



# The Law and Practice of Fact-Finding before the International Court of Justice

James Gerard Devaney

Thesis submitted for assessment with a view to obtaining  
the degree of Doctor of Laws of the European University Institute

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European University Institute  
**Department of Law**

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## *Thesis Summary*

This thesis takes as its starting point a number of significant recent criticisms of the way in which the International Court of Justice (the Court) deals with facts. After examining the Court's substantial fact-finding powers as set out in its Statute and Rules, it is noted that the Court has not made significant use of the fact-finding powers that it possesses, instead preferring to take a reactive approach to fact-finding. It is this reactive approach, largely relying on the parties to put evidence before the Court, which is the subject of recent criticisms both from within the Court itself and from international legal scholarship. Having assessed the merits of these arguments, the thesis takes the position that such criticisms are indeed warranted and that the Court's reactive approach to fact-finding falls short of adequacy both in cases involving abundant, particularly complex or technical facts and in those cases involving a scarcity of evidence, such as cases of non-appearance.

Subsequently, the thesis undertakes a comparative exercise in order to examine how other relevant inter-state tribunals conduct fact-finding. Drawing on the practice of other tribunals, namely the adjudicative bodies of the World Trade Organization and a number of recent inter-state arbitrations, the thesis then makes a number of select proposals for reform which, it is argued, will enable the Court to address some of the current weaknesses in its approach to fact-finding and better ensure factual determinations that are as accurate as they can possibly be within the judicial process. Such proposals include (but are not limited to) the development of a power to compel the disclosure of information, greater use of provisional measures and a clear strategy for the use of expert evidence.



## *Abstract*

The thesis takes as its starting point a number of significant recent criticisms of the way in which the International Court of Justice deals with facts. Drawing on an extensive survey of other relevant inter-state tribunals the thesis makes a select number of proposals for reform which could realistically be made through orders or practice directions to remedy some of the defects of the Court's current reactive approach to fact-finding, crucially without amendment of the Court's Statute.

The thesis first notes that the Court is regularly faced with cases of such a complex or technical nature so as to be beyond what any judge could be reasonably expected to comprehend. Next, Chapter 1 shows that despite possessing far-reaching fact-finding powers the Court has never utilised them to any meaningful extent. Instead, the Court's approach to fact-finding is in many respects reactive – the onus being placed squarely on the parties to place before the Court the information necessary for the establishment of a sound factual basis upon which the case can be decided. That the Court operates in this manner is the product of a number of interrelated factors including resource constraints and, most significantly, a deferential attitude to states in light of their sovereign nature – an attitude that has permeated the operation of the Court since the days of the Permanent Court of International Justice (PCIJ).

Chapter 2 explores a number of criticisms that have been made of the way in which the Court operates. These criticisms of the Court's reactive approach have emanated both from international legal scholarship and from within the Court itself. Whilst the merits of the Court's current approach are acknowledged, it is argued that the Court's reactive approach falls short of adequacy both (i) where the facts are abundant or particularly complex or technical, since the Court struggles to effectively assess the evidence presented, and (ii) where there is a paucity of facts, since the Court struggles to fulfil its Article 53(2) ICJ Statute obligation to satisfy itself that the case is sound in fact and in law.

It might be said that this much is uncontroversial. As such, the thesis seeks to take the next step and explore whether we can envisage an approach that would allow the Court to more effectively conduct fact-finding. In doing so, the thesis takes advantage of the much-discussed proliferation of international courts and tribunals and draws upon the substantial body of practice in this area. A survey of this body of practice in Chapter 3 reveals that a number of other international courts and tribunals, such as the WTO adjudicative bodies and inter-state arbitrations generally take a more proactive approach to fact-finding. The thesis then asks whether the adoption of a similarly proactive approach by the ICJ could potentially help to remedy some of the fact-finding deficiencies for which the Court has been criticised in recent times.

Drawing on the practice of the other international courts identified, Chapter 4 suggests that there are a number of avenues open to the Court with potential to address some of its current weaknesses, should it choose to do so:

1. The first relates to the possibility of making greater use of the fact-finding powers that the Court already possesses. Chapter 4 explores the possibility of the Court taking a teleological approach to its Statute and Rules and the so-called duty of collaboration in asking whether the Court could potentially construe its fact-finding powers to compel the production of evidence, as opposed to merely requesting it.

