(Judgment)* [2014] ICJ Rep. 226, at 235 (para. 6); Separate Opinion of Judge Greenwood, at 418 (para. 36); Dissenting Opinion of Judge Owada (at 301, para. 3).
[103] ICJ Rules, Art. 101; ITLOS Rules, Art. 48.

arisen in 8 cases.[104] It has also occurred at the Tribunal.[105] Late filing could be due to genuine logistical difficulties, such as the coordination of government ministries to locate historical documents in archives or solicitation of third States to identify and secure documents in their possession. Nevertheless, the Committee propose the amendment of Articles 56(2) of the ICJ Rules and 71(2) of the ITLOS Rules to prescribe criteria for authorisation of late filing. Absent the consent of the opposite party, such criteria might be that a party applying to file a late document would be required to prove that they discovered the document or came into possession of it *after* the closure of the written phase; the document must also be material to the proceedings, though its weight would remain to be assessed at a later stage.

Another problem is tactical withholding in an attempt to wrong-foot the other side. Debate concerning the meaning of 'publication readily available',[106] the surreptitious insertion of undeclared documents in judges' folders[107] as noted in Practice Direction IX*ter* and the posting of documents on websites shortly before the start of the oral phase[108] suggest intent. The policy problem is to balance the avoidance of prejudice to the parties with the deterrence of tactics. Articles 56(4) of the ICJ Rules and 71(5) of the ITLOS Rules should be amended to clarify that documents must be publicly available at the time of closure of the written phase.

J. Oral Phase of Pleadings

The point between the closure of the written phase and the opening of the oral phase is an important bottleneck. By enabling the 'back-to-back hearing of cases' and 'forward planning', the Court cleared its backlog in 2010.[109] In the period under review, the mean average duration of the oral phase has been 19 months (versus 12 months for the written phase and 6 months for deliberations) in jurisdictional proceedings and 11 months (versus 31 months for the written phase and 6 months for deliberations) in merits proceedings. The experience of the ITLOS suggests that the 'six month rule' of scheduling oral hearings to take place within six months of the closure of the written phase is a viable one. Though six months may be considered to be an insufficiently ambitious timeframe, the Committee propose the adoption of this rule through amendment to Article 54. As delay and cost can arise and the usefulness of hearings has been criticised,[110] the Committee consider reform in this area to be important.

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[104] *Croatia Genocide (Croatia v. Serbia)(Preliminary Objections)*; *Territorial and Maritime Frontier (Cameroon v. Nigeria, Equitorial Guinea Intervening); Croatia Genocide (Croatia v. Serbia)(Merits)*; *Territorial and Maritime Dispute (Nicaragua v. Honduras)(Merits)*; *Frontier Dispute (Benin v. Niger)(Merits)*; *Avena (Mexico v. United States of America)(Merits)*; *Pedra Blanca/Pulau Batu Puteh (Malaysia v. Singapore)(Merits)*; *Black Sea (Romania v. Ukraine)*.

[105] No. 2 *The M/V Saiga (No. 2)(St Vincent and the Grenadines v. Guinea)(Merits)(Judgment of 1 July 1999)*, at para. 20; No. 18 *The M/V Louisa Case (St Vincent and the Grenadines v. Spain)(Merits)(Judgment of 28 May 2013)*, at paras 22-26; No. 19 *The M/V "Virginia G" Case (Panama v. Guinea-Bissau)(Merits)* [2014] ITLOS Rep. 4, at 17 (para. 41); Case No. 8 *The 'Grand Prince' Case (Belize v. France)(Prompt Release)(Judgment of 20 April 2001)* at paras 28-29; *Affaire No. 23 Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d'Ivoire dans l'Océan Atlantique (Ghana c. Côte d'Ivoire)(mesures conservatoires)*, Compte-rendu (30 mars 2015, après-midi), pages 4 (lignes 24-40) et 6, lignes 45-50.

[106] ICJ Rules, Art. 56(4); ICJ Practice Direction IX*bis*. See, e.g. – *Pulp Mills*, *supra* note 83, at 27 (paras 18-19).

[107] ICJ Practice Direction IX*ter*.

[108] See the *Atlantic Ocean Case*, note 105, *supra*.

[109] *ICJ Report (2009-2010)*, UN Doc. A/65/4 (1 August 2010), at 6 (para. 22).

[110] E.g. – Peck and Lee (Eds), *Increasing the Effectiveness of the International Court of Justice* (1997), at 128, 142 (Highet), 148 (Crawford); United Nations Institute for Training and Research, *A Dialogue at the Court/Un dialogue à la Cour* (2006), at 20-25; Miron, 'Working Methods of the Court', 7 *Journal of International Dispute*

1. Scheduling

Scheduling may be disrupted by congestion or sudden developments (e.g. – incidental proceedings). The adoption of the proposals made elsewhere in this Report, such as tighter time-limits in the written phase and standardisation of protocols on evidence, would enable expeditious organisation of the oral phase by case management conference upon the closure of the written phase. As the calendar of the Court (e.g. – vacation periods) would inform the General Assembly and the public about its workings, the Committee recommend that it be published as general administrative practice.

Conflicts between the diaries of judges and proposed dates for hearings can occur in practice. Scheduling conflicts on the part of counsel and/or agents may also cause delay, though the modern reality of large legal teams enables substitution of agents and/or advocates whose diaries preclude attendance.[111] Diary clashes should not be allowed to delay proceedings for more than one month, as a guide. The Committee advise a strict general rule of six months for the organisation of the oral hearings, as proposed above, as well as publication of the reasons for delay to the fixing of hearings in press releases, orders and judgments for transparency.

2. Duration and Utility

Article 60(1) of the Rules stipulates that oral statements shall be 'succinct' and 'directed to the issues that still divide the parties'.[112] In the period under review, the duration of oral hearings has been a mean average of 12 hours in preliminary objections/jurisdiction cases and 26 hours in merits cases; at the Tribunal, the duration has averaged 34 hours per case – a striking difference, as there have been only 4 merits cases as opposed to 22 cases at the Court. Oral argument may usefully be foregone in certain cases, particularly for incidental proceedings (e.g. – applications to intervene).

The *Counsel Survey* shows broad support for more dynamism in the oral hearings and greater use of Article 61 of the Rules to indicate issues to counsel prior to and/or during the course of hearings.[113] The effectiveness of this measure depends on the ability of the Court to compose a list of precise topics; while the communication of questions after initial deliberations by the Tribunal has informed the presentations of the parties, it has been of marginal value as it has not framed the debate in the hearings. One reason is timing: the initial deliberations are held shortly before the hearings, by which time the parties' presentations are already prepared.

To improve the utility of the hearings, the Committee advise that Article 1 of the Resolution on Internal Judicial Practice be amended to specify that the initial deliberations be held within a certain period, e.g. no later than four weeks, after the termination of the written phase; Article 1(1) should also be amended to specify that 'a deliberation' should be held within a certain period, e.g. two weeks after the termination of the written proceedings. The President, duly

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Settlement (2016), 371-394; Cot, 'The bar' in Bannelier *et al.*, *The ICJ and the Evolution of International Law: The enduring impact of the* Corfu Channel case (2012), 21-38; Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (2014), at 359; Shaw, *Rosenne's Law and Practice of the International Court 1920-2015* (2016)(Vol. III), at 1325-1328; Oda, 'The International Court of Justice Viewed from the Bench', 244 *Recueil des cours* (1993), online at: <http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*-ej.9789041100870.009_190>, at 119; Pellet, Pellet, 'Remarques sur l'(in)efficacité de la Cour internationale de justice et d'autres jurictions [*sic.*] internationales' in Badinter et al., *Liber amicorum Jean-Pierre Cot* (2009), 193-213, at 208.

[111] E.g. – ICJ Practice Direction X.

[112] Also ICJ Practice Direction VI.

[113] Crawford and Keene, *supra* note 18, at 226, 228.

informed, would then hold the case management conference within the stipulated period, in which he/she would consult the parties regarding a list of issues.

Thereafter, the Court would decide by order the list of issues and speaking-times alongside other procedural matters: rather than present independently-prepared, holistic sets of submissions delegation-by-delegation in the current two-round format, counsel would plead sequentially and issue-by-issue. Legal teams could be provided with 'reserved time' for the presentation of arguments (e.g. – rebuttals) developed during the course of the hearings. This approach would inculcate focus and conversation in pleading, particularly sensible agreements and concessions. This restructuring of the hearings would also enable the interrogation of witnesses at the outset of the hearings.[114]

The Committee propose that this method of organisation of the oral hearings be piloted in judicial practice in order to determine its usefulness relative to the traditional approach. As such, the Court could hold traditional hearings where it finds that the circumstances of the case so require and the parties may jointly so propose to the Court.[115] The part-time character of the Tribunal calls for a stronger formal role for the President, as the sole full-time judge. The Committee accordingly recommend that Article 75(1) of the Rules be amended to empower the President, following consultation with the Tribunal (e.g. – conference call) in the initial deliberations, to order a common structure of issues for the hearings. Article 68 of the Rules should also be amended to enact a time-limit, e.g. four weeks, following the closure of the written phase for the deliberations.[116]

K. Deliberations and Judgment

1. External Professional Activities

A practice that has given rise to controversy in recent years has been the acceptance by Members of the Court of appointments as investment arbitrators.[117] The Committee opine that appointments as arbitrator, alongside other forms of gainful work such as academic lectures, constitute a 'professional activity' per Article 16 of the ICJ Statute. The recent flourishing of investor-State arbitration raises two problems in this respect.

First, 'Members of the Court shall be bound… to hold themselves permanently at the disposal of the Court'[118]. Although the 1995-1996 Report of the Court stated that '[t]he practice, which involves a very limited number of judges for very limited periods, has no adverse effect on the pace of the work of the Court or the total precedence given to that work by its Members',[119] the situation has, however, radically changed with the startling increase of investor-State arbitration and with the more and more frequent use of the Court by States. If ICJ judges are

[114] Section II(L)(2), *infra*.
[115] ICJ Rules, Art. 101; ITLOS Rules, Art. 48.
[116] Paragraph 2(1) of the Resolution on Internal Judicial Practice would also need to be amended to bring forward the current deadline of five weeks for judicial notes (e.g. – to two weeks).
[117] E.g. – Bernasconi-Osterwalder and Brauch, 'Is "Moonlighting" a Problem? The role of ICJ judges in ISDS', International Institute for Sustainable Development (November 2017), https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf. The net annual salary of ICJ judges (omitting ancillary benefits) for the 2015 calendar year was 205,435€ or $228,687. Arbitrator fees can be $3000 per day in ICSID arbitration or 500-700€ per hour in inter-State arbitration
[118] ICJ Statute, Art 23(3).
[119] Report of the International Court of Justice 1 August 1995 – 31 July 1996, UN Doc. A/51/4, para 199.

perceived to be unable to give 'the fullest precedence to their supervening duties as members of the Court'[120] due to their other activities, the legitimacy of the Court will be weakened.