2. Secondly, the possibility of better utilising the Court's power to order provisional measures under Article 41 of its Statute is examined.
3. Thirdly, relating to both the fact-finding and fact-assessment process, the thesis explores the possibility of increased use of experts, the refinement of the current procedure for the presentation of expert evidence and greater use of cross-examination as a way of aiding the Court's effective assessment of the facts put before it by the parties.

Finally, Chapter 5 examines the merits of a more proactive approach to fact-finding, facilitated in the manner set out in the previous chapter. However, before the relative merits of a more proactive approach can be assessed, Chapter 5 first of all addresses the fundamentally important question of whether the Court has completely unconstrained discretion to take a more proactive approach to fact-finding or whether its discretion is somehow fettered by factual determinations made by other UN organs (in particular the Security Council under Chapter VII of the Charter). Ultimately it is argued that there is nothing in either the Court's constitutive instruments or practice which would fetter the Court's discretion and that accordingly the Court, as an independent international tribunal, is competent to adopt a more proactive approach to fact-finding.

In moving to consider the merits of a more proactive approach, Chapter 5 next illustrates in practical terms what the more proactive approach set out in Chapter 4 would look like. Whilst a case is made for such reforms, Chapter 5 considers the limitations of the Court's fact-finding powers and ruminates on the merits of the Court's current reactive approach to fact-finding. Subsequently, after the limitations of the Court's powers have been established, it is argued that taking a more proactive approach to fact-finding is no panacea for the current problems that the Court faces. Nevertheless, it is maintained that implementation of any of the proposals set out in Chapter 4 would ultimately leave the Court better placed to make accurate factual determinations upon which the law could be decided.



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## *Introduction*

### *(i) Factually Complex Cases: the Court's Bread and Butter*

In 1958 Neill Alford Jr. stated that the likelihood of a dispute as to the facts in any case before the International Court of Justice was fairly remote.<sup>1</sup> He argued that this was so due to the fact that generally neither state party to a case before the Court had sufficient evidence to question the factual assertions made by the other party.<sup>2</sup> However, a number of developments in the intervening fifty or so years including the greater flow of information brought about by the internet and the involvement of Non-Governmental Organisations and International Organisations in human rights monitoring have proved Alford wrong as increasingly the Court has had to deal with cases in which the outcome of the case has turned not just on legal questions but also on factual determinations.<sup>3</sup> As Mosk has stated:

‘...there have been dramatic changes in the availability, ascertainment and importance of facts. The technological age has produced more facts and more facts that can and must be ascertained...it is no longer necessary to wade through a warehouse full of documents to find critical evidence...It also may not be necessary to travel thousands of miles to find documents and interview witnesses. New methods of storing documents and of communicating have drastically affected means of investigating and ascertaining facts’.<sup>4</sup>

Crucially, such cases requiring a heavy focus on the facts have challenged the Court's traditional approach to the facts. In the past the Court was often able to decide the outcome of a case through reliance on undisputed facts, meaning that it was not so much the facts that were dispute but rather the legal conclusions that were to be drawn from them.<sup>5</sup> It has been

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<sup>1</sup> N.H. Alford Jr, ‘Fact Finding by the World Court’ 4 Vill L Rev 37, 57

<sup>2</sup> *ibid*

<sup>3</sup> S. Halink, ‘All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case’ 40 NYUJ Int'l L & Pol 13, 13 KJ Keith, ‘The International Court of Justice and Criminal Justice’ 59 International & Comparative Law Quarterly 895, 904 R. Teitelbaum, ‘Recent Fact-Finding Developments at the International Court of Justice’(2007)’ 6 The Law and Practice of International Courts and Tribunals 184, 125

<sup>4</sup> R. Mosk, ‘The Role of Facts in International Dispute Resolution’ (2003) 203 *Receuil des Cours - Collected Courses at the Hague Academy* 11, 19

<sup>5</sup> Indeed, cases before the PCIJ primarily concerned the application of treaties and as such the Court ‘was in a position to establish and rely on facts that were not in dispute between the parties, obviating, in most cases, the need for detailed rules of evidence’, see E. Valencia-Ospina, ‘Evidence before the International Court of Justice’ (1999) 1 International Law Forum du droit international 202, 202; see also Rosalyn Judge Higgins, *Speech by H. E. Judge Rosalynn Higgins, President of the International Court of Justice* (At the 58th Session of the International Law Commission, 2006) such as *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, ICJ Reports 2007, p 659 120; Shabtai Rosenne and Yaël Ronen, *The law and practice of the International Court, 1920-2005* (4th edn, Martinus Nijhoff 2006) 1040; with regard to the ICJ, As Judge Yusuf stated in the *Pulp Mills* case, ‘on many occasions in the past the Court was able to resolve complex and contested factual issues without resorting to

remarked that ‘[i]n times past, courts and arbitrators dealt with situations that were not as complex as those today...’<sup>6</sup> Whether or not this is so (for cases such as *Corfu Channel and Nicaragua* could hardly be described as straightforward in terms of the facts<sup>7</sup>), what is certain is that the Court is increasingly deprived of the possibility of basing its decisions on undisputed facts.