Second, arbitrator work gives rise to an ethical problem of conflict-of-interest. Whether the judge is appointed by the investor or by the State[121], the participation of that judge in a subsequent proceeding at the Court in which that State appears would give rise to a perception of bias. Since the judge would need to self-recuse, the Court would be deprived of his/her services, which would be contrary to their duty to give 'the fullest precedence to their supervening duties as members of the Court'.[122] Though the President is empowered to refuse permission to colleagues to accept arbitral appointments, this is awkward to implement.[123]

While the most frequently raised defence of the presence of ICJ judges in investor-State arbitration is that it may be beneficial to the latter, where questions on general international law are frequently discussed,[124] it has to be recognised that the current practice causes the abovementioned problems. The Committee thus exhort the Court to adopt a public resolution to curb the practice of arbitrator work in order to preclude these problems. Members of the Court should refrain from accepting appointments as investment or commercial arbitrators, as these are activities that are incompatible with their office. By contrast, service as an arbitrator in inter-State arbitration can arguably serve the basic function of the judicial office to promote inter-State dispute settlement. Members should be permitted to undertake such appointments, subject to their fees being credited to the budget of the Court and such appointments should be disclosed in the Court's Annual Report; in the event of conflict between the scheduling of the Court and the arbitration, the Member should be required to resign from the arbitration.

These considerations do not apply in the same way to ITLOS judges, as they are part-time and not subject to the same statutory restrictions upon professional activity. Nonetheless, ITLOS judges should not undertake investment arbitrator work, due to the aforementioned possibility of conflict-of-interest prompting recusal. By contrast, participation by ITLOS judges in inter-State arbitrations may be allowed for the same reason as the one indicated above with respect to ICJ judges. In particular, participation by ITLOS judges in UNCLOS Annex VII arbitrations should be allowed as it constitutes part of the UNCLOS dispute settlement system.

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[120] 'Conditions of service and compensation: Members of the International Court of Justice', UN Doc. A/C.5/50/18 (2 November 1995), at 12 (paras 30-32); 'Conditions of service and compensation: members of the International Court of Justice: Report of the Secretary-General', UN Doc. A/C.5/53/11 (6 October 1998), at 12 (paras 51-52).

[121] Situations where an ICJ judge is appointed by the arbitration institution (e.g. the ICSID) or the appointing authority are excluded here. However, the problem of availability applies also to such situations.

[122] 'Conditions of service and compensation: Members of the International Court of Justice', UN Doc. A/C.5/50/18 (2 November 1995), at 12 (paras 30-32); 'Conditions of service and compensation: members of the International Court of Justice: Report of the Secretary-General', UN Doc. A/C.5/53/11 (6 October 1998), at 12 (paras 51-52).

[123] Institut de Droit International, 'La situation du juge international' (6ème Commission, Rapport, Rhodes, 2011), at 26 (para. 55).

[124] Although the Court once stated that the presence of ICJ judges in arbitrations contributes to the development of international law (UN Doc. A/51/4, para 199), such an argument does not hold good with respect to investor-State arbitrations that are not disclosed to the public.

2. Judicial Secrecy

The breach of the secrecy of deliberations[125] in the *Croatia v. Slovenia Arbitration* throws into sharp relief the question of internal security measures.[126] Its importance is amplified by the digital age in which techniques for the interception of data have become increasingly sophisticated. The fact that judges, as in arbitration, may work on case materials remotely from various points in the world exacerbates the risk of data interception. The Committee recommend that security protocols be reviewed to fortify the control of the Court and Tribunal over judicial secrecy, particularly in relation to cybersecurity. Confidential information could be transmitted in digital form by encrypted data stick or printed in limited copies and held in vaults in a secured room to be consulted by time-limited signature or exclusively in the room itself. Electronic and telephone communication could be encrypted while deliberations concerning cases could be restricted to secure locations as a counter to electronic surveillance.

III. Jurisdictional Objections

The 2001 amendment to Article 79 to require preliminary objections to be filed within three months of the filing of the Memorial was prompted by the so-called 'free ride'[127] then available to respondents. Practice Direction V specifies a time-limit of four months for the filing of written observations by applicants on the objections. Statistical data in the period under review confirms that these measures have moderately shortened the duration of written phases in preliminary objections cases: while the mean average duration from the initiation of proceedings on the merits to the closure of the written phase of preliminary objections (omitting extensions to time-limits for comparison) is 21 months, it is reduced to 19 months when the three cases litigated under the old Article 79(1) rule are omitted.

In response to the 'free ride' criticism of the old Article 79, ITLOS chose in Article 97(1) of its Rules to depart from then-applicable ICJ practice in requiring preliminary objections to be filed within ninety days of the institution of proceedings. To mitigate the likelihood of the application being less than fully developed, Article 97(3) permits the other party to present written observations on the objections within sixty days of their filing, following which the objecting party may file written observations in response within sixty days. There has been one Article 97 case to date.[128]

In the four cases handled under the Article 79(2) procedure[129] whereby the Court order parties to file written pleadings on jurisdiction and admissibility shortly after the initiation of proceedings, the mean average duration is 11 months with the longest duration being 14 months in the *Nuclear Disarmament Cases*.[130] Whilst there have been fewer cases handled under this procedure, it nonetheless requires less time than the Article 79(1) procedure. Moreover, the time-limit under Article 79(1) provides respondents with a tactical advantage in that they can

[125] ICJ Statute, Art. 54(3); ICJ Rules, Art. 21(1); ITLOS Rules, Art. 42(1).
[126] See also the incident in the *Nuclear Tests Cases*, note 3, *supra*.
[127] E.g. – Peck and Lee, *supra* note 110, at 135 (Highet).
[128] No. 25 *The M/V Norstar Case (Panama v. Italy)(Preliminary Objections)(Judgment of 4 November 2016)*. Its duration of was eight months overall.
[129] *Aerial Incident of 10 August 1999 (Pakistan v. India)*; *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)(New Application)*; *Nuclear Disarmament Case (Marshall Islands v. Pakistan)*; *Nuclear Disarmament Case (Marshall Islands v. India)*. Though *Aerial Incident of 10 August 1999 (Pakistan v. India)* was filed prior to the codification of Article 79(2) in 2001, it was nonetheless handled by the Court according to the same procedure with the agreement of the parties.
[130] Note 32, *supra*.

raise preliminary objections after the filing of the memorial on the merits, thus enabling them to prepare their counter-memorials on the merits while litigating the preliminary objections.

The Committee propose that the right of respondents to automatically bifurcate the proceedings per Article 79(1) of the ICJ Rules be retained, but that the ICJ adopt the ITLOS approach of a strict time-limit for the raising of preliminary objections of ninety days from the filing of the application. The default sequence of filing of pleadings, whether under Article 79(1) or Article 79(2) in the event of bifurcation, should be respondents followed by applicants as is the case in current practice, unless the parties agree otherwise. The Committee further propose that Articles 79 of the ICJ Rules and 97 of the ITLOS Rules be amended to codify the practice of 'pleas in bar'[131] which can serve as a backstop option in case respondents need to raise jurisdictional objections in response to events arising after the preliminary objections phase.[132]

IV. Evidence

Evidence attracted the most responses in the *Counsel Survey*.[133] Whereas the procedural treatment of expert evidence has been a particularly prominent issue, this is by no means the only topic of interest. This section addresses working practices for the *handling* of evidence rather than the *evaluation* of fact (e.g. – burden of proof; standard of proof).

A. Documentary Evidence

1. Requests for Evidence

Though documents are the principal category of evidence, they are not defined. As there is no process of 'discovery' or document production phase, the only way for a party to request a document is through the 'indirect discovery' procedure piloted by Italy in the *ELSI Case*.[134] The system does not foresee a set method of channelling inter-party requests for documents, a state of affairs that increases scope for debate on process and evaluation.[135]

The Committee propose the adoption of an 'indirect discovery' procedure through amendment to Article 62 of the ICJ Rules and Article 77 of the ITLOS Rules, whereby parties could submit requests for documents to the Court, to be filtered and transmitted by the Court through the exercise of its Article 62(1) power. Criteria could accordingly be specified[136] to direct the legal teams to keep requests brief, coherent and relevant. Whereas applicants' requests for documents should be presented by the first case management conference, respondents' requests should be filed by the time-limit for the filing of the Memorial.

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[131] E.g. – *Avena and other Mexican Nationals (Mexico v. United States of America)(Merits)(Judgment)* [2004] ICJ Rep. 12, at 28-29 (paras 22-24), Separate Opinion of Judge *ad hoc* Sepúlveda (at 100-101). See also *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)(Merits)(Judgment)* [2007] ICJ Rep. 43, at 84-85 (paras 101-102), 94-97 (paras 124-129); *Application of the Interim Accord of 13 September 1992 (The Former Yugoslav Republic of Macedonia v. Greece)(Order of 12 March 2010)* [2010] ICJ Rep. 11, at 12.

[132] E.g. - the adoption of a UN Security Council resolution, as in the *Lockerbie Cases*, note 69, *supra*.

[133] Crawford and Keene, *supra* note 18, at 226.

[134] ICJ Statute, Art. 49; ICJ Rules, Art. 62; *Elettronica Sicula S.p.A. (ELSI)(United States of America v. Italy)(Judgment)* [1989] ICJ Rep. 15, at 26 (para. 19). See also ITLOS Rules, Art. 77(1); *The M/V Louisa Case*, *supra* note 105, at paras 36-37 for an instance of documents requested by the Tribunal *ex proprio motu*.

[135] E.g. – *Bosnia Genocide Case*, *supra* note 131, at 129 (para. 206); Dissenting Opinions of Judge al-Khasawneh (at 254-255) and Judge *ad hoc* Mathiou (at 415-421); *Avena*, *supra* note 131, at 41-42 (para. 57).

[136] E.g. – International Bar Association Rules on the Taking of Evidence in International Arbitration (29 May 2010), Art. 3(3).

The WTO DSS practice of cooperation between the parties in the discovery and provision of evidence [137] is a potential source of inspiration for the adoption of a specific 'dialogue procedure'. As so-called 'fishing expeditions' should be avoided, parties could be encouraged to submit to one another and to the Court or Tribunal lists containing specific requests for documents believed to be in the possession of the other party.

2. Refusals to Produce Evidence

Article 49(2) of the ICJ Statute provides that 'formal note shall be taken of any refusal'.[138] The natural, though optional, consequence of a formal note of refusal is the drawing of (rebuttable) presumptions of fact or (conclusive) adverse inferences against the refusing party. The Court has rarely exercised its Article 49 power.[139] The current framework is opaque in that parties cannot predict the consequences of a refusal; the Iran-US Claims Tribunal and the WTO DSS have drawn adverse inferences, if persuaded that the documents are material and in the possession of the party. The Committee advise the greater use of formal notes of refusals to produce evidence, as a logical consequence of the abovementioned call for the greater use of requests for evidence.

Moreover, the Committee propose codification of adverse presumptions of fact in Articles 62 of the ICJ Rules and 77 of the ITLOS Rules in the event of refusals to produce requested evidence. Unlike an adverse inference conclusively establishing a fact, the inference would be *presumptive* and *evidentiary*: it could be displaced by rebutting evidence. The Court would not be bound to ultimately uphold it, though it would explain its reasons for departing from it. This would provide predictability to the mechanism and increase the incentive to comply with requests. Should a party produce a requested document after the time-limit, the presumption would be removed, though a costs order could be considered.

3. Secrecy

Though the texts are silent on the matter, parties have invoked relevance, national secrecy or legal professional privilege as grounds to not disclose or supply documents. Recent arbitral practice has featured differing approaches to the problem.[140] The Committee propose the adoption of a procedure in Articles 62 of the ICJ Rules and 77 of the ITLOS Rules for the evaluation of requests by parties not to disclose or supply documents. As each of the approaches taken by the respective tribunals in the three recent inter-State arbitrations of documents being viewed by an expert and/or the panel or President under embargo each offers advantages and disadvantages, the Committee suggest that the approaches be used on a case-by-case basis.