In addition to the disputes coming before the Court being consistently complicated, these complex facts are being increasingly contested. By this it is meant that states themselves have demonstrated a willingness to use ‘ever more sophisticated forms of evidence to substantiate their claims’.<sup>8</sup> Such developments have led to criticism of the way the Court handles factually complex cases that come before it (as we will see in greater detail in the following chapters)<sup>9</sup> and have been one of the driving forces behind calls to move away from the Court’s current approach to the facts.<sup>10</sup>

That is not to say that no such disputes where the facts are uncontroversial come before the Court today- even now the Court will occasionally be asked to deal with a case that almost exclusively turns on legal issues alone. For instance, in the *Arrest Warrant* case the Court only had to consider the legal issue of whether the arrest warrant issued by Belgium violated

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Article 50 of the Statute’ or utilising its other fact-finding powers; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, ICJ Judgment (20 April 2010) <<http://www.icj-cij.org/docket/files/135/15877pdf>>, Declaration of Judge Yusuf at 6

<sup>6</sup> Mosk 23

<sup>7</sup> See *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports 1986, p 14

<sup>8</sup> Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009) 5; Teitelbaum 152; Jean D’Aspremont and Makane M. Mbengue, ‘Strategies of Engagement with Scientific Fact-Finding in International Adjudication’ Amsterdam Law School Research Paper No 2013-20 stating that ‘[i]t is commonplace that the role of science and technologies is growingly infusing all the layers of the international legal system as a whole’; Anna Riddell, ‘Scientific Evidence in the International Court of Justice - Problems and Possibilities’ (2009) 20 *Finnish Yearbook of International Law* 229, 229

<sup>9</sup> S. Mathias and others, *The International Court of Justice at 60: Performance and Prospects* (JSTOR 2006) 398 Teitelbaum 120; Stephen M. Schwebel, *Three Cases of Fact-Finding by the International Court of Justice in International Law* (Cambridge University Press 1994) 2; Thomas Franck, ‘Fact-finding in the I.C.J.’ in R.B. Lillich (ed), *Fact-finding before international tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992) 21; John Crook, ‘The Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) and its Implications for the Rules on the Use of Force’ (American Society of International Law Briefing at Tillar House)

<sup>10</sup> Christian J Tams, ‘Article 49’ in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 1107. As Tams has stated, ‘[g]iven the increasing number of cases brought before the Court, and the considerable length of proceedings, it is not surprising that the Court’s cautious approach just described has come under strain. Especially in recent years, there has been talk about the need to “modernize the conduct of the Court’s business”’; see also Caroline E. Foster, ‘New Clothes for the Emperor? Consultation of Experts by the International Court of Justice’ *Journal of International Dispute Settlement*, 2



its international obligations to respect the immunity from criminal jurisdiction of the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo.<sup>11</sup>

However, there is no doubt that today disputes in which the resolution of factual determinations is critical to the resolution of the legal issues in the dispute are commonplace.<sup>12</sup> Domestic courts with procedures for discovery or explicit powers to compel the production of evidence often have to guard against so-called ‘fishing expeditions’ whereby one party submits often speculative requests for the disclosure of information in the possession of the other party. However this is not a problem the ICJ has ever faced. Indeed, its reactive approach to the facts results in the ‘opposite extreme’ – namely the danger that the parties flood and overwhelm the Court with thousands of pages of written submissions, annexes and reports. Whether this practice has arisen as a result of the fact the parties are unclear what kind of information the Court will find probative or not, the end result is that the Court struggles to deal with the vast amounts of evidence.<sup>13</sup> The fear of ‘documentary overload’<sup>14</sup> prompted the Court to adopt its Practice Directions II and III, urging the parties to only submit documentary evidence that was absolutely necessary to support the case.<sup>15</sup>

Despite these Practice Directions the Court itself has referred in recent times to ‘mass[es] of

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<sup>11</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002*, p 3