A related, though distinct, issue is the handling of sensitive documents by the panel where the party supplies them. Arbitral tribunals have used both internal and external security protocols,

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[137] E.g. – *Argentina – Textiles and Apparel*, Panel Report of 25 November 1997, WT/DS56/R at paras 6.40, 6.58.
[138] Obscurely, Article 77 of the ITLOS Rules does not replicate this sentence.
[139] E.g. – *Corfu Channel Case (United Kingdom v. Albania)* [1949] ICJ Rep. 4, at 32; Dissenting Opinions of Judge Krylov (at 75) and Ečer (at 129). See also *Vienna Convention on Consular Relations Case (Paraguay v. United States of America)*, ICJ Pleadings, at 85-88 cited in Quintana, *supra* note 110, at 417; PCA Case No. 6 *Lighthouses Arbitration (France v. Greece)* 23 I.L.R. 677.
[140] PCA Case No. 2004-4 *Guyana v. Suriname*, Award (17 September 2007), at paras 16-20, 24-36, 44-47; PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award (18 March 2015), at paras 35-49; PCA Case No. 2011-01 *Indus Waters Kishenanga (Pakistan v. India)*, Partial Award (18 February 2013), at paras 89-104; PCA Case No. 2017-16 *Coastal State Rights in the Black Sea (Ukraine v. Russia)*, Procedural Order No. 2 Regarding Confidentiality (18 January 2018). See also ITLOS Case No. 23 *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Judgment of 23 September 2017, at paras 21-23.

such as access restrictions and expurgated versions, to control such documents.[141] For example, parties could gain access to material deemed to be admissible under strict embargo with expurgated versions of the material published in judgments and orders. Whilst the Committee recommend the adoption of a provision in Articles 62 of the ICJ Rules and 77 of the ITLOS Rules for such measures, the need for flexibility militates in favour of the detail being developed through judicial practice.

4. Provenance

Whereas there is no explicit basis for the practice, the Court has often taken judicial notice of publicly available information as a matter of weight.[142] Though prominent in default cases,[143] it is by no means confined to them. The texts are silent on the key issue of the admissibility as evidence of material alleged to have been obtained and/or published in breach of national and/or international law. A related issue is the submission of allegedly false documents.[144]

The admissibility of published material has gained recent prominence in light of the Wikileaks phenomenon, as in the *Chagos Islands Arbitration*.[145] In the *Seizure of Certain Documents and Data Case*, the Court was faced not with admission into evidence of documents allegedly obtained unlawfully but rather with an application for their return on grounds of title and/or breach of legal confidentiality.[146] The underlying issue is competing policies to sanction unlawful conduct, to make pragmatic use of documents already published and to verify the provenance of such documents. The Committee opine that this wants development through judicial practice rather than legislation at this juncture.

However, the Committee advise the prescription of criteria for the determination of admissibility. This could distinguish challenges based upon *authenticity* from those grounded in *illegality* in terms of time-limits: the former could be brought 'promptly' – immediately upon becoming aware of the potential falsehood of the documents in question – whereas the latter could be subject to a time-limit (e.g. – one month) after the communication of the document. Whereas the Court directed the parties in the *Qatar v. Bahrain Case* to address the issues of authenticity in their pleadings on the merits, it would be more efficacious for the parties to file concise submissions focused on admissibility of the relevant piece of evidence within a time-limit of 1-2 months while the case concurrently progresses.

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[141] See in particular *Coastal Rights in the Black Sea*, note 140, *supra*.
[142] ICJ Statute, Arts 30, 48; ITLOS Rules, Art. 77(1).
[143] E.g. – *Tehran Hostages Case*, *supra* note 17, at 10 (para. 13).
[144] *Maritime and Territorial Questions (Qatar v. Bahrain)*, 'Interim Report Submitted by the State of Qatar' (30 September 1998), at para. 14; *(Merits)(Judgment)* [2001] ICJ Rep. 40, Separate Opinion of Judge *ad hoc* Fortier, at 432 (para. 6); *Rights of Passage over Indian Territory (Portugal v. India)*, CR 23 September 1959 (Morning) in Oral Arguments and Documents, Vol. V, at 358; *Lehigh Valley Railroad Company Case (No 3)* [1932] 8 UNRIAA at 121; *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)(Pleadings)(Vol. II)* [1960] ICJ Rep. 1, at 164-165; *The M/V Louisa Case*, *supra* note 105, at paras 36-37, Separate Opinion of Judge Cot, at paras 67-79.
[145] *Chagos Islands*, *supra* note 87, Memorial of Mauritius at 72-73; Oral Hearing (23 April 2014), at 191, 1165; Award, at para. 542. See also *ConocoPhillips v Venezuela* (ICSID Case No. ARB/07/30), Decision on Respondent's Request for Reconsideration,10 March 2014, at paras 3, 9; Dissenting Opinion of Georges Abi-Saab, at para. 64; PCA Case No. AA 226 *Hulley Enterprises Limited v. Russia*, Award (18 July 2014), at paras 1185-1186.
[146] *Seizure and Detention of Certain Documents and Data (Provisional Measures)(Order)* [2014] ICJ Rep. 147, at 148 (para. 2), 152 (para. 24).

B. Testimonial Evidence

In the period under review, testimonial evidence has been increasingly prominent in the procedure of the Court and the Tribunal.[147] Procedural modalities have had to be crafted on an *ad hoc* basis, prompting extensive correspondence and negotiation,[148] which delay the opening of the oral phase and add to the litigation costs. Regularisation of best practices by the Court and the Tribunal on testimonial evidence would facilitate expeditious handling by prescribing templates and foreclosing problems.

1. Witnesses of Fact

As the Court has never exercised its Article 67 power to request the attendance of a witness, witnesses are called by parties. In light of the fact that individuals, companies and non-governmental organisations are not able to submit *amicus* briefs, the Committee suggest that the Court and Tribunal consider in judicial practice the exercise of this power where appropriate to enable such entities to provide evidence.[149] Additional procedural measures for consideration include: 1) witness security; 2) pre-testimonial communication between counsel and witnesses; and 3) the lack of a perjury mechanism. In the *Croatia Genocide Case*, the Court adopted a raft of useful security measures to conceal witness identities;[150] in some cases, it may be necessary to adopt even stronger measures (e.g. – anonymised video-link in a separate chamber). The Committee recommend that this template be codified by Practice Direction.

The US and Canadian practice of 'witness proofing', whereby counsel engage in model question-and-answer sessions in order to prepare the witness to give testimony, is sometimes practised by legal teams. The difficulty is the risk that counsel may, accidentally or intentionally, contaminate the natural presentation of evidence. The Committee advise that its explicit discouragement by Practice Direction would be useful. Legal teams using proofing in spite of this discouragement would run the risk of the weight of the testimony being adversely affected; for example, as general practice the Court or the Tribunal could ask witnesses at the outset of the interrogation whether they have conducted question-and-answer sessions with counsel.[151] As stated in the *Counsel Survey*, prescription of guidance in the Practice Direction on the content and form of witness statements would assist.[152] Clarification of the modalities of affidavits (including the consequences of acceptance of their authenticity) would be valuable.[153] Since the Court and the Tribunal at present lack the ability to compel witnesses, the Committee also propose that they instigate negotiation with the host States to create a perjury mechanism.[154]

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[147] ICJ Statute, Arts 43(5), 51; ICJ Rules, Arts 57-58, 62-65; ITLOS Statute, Art. 27; ITLOS Rules, Arts 78-80.
[148] E.g. – *Croatia Genocide Case*, *supra* note 6, at 17-23 (paras 17-44).
[149] E.g. – *Arctic Sunrise Arbitration*, *supra* note 11, at paras 58-60.
[150] *Ibidem*, at 22 (para. 39).
[151] For admonitions on contacts with witnesses that 'could compromise their independence or breach the terms of their solemn declaratin', see *Croatia Genocide Case*, *ibidem*, at 20 (para. 33). See also *The M/V Saiga (No. 2) Case*, *supra* note 105, PV.99/9 (12 March 1999, 10 a.m.), at 11 (lines 10-14, 23-45), 12 (lines 12-32, 45-49), 13 (1-49), 14 (1-7); PV.99/10 (12 March 1999, 2 p.m.), at 15 (lines 1-34), 29 (5-37).
[152] Crawford and Keene, *supra* note 8, at 228. See also *Croatia Genocide*, Declaration of Judge Donoghue, at paras 3-5; *The M/V Saiga (No 2) Case*, *supra* note 105, PV.99/3 (9 March 1999, 10 a.m.), at 5 (lines 1-17); PV.99/4 (9 March 1999, 2 p.m.), at 7-8 (lines 23-48, 1-35); *The M/V Louisa Case*, *supra* note 105, PV.12/C18/4/Rev.1 (5 October 2012, 3 p.m.), at 3-9.
[153] This has been a problem at the Iran-US Claims Tribunal – *W. Jack Bukamier Case* cited in Amerasinghe, *Evidence in International Litigation* (2005), at 390-394.
[154] This would require a waiver by the Court and Tribunal of immunity for witnesses – UNGA Resn 90(I), 11 December 1946, para. 5(b); Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany Regarding the Headquarters of the Tribunal, Art. 24(2).

2. Expert Witnesses and Assessors

The prominence of experts in the period under review has excited considerable professional comment and calls for reform in the *Counsel Survey*.[155] There have hitherto been three methods by which experts may appear before the Court: 1) as 'technical' or 'scientific' counsel in the parties' legal teams; 2) as a witness called by the parties pursuant to Article 63 of the Rules; or 3) as an expert appointed by the Court pursuant to Article 67 of the Rules.

As there is professional consensus welcoming the discouragement by the Court in the *Pulp Mills Case* of the appointment of experts as counsel,[156] a logical extension is to codify this. The Committee opine that the practice of *experts fantômes* should not continue, as the fact that the parties are unaware of their use contravenes the procedures set out in the Statute and the Rules. Whereas the Committee consider that the availability of scientific experts as a resource to assist judges on technical matters (e.g. – cartographers for the drawing of a maritime line) is good practice, this should be done with the knowledge of the parties. Parties should not, however, have the right to comment upon the appointment procedure of these experts, as they form part of the prerogative of the Court concerning deliberations.

In this respect, the Committee suggest that the Court could consider appointing experts as assessors to assist in deliberations without the right to vote.[157] Terms of reference could be agreed with the assessors, which may or may not include entry into the deliberations room (i.e. – advice to the panel sitting collectively) and/or availability for consultation individually by panel members. Whilst the identity and terms of reference of the assessors should be published, the Court should decide the scope of the experts' involvement without comment by the parties. The open use of assessors according to prescribed procedures as an alternative to *experts fantômes* would enable the Court to continue to receive input with the confidence of the parties.

In this respect, there is a sharp distinction between this form of assistance and the *evaluation* by an expert of factual issues (e.g. – through a report). In the latter case, the parties should have the right to be consulted on the appointment process. In the *Maritime Delimitation in the Caribbean Sea Case*, the Court exercised for the third time[158] its Article 67 power to appoint experts *proprio motu* in consultation with the parties. This welcome and successful exercise of the power accords with the consensus view in the profession concerning the best method of appointment. The Committee accordingly recommend that this become the regular procedure for the taking of expert evidence. To encourage celerity, Articles 66-67 of the ICJ Rules as well as 80 and 82 of the ITLOS Rules could be amended to provide that requests for experts, inquiries and site visits be received by the time-limit for the filing of the Memorial.