<sup>12</sup> Rosalyn Judge Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’ (Sixth Committee of the General Assembly, 2 November 2007); Laurence Boisson de Chazournes, ‘Introduction: Courts and Tribunals and the Treatment of Scientific Issues’ 3 *Journal of International Dispute Settlement* 479; Similarly Highet stated that since the mid-1980s the Court has been ‘increasingly exposed to situations involving disputed facts’; K. Highet, ‘Evidence, the Court, and the Nicaragua Case’ 81 *The American Journal of International Law* 1, 10

<sup>13</sup> Teitelbaum suggests that the Court is partly to blame for this: ‘...the Court’s failure to give some guidance to the parties in terms of the burden of proof required, prior to the rendering of its decision, may contribute to the excessive annexes and lack of focus in the written pleadings on the part of counsel’ see; Teitelbaum 123

<sup>14</sup> Berman has referred to documentary overload being ‘a real and growing problem. The urge to be complete is understandable and laudable, but it leads to the essential becoming swamped by the peripheral’; see; Frank Berman, ‘Remarks by Frank Berman’ [American Society of International Law] 106 *Proceedings of the Annual Meeting (American Society of International Law)* 162

<sup>15</sup> To provide some illustration, in the Permanent Court’s first case the documents submitted included only a handful of letters, memoranda and one telegram; see *Nomination of the Netherlands Workers’ Delegate to the Third Session of the International Labour Conference, 1922 PCIJ, ser B, No 1 (Advisory Opinion of July 31)*. By the time of the *German Interests in Polish Upper Silesia* case however, just a few years later, the Court was already dealing with substantial documentary evidence, more than two hundred documentary annexes being submitted at one stage or another in the course of these proceedings; see *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits)* 1926 PCIJ, Ser A, No 7, Judgment of May 25, at 11-13; see Hudson Reports at 116; Highet 16. In *Corfu Channel*, the first case to come before the ICJ, 188 documents were submitted in total and by 1950 and the *South West Africa* advisory opinion the submission of documentary evidence ‘had reached truly epic dimensions’ – with over 27 pages required simply to list the over three hundred documents submitted; *ibid*; see *International Status of South-West Africa, Advisory Opinion: ICJ Reports, 1950*, p 128

scientific and technological information’,<sup>16</sup> ‘vast amounts of factual and scientific material containing data and analysis’<sup>17</sup> ‘complex scientific’<sup>18</sup> or ‘highly complex and controversial technological, strategic and scientific information’<sup>19</sup> and simply ‘vast masses of factual material’.<sup>20</sup> The Court is not just referring here to the sheer quantity of information put before the Court but also to the complexity of the evidentiary issues at the heart of such cases.<sup>21</sup>

For instance, in the *Armed Activities* case the Court had to deal with a myriad of (often extremely complex) factual issues related to the Democratic Republic of Congo’s claims that Uganda had violated the prohibition on the use of force, supported irregular Ugandan forces and occupied part of its territory as well as violated international human rights law and international humanitarian law amongst other claims.<sup>22</sup> Similarly, in the *Bosnian Genocide* case the Court had to make numerous factual determinations in order to establish whether Serbia had committed the atrocities alleged by Bosnia-Herzegovina and to establish whether it had the specific intent to commit genocide.<sup>23</sup> Most recently, in the *Whaling in the Antarctic* case, in the course of assessing whether the taking, killing and treating of whales could be classified as being done ‘for purposes of scientific research’, the Court went to considerable lengths in examining such complex issues as the reasonableness of the use of lethal methods and the very design and (to some extent) implementation of Japan’s JARPA II whaling programme.<sup>24</sup>

A further example is the *Pulp Mills* case which was described by two judges of the Court itself as being one of the ‘exceptionally fact-intensive’ cases that have become commonplace

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<sup>16</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p 7, para 2 (25 September) Dissenting Opinion of Judge Skubiszewski; Judge Schwebel has also described the more than 5,000 pages of pleadings and documentary annexes as having placed a ‘considerable burden on the Court’s tiny translation services and on its budget’; see Stephen M. Schwebel, ‘Speech of the President of the International Court of Justice to the General Assembly, A/52/PV.36, 27 October 1997’

<sup>17</sup> *Pulp Mills Case*, para 229

<sup>18</sup> Ibid, Joint Dissenting Opinion of Al-Khasawneh and Simma, para 11

<sup>19</sup> Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, p 66, para 15

<sup>20</sup> Ibid, Dissenting Opinion of Judge Weeramantry, 451

<sup>21</sup> Please note that the terms ‘evidentiary’ and ‘evidential’ are used interchangeably throughout the thesis, owing to their synonymous nature and reflecting the common use of both terms in practice. ‘Evidential’ is historically the older term and is more prominent in British English, with ‘evidentiary’ (invented by J. Bentham in his ‘Elements of the Art of Packing...’ in 1821 or J. Mill in his ‘History of British India, Volume III’ according to the Oxford English Dictionary) being used more often in American English

<sup>22</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, p 168, 239, 116, para 24

<sup>23</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, ICJ Reports 2007, p 43, 91

<sup>24</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment, 31 March 2014, at para 67

in recent times.<sup>25</sup> The factually complicated nature of the *Pulp Mills* case was summed up well in the Dissenting Opinion of Judge Cançado Trindade who stated that:

‘...by and large, conflicting evidence seems to make the paradise of lawyers and practitioners, at national and international levels. It seems to make, likewise, the purgatory of judges and fact-finders, at national and international levels...’

However Judge Cançado Trindade went on to say that ‘...[c]onsideration of this issue cannot be avoided...’<sup>26</sup> and there is no doubt that this is so. Whilst the factually complex nature of cases regularly coming before the Court might be akin to purgatory for it, it is clear that such issues can no longer be avoided. In fact, if current trends are to continue, as former President of the Court Judge Rosalyn Higgins stated in her address to the Sixth Committee of the General Assembly in 2007, such ‘fact-heavy’ cases are likely to be a constant feature of the Court’s work in the future.<sup>27</sup>

Accordingly, it is argued that it is a feature of modern international adjudication that complex factual issues are commonplace and that the handling of these issues is an integral part of the international judicial function.<sup>28</sup> It will be argued that the Court’s approach to the facts ought to reflect this. However, before we turn our attention to the Court’s current approach to fact-finding (and recent criticisms of this approach) it is necessary to first consider just why factual determinations matter in international adjudication.

#### *(ii) The Importance of ‘Taking Facts Seriously’*

It can be anticipated that the consistently factually complex nature of contemporary international litigation will not be universally accepted as presenting any meaningful

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<sup>25</sup> *Pulp Mills Case, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 3*

<sup>26</sup> *ibid*, Dissenting Opinion of Judge Cançado Trindade at para 148

<sup>27</sup> Judge Higgins stated that ‘[t]he judicial determination of relevant facts will be an ever more important task for the Court’ and cited the *Case Concerning Land Reclamation by Singapore in and around the Straights of Johor (Malaysia v Singapore) Provisional Measures, International Tribunal for the Law of the Sea, Order of 8 October 2003*, in which 4,000 pages of annexes were put before the Court; see Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’

<sup>28</sup> In the words of Rosenne; ‘There is no question that modern international relations, and hence modern diplomacy and modern international litigation is daily becoming increasingly concerned with scientific and technological facts’, see ‘Fact-Finding Before the International Court of Justice’ in S. Rosenne, *Essays on International Law and Practice* (Martinus Nijhoff Publishers 2007) Makane Moïse Mbengue, ‘Scientific Fact-finding by International Courts and Tribunals’ 3 *Journal of International Dispute Settlement* 509, 512; *Nuclear Tests (New Zealand v France), Judgment, ICJ Reports 1974*, p 457, para 30

challenges for the Court and for international law as a whole. For instance, it is likely to be contended that the establishment of the facts is a secondary concern in inter-state adjudication where the primary task of the tribunal is to settle the dispute before it.<sup>29</sup> As one commentator has stated, ‘it can be argued that the ultimate purpose of international adjudication is not establishing the facts, or truths, even, The Truth, but rather to settle the dispute’.<sup>30</sup> This is a position that has carried great weight over the years and is one which is supported by the historical preference of the Court to decide cases on questions of law rather than the facts.

In the past it has been argued that well-reasoned judgments based in the law rather than decided on technical issues of fact have traditionally been perceived as being of a higher prestige and consequently somehow less offensive to the state party on the wrong end of the judgment.<sup>31</sup> This argument in some way ties in with the deference shown to states as a result of their sovereign nature (a point to be examined in greater detail in section 1.3.3. below) and that fact that in international litigation, with often so much at stake, the perception that ‘technicalities are taboo’.<sup>32</sup> In addition, international judges, educated in one particular legal system, often hail from domestic appellate courts which in general do not deal with complex factual issues, these having been determined by the lower trial courts.<sup>33</sup> As such it is suggested that this attitude towards facts, that having already been dealt with by lower courts they require no further attention, is potentially carried over to the International Court (even if only subconsciously).<sup>34</sup>