Such evidence should be called only if truly necessary in light of the financial cost. In *Maritime Delimitation in the Caribbean Sea*, the General Assembly approved a reduced request of the Court for extraordinary expenses.[159] While the typical cost of experts is a relatively minor expense for the parties, it is a significant one for the Court due to its small allowance for unforeseen expenses; moreover, the triennial nature of the UN budgetary process inhibits predictability. The Committee accordingly propose that parties – save for those who are supported by the Trust Fund – be ordered to contribute to such extraordinary costs.

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[155] Crawford and Keene, *supra* note 8, at 229.
[156] *Pulp Mills*, *supra* note 83, at 72 (para. 167). The Tribunal has not taken this up – *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh v. Myanmar)(Judgment)* [2012] ITLOS Rep. 4, at 8, 115 (para. 444).
[157] ICJ Rules, Art. 21(2); UNCLOS, Art. 289. This was arguably done in the *Gulf of Maine Case*.
[158] *Maritime Delimitation in the Caribbean Sea Case (Costa Rica v. Nicaragua)(Order of 16 June 2016)*, at 33-34. The Tribunal has yet to exercise its equivalent power under Article 82(1) of the Rules.
[159] UNGA Resn 71/272 (23 December 2016), at VIII.

On solicitation of experts (e.g. – by contacting professional associations in search of nominees) a measure of flexibility in the consultations between the Court and the parties is necessary. The modalities could be prescribed in general terms in the procedure (timing, consultation of the parties, duty of cooperation, opportunity for comment). The experience of the *Caribbean Delimitation Case* and others suggests that an early time-limit (e.g. – the filing of the Memorial) for parties to request Court-appointed experts is feasible. Though the *voir dire* procedure has been applied on rare occasions,[160] objections may be addressed in the Article 50 procedure.

3. Examination

Whilst judicial practice in the period under review has led to a degree of regularisation of procedures for the interrogation of witnesses,[161] problems nonetheless arise and there is demand for further clarification.[162] The propriety of expert witnesses not only reading (and potentially informing) written pleadings but also observing the oral arguments of counsel[163] is dubious. Expert witnesses, whether Court-appointed or party-appointed, could be directed not to participate in the preparation of pleadings or to observe their presentation; conversely, counsel could be directed not to communicate with witnesses who are subject to recall, especially on the case.[164] Where their evidence is cited in the interrogation of other witnesses, they could be provided with the relevant extracts if recalled.

Though the procedure of the Court on witness interrogation broadly follows the English model, clarity is lacking on matters of detail. Whereas the rule on open and leading questions has been adopted,[165] it is not evident that the rule is always comprehensible to counsel. The resulting scope for misunderstanding thus militates in favour of prescriptiveness through Practice Direction on the detail of the procedure, such as contacts with witnesses under interrogation, reference to personal knowledge or impeachment of the credibility of a witness.[166] Restructuring of the oral phase, as proposed above, whereby testimonial evidence could be taken at the outset, would help to insulate witnesses from undue exposure to the pleadings.

C. Site Visits

Though the Court is empowered to order a site visit *proprio motu*,[167] the sole site visit in the *Gabćikovo-Nagymaros Project Case* was done with the agreement and financing of the parties.[168] That experience suggests that a time-limit coincidental with the closure of the written phase for the consideration of a potential site visit is viable. Two successful site visits were conducted with the cooperation and support of the parties in the recent *Indus Waters*

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[160] E.g. – Cases Nos 3 and 4 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)(Provisional Measures)(Order of 27 August 1999)*, PV.99/20/Rev.2 (18 August 1999, 10 a.m.), at 35-41, esp. 38.
[161] E.g. – *Whaling Case*, *supra* note 102, CR 2013/9 (27 June 2013, 10 a.m.), at 38; *Certain Activities/Construction of a Road*, *supra* note 76, CR 2015/3 (14 April 2015, 3p.m.), at 20-21.
[162] Crawford and Keene, *supra* note 8, at 228.
[163] E.g. – *Whaling Case*, *supra* note 102, at 53; at 20-21. Witnesses of fact, by contrast, are directed at both the Court and the Tribunal to remain outside of the chamber until called.
[164] *Certain Activities/Construction of a Road Cases*, *supra* note 76, Verbatim Record, CR 2015/12 (24 April 2015, 10 a.m.), at 20-21; *The M/V Louisa Case*, *supra* note 105, PV.12/C18/2/Rev.1 (4 October 2012, 3 p.m.), at 1 (lines 12-13); *Arctic Sunrise Arbitration*, *supra* note 11, Transcript (10 February 2015), at 2 (lines 23-25), 3 (lines 1-4); *The M/V Virginia Case*, *supra* note 105, P/V.13/C19/4/Rev.1 (4 September 2013, 10 a.m.), at 31 (lines 18-48).
[165] E.g. – *Croatia Genocide*, *supra* note 6, CR 2014/11 (6 March 2014, 3 p.m.), at 33.
[166] E.g. – *The M/V Saiga (No. 2)*, *supra* note 105, PV.99/9 (12 March 1999, 10 a.m.), at 11-13; *The M/V Louisa Case*, *supra* note 105, PV.12/C18/2/Rev.1 (4 October 2012, 3 p.m.), at 17-18.
[167] ICJ Statute, Art. 44(2); ICJ Rules, Art. 66; ITLOS Rules, Art. 81.
[168] Note 90, *supra*. Cost was a key factor in the rejection of requests for site visits in *South West Africa Cases*, *Gulf of Maine Case*, and *Land, Island and Maritime Frontier Dispute Case*.