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<sup>29</sup> The situation being somewhat different in relation to international criminal law, see N.A. Combs, *Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010); R. Mackenzie and others, *The Manual on International Courts and Tribunals* (2nd edn, OUP); Tim Kelsall, *Culture Under Cross-examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press 2009)

<sup>30</sup> C. Romano, ‘The Role of Experts in International Adjudication’ [2009] *Société Française Pour le droit International*

<sup>31</sup> A number of reasons have been cited as potential explanations for the Court’s traditional predilection for questions of law over questions of fact such as a reluctance or inability to conduct independent fact-finding and the domestic judicial experience of the judges of the Court.; R.R. Bilder, ‘The Fact/Law Distinction in International Adjudication’ Richard Bonnot Lillich (ed), *Fact-finding before International Tribunals* 95, 97; Foster 28

<sup>32</sup> D.V. Sandifer, *Evidence before international tribunals*, vol 13 (University Press of Virginia 1975) 22; it could be argued that technical or more nuanced judgments allow both sides to claim a victory of sorts, as in the case of the *Bosnian Genocide* case; see <http://www.nytimes.com/2007/02/26/world/europe/26cnd-hague.html>

<sup>33</sup> On this issue see; Daniel Terris, Cesare PR Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford University Press 2007) 20; who note that out of 215 judges in their study, approximately one third (70) came from national domestic courts, one third from academia (85) and one third (60) from civil service both national and international

<sup>34</sup> This argument has been made by Lauterpacht who in the context of the influence on the law of evidence of the majority of judges coming from what he terms ‘the Roman law systems of law’ has argued that ‘...the probability is that they would tend to apply the rules of evidence obtaining in their own legal systems and disregard those applied by Common Law courts.’ See; H. Lauterpacht, ‘So-Called Anglo-American and

However, such arguments founder in the face of the consistent practice of the ICJ since its inception. More specifically, it is argued that the submissions of the parties and the practice of the Court in every case of insisting on establishing the factual basis of the case before it necessarily shows that the Court views its own function as making judgments that are not merely legal abstractions but that in reality accord with the facts.

To elaborate, Article 49 of the Rules of the Court stipulates that states are required to submit a Memorial to the Court<sup>35</sup> that shall contain ‘a statement of the relevant facts’ and that the resulting Counter-Memorial must contain an admission or denial of these facts.<sup>36</sup> This ensures, in the words of Rosenne, ‘the presentation and airing of the facts and of any arguments on them throughout the written proceedings in every contentious case’.<sup>37</sup> Similarly, if a case is brought before the Court on the basis of a unilateral application, it must contain a succinct statement of the facts, and the subsequent pleadings require the systematic developments of each party’s statement of the facts.<sup>38</sup> In short, this provision explicitly confirms that facts will play a part in any case that comes before the Court in one way or another.

In addition, Article 36(2)(c) of the Court’s Statute gives the Court jurisdiction over disputes concerning ‘the existence of any fact which, if established, would constitute a breach of an international obligation’. Although this provisions deals specifically with cases brought under the optional clause it also gives a good indication of what would be considered a ‘legal dispute’ under Article 36(1) of the Statute, establishing the Court’s jurisdiction.<sup>39</sup> Such provisions, at the heart of the operation of the Court since 1920, highlight the centrality of facts in the Court’s work. The Court cannot change the general procedural rules set out in its Statute pertaining to evidence. As the Court stated in the *Nicaragua* case, it is ‘bound by the relevant provisions of its Statute and Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties’.<sup>40</sup> Alternatively, in the words of Georg Schwarzenberger, ‘individual parties to cases

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Continental Schools of Thought in International Law, The’ 12 Brit YB Int’l L 31, 37

<sup>35</sup> Under Article 43 of the Statute and 45 of the Rules of the Court

<sup>36</sup> Article 49 (1) and (2) of the Rules of the Court

<sup>37</sup> Rosenne 235

<sup>38</sup> Article 38(1) Rules of the Court

<sup>39</sup> Hight 5

<sup>40</sup> See; *Nicaragua Case*, p. 39 at 59 ; I. Scobbie, ‘Discontinuance in the International Court: The Enigma of the

before the Court have but a limited choice: they may take the Statute as they find it or leave it'.<sup>41</sup>

Whilst a former President of the Court once remarked that international lawyers tend to think a lot about the law and perhaps too little about procedure and the finding of facts, there is no doubt that the Court itself considers the establishment of a sound factual basis as an essential part of the judicial function.<sup>42</sup> Ensuring that the Court's decisions are 'founded on a sure foundation of fact'<sup>43</sup> has been very much a central part of the international judicial function and this can be evidenced by the time and effort dedicated to this process in each and every case before the Court.<sup>44</sup> The Court itself has stated that it sees the establishment of the facts as a prerequisite in any case that comes before it:

'[the Court] will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed'.<sup>45</sup>

The Court is one of both first and last instance meaning that unlike certain domestic Constitutional Courts, the establishment of the facts is an essential part of the Court's function.<sup>46</sup> As the Court stated in *Pulp Mills*:

'...it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate...the Court will make its own determination of the facts, on the basis of the evidence presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed'.<sup>47</sup>

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Nuclear Tests Cases' 41 *International and Comparative Law Quarterly* 808, 810; Scobbie states that the Court is bound by its rules of procedure for a good reason – to provide an element of predictability for States before the Court and to prevent ad hoc or arbitrary modifications that deny any guarantee of consistency; *ibid*, 'International Court of Justice: Resolution Concerning the Internal Judicial Practice of the Court' [*American Society of International Law*] 70 *The American Journal of International Law* 905; see further Robert Kolb, *The International Court of Justice* (Hart 2013) 942

<sup>41</sup> Georg Schwarzenberger, *International Law - As Applied by International Courts and Tribunals* (Stevens & Sons 1968) 413

<sup>42</sup> Rosalyn Higgins, 'Introductory Remarks by Rosalyn Higgins' [*American Society of International Law*] 106 *Proceedings of the Annual Meeting (American Society of International Law)* 229, 229

<sup>43</sup> See Lord Justice Bingham in *Air Canada and Others Appellants v Secretary of State for Trade and Another Respondents* [1983] 2 W.L.R. 494, A.L. Marriott, 'Evidence in International Arbitration' 5 *Arb Int'l* 280, 281

<sup>44</sup> Higgins 229

<sup>45</sup> See *Armed Activities Case*, 200, para 57;

<sup>46</sup> K. Highet, 'Evidence and Proof of Facts' in Lori F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational 1987) 355; Franck 21; C. J. Tams, 'Article 51' in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (OUP 2006) 1301

<sup>47</sup> *Pulp Mills Case*, paras 162; see also paras 163 and 168

And it would appear that the same goes for advisory opinions. The Court has in the past addressed arguments such as that of South Africa in the *Namibia* case in which it was argued that since advisory opinions could only be given on legal questions, the Court ought to refuse to give an advisory opinion where doing so would entail a factual determination.<sup>48</sup> However, the Court in this case (and in subsequent cases) rejected this argument outright.<sup>49</sup>

As such, it is clear that the Court considers the determination of the facts as an essentially important part of the judicial function. This can be seen in the substantial amount of time dedicated to pleadings on the facts in cases that come before the Court, and as a result it is submitted that the issue of how the Court deals with facts and the current deficiencies of its current approach to be considered in subsequent chapters, are issues deserving of our attention.<sup>50</sup>

Additionally, with a number of high profile cases currently before the Court such as *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*,<sup>51</sup> *Construction of a Road in Costa Rica Along the San Juan River* and most recently the proceedings instituted by Nicaragua against Columbia on 16 September 2013 regarding delimitation of the continental shelf between these two states,<sup>52</sup> it would appear that the need for consideration of such issues is more pressing than ever.<sup>53</sup>

### (iii) *Rules of Evidence in International Litigation: Generality, Liberality & Scarcity*

Different domestic legal systems employ broadly different approaches to the key issues of the

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<sup>48</sup> *Pleadings, Namibia Advisory Opinion, Volume 1, p. 143, para 45*

<sup>49</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p 16, page 27, para 40*

<sup>50</sup> Kolb 928

<sup>51</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Preliminary Objections, Judgment, ICJ Reports 2008, p 413*

<sup>52</sup> See ICJ Press Release No. 2013/21, 17 September 2013, available at: <http://www.icj-cij.org/docket/files/154/17530.pdf>