Arbitration.[169] The Committee recommend that these templates of best practice be codified by Practice Direction for further development.

V. Conclusions

This Interim Report has proposed procedural reforms at the ICJ and the ITLOS that, in the view of the Committee, are practicable and useful. Three overarching policy considerations drive these measures: 1) enhancing the 'sound administration of justice' (*la bonne administration de la justice*) as the effective exercise of the judicial function; 2) promoting procedural economy, as the time-efficiency of contentious procedures both for the institutions and for the parties; and 3) furthering cost-effectiveness in order to increase, and to be seen to increase, the value of the services provided by the institutions for the money invested in them by States. While drawing valid and useful comparisons between the Court and the Tribunal, the Committee have also acknowledged their respective institutional realities: certain approaches may well work for both, others not. The Committee have continuously been mindful of the fact that parties may jointly propose modifications to the Rules at the outset of proceedings,[170] which ensures that their voices may be heard in practice.

This exercise appears at a time of considerable challenge to the legitimacy of institutions across public life. In this evolving environment, practices that were once acceptable have become less so even while expectations have risen as to the performance of the institutions. To respond with conviction, institutions, including international courts and tribunals, need to adapt by demanding more of themselves in terms of both effective performance and ethical rigour. Whereas enhanced procedural efficacy and strengthened ethical standards are not necessarily a decisive factor in the decision-making process of States to participate in international adjudication, they are by no means peripheral: continuous efforts to achieve effective and efficient proceedings would promote confidence amongst States in the professionalism and fairness of the Court and the Tribunal and thus fortify their budgetary and logistical requests.

Times of challenge also bring opportunity. Whereas the ICJ now has a healthy docket in comparison with the levels typical of the Cold War, it remains modest when considered against the great potential that remains dormant due to low participation levels amongst States. The ITLOS remain a part-time tribunal with a low number of contentious cases brought before them. In exercising their powers to reform their procedures and working practices, the Court and the Tribunal can strive to attract States to participate in greater numbers. Were States to bring their disputes in ever-larger numbers, the present constraints of the procedure would quickly place a strain upon the ability of the Court and the Tribunal to handle them with expedition while guaranteeing procedural fairness. Through the proposed measures, the Committee believe that the Court and the Tribunal would increase their throughput and thus their load-bearing capacity. Such reform would serve as a declaration of intent by the Court and the Tribunal to serve the international community of States to the greatest extent possible, as appropriate to the judicial function in the pacific settlement of international disputes.

[169] *Supra* note 140, at paras 33-40, 77-88.
[170] ICJ Rules, Art. 101; ITLOS Rules, Art. 48.

VI. Annexe

The Committee decided at this stage not to adopt certain proposals while keeping them under review. To solicit comment, the Committee set out those ideas below:

1. **Implicit Claims**: the Committee considered whether the Court and the Tribunal ought to adopt a new Rule to define 'implicit claims', which would provide a legal test for admissibility. Whereas this has been a problem in recent practice, the Committee considered that such a Rule may intrude into the substance of the claims;
2. **Default**: the Committee debated the possibility of amendment to Articles 91 of the ICJ Rules and 108 of the ITLOS Rules to empower the Court and the Tribunal to assign a default case to the standing Chamber of Summary Procedure upon application by the participating party in the absence of an objection, tendered by a duly appointed agent, by the defaulting party. The Committee decided not to adopt this idea at this time, as it may be perceived to conflict with the duty of international courts and tribunals to ensure that their judgments are 'well founded in fact and law';
3. **Composition of the Panel**: the Committee discussed the possibility of adopting a formal procedure for parties to challenge individual judges. As the discussion was insufficiently mature at the time of submission, the Committee chose to keep the topic under review;
4. **Judges *ad hoc***: the Committee discussed the *Whaling* case situation, where one of the parties and a third State publicly agreed that the latter would participate as an Article 63 intervenor rather than as a party so that the *ad hoc* judge appointed by the party would remain notwithstanding the fact that one of the Members of the ICJ had the nationality of the intervenor. As the Committee did not form a concrete proposal, it decided to keep the topic under review;
5. **Language**: the Committee considered the potential promotion of *ad hoc* chambers to hear cases in English only or French only where one of those languages is shared by the parties as an official language. The Committee did not adopt this proposal, as concerns were expressed that it may detract from the diversity of the panel. The Committee also considered the potential use of the Spanish language in an *ad hoc* Chamber where three Members of the ICJ are Spanish-speakers, taking into account Article 39 of the ICJ Statute;
6. **Chambers**: there have been calls in the *Counsel Survey* and elsewhere for the greater use of chambers. Whilst certain members felt that greater use of *ad hoc* chambers would detract from the jurisprudence of the full Court, others opined that chambers can be more free to adopt useful innovations. In the absence of consensus, it remains under review;
7. **Written Notes**: the Committee investigated options for deliberation, such as a judge rapporteur system or a cap on written notes. The Committee did not adopt a proposal, as some members felt that the institutions were best-placed to evaluate the different methods;
8. **Individual Opinions**: the Committee considered a cap on the length of individual opinions. Whereas some members felt that this would set a moral example and that it would save costs on lengthy opinions (e.g. – by judges *ad hoc*), others considered this to intrude into the judicial function. In the absence of consensus, a proposal was not adopted;
9. **Joinder of Objections**: whereas some members favoured the abolition of joinder of objections to the merits, others felt that this may intrude into matters of substance rather than procedure. In the absence of consensus, the proposal was not adopted;
10. **Inquiries**: the Committee considered the potential expansion of the use of inquiries, such as in cases of alleged violations of provisional measures. As the Committee did not arrive at a concrete proposal, it decided to keep the topic under review.