<sup>53</sup> *Whaling in the Antarctic, Judgment; Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Joinder of Proceedings, Order of 27 April 2013, joining the proceedings in the cases of *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Application Instituting Proceedings, 18 November 2010, and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* Application Instituting Proceedings, 21 December 2011; And indeed until the recent removal of the case from the docket of the Court at the request of the Republic of Ecuador, the *Aerial Spraying* case looked as if it would raise many pertinent issues in this regard also; see ICJ Press Release No. 2013/20, 17 September 2013, *Aerial Herbicide Spraying (Ecuador v. Colombia)*, available at: <http://www.icj-cij.org/docket/files/138/17526.pdf>

law of evidence.<sup>54</sup> For instance, in proceedings before a court in a common law jurisdiction ‘the truth is presumed to lie somewhere between the opposing positions of the two parties’ and as such the judge’s role is an adversarial one – that of a disinterested umpire, presiding over the enforcement of the rules of evidence and adjudicating on the competing assertions of the parties.<sup>55</sup> On the other hand, in proceedings before a court in a civil law jurisdiction, the role of the judge is inquisitorial – traditionally playing a much more active role in establishing the facts in any case before it.<sup>56</sup> One thing that all the major domestic legal systems have in common, however, is that they all possess detailed and sophisticated rules of evidence that are routinely applied in civil and criminal cases which come before their judicial bodies.

Rules of evidence and procedure in international adjudication, on the other hand, were for a long time somewhat of a misnomer. As one commentator has noted, ‘the typical evidentiary regime in international proceedings can be characterized by the generality, liberality and scarcity of its provisions’.<sup>57</sup> Several important factors explain why detailed rules of evidence of the type common to domestic legal systems never developed in international litigation including (but not limited to<sup>58</sup>) the influence of the evidentiary regime of international arbitration<sup>59</sup> and the sovereign nature of the parties to international adjudication<sup>60</sup> which

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<sup>54</sup> Evidence defined as: ‘...the material submitted by a party to a dispute, on its own initiative or at the Court's request, to prove a fact alleged or a legal title claimed’ see: International Court of Justice. Registry, United Nations Institute for Training and Research, *A dialogue at the Court: proceedings of the ICJ/UNITAR Colloquium held on the occasion of the sixtieth anniversary of the International Court of Justice, at the Peace Palace on 10 and 11 April 2006* (International Court of Justice, Registry of the Court 2007) 25, whereas Proof is defined as: ‘any effort that attempts to establish the truth or fact, something serving as evidence, a convincing token or argument; the effect of evidence; the establishment of fact by evidence’; see also ‘proof is the result or effect of evidence, while “evidence” is the medium or means by which a fact is proved or disproved’. FJ Ludes and HJ Gilbert (eds), *Corpus Juris Secundum: A Complete Restatement of the Entire American Law*, Vol 31 A: *Evidence* (West Publishing, St Paul, 1964) 820 F.J. Ludes and H. Gilbert, ‘Corpus Juris Secundum, Vol. 35’ Brooklyn: American Law Book Company, 820 cited in Riddell and Plant 79

<sup>55</sup> Riddell and Plant 1

<sup>56</sup> See Roger Derham and Nicole Derham, ‘From ad hoc to hybrid-the rules and regulations governing reception of expert evidence at the International Criminal Court’ 14 *International Journal of Evidence and Proof* 25, 33

<sup>57</sup> Riddell and Plant 2, M Grando, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (OUP 2009) 12

<sup>58</sup> Further factors include the dual trial and appeal function of the Court, the binding nature of its decisions and the impossibility of appeal. Gattini has also suggested that courts themselves are unwilling to constrain the way they operate, being: ‘...too unwilling to constrain themselves by the authority of a given precedent or a given set of rules, in the absence of clear indications in their statutes’; A. Gattini, ‘Evidentiary Issues in the ICJ's Genocide Judgment’ 5 *Journal of International Criminal Justice* 889, 899 see also; G. Niyungeko and J.A.S. Salmon, *La preuve devant les juridictions internationales* (Bruylant 2005) 413

<sup>59</sup> As Lauterpacht characterised the situation in 1931, ‘...no specific rules as to evidence and proof have so far evolved in international arbitration. But there has been a general tendency, sanctioned by a long series of arbitral pronouncements, to disregard elaborate restrictions upon the admissibility of evidence and to accept the principle that no evidence should be excluded a *limine* and that it should be left to the judge to appreciate the weight and persuasiveness of the evidence put before him.’ In this regard, the *Parker* case of March 1926 before the American-Mexican Mixed Claims Commission (where the Commissioners expressly refused to be



necessitates what has been called ‘an obligation to accommodate as far as possible each litigating State’s notion of the most appropriate way of presenting and substantiating its own version of events’.<sup>61</sup> A further reason for the relative scarcity of rules of evidence in international litigation is the nature of the cases brought before it. Cases routinely centre around issues such as national security, sovereignty and other such crucially important matters. When dealing with matters of such import in international litigation, ‘technicalities are taboo’.<sup>62</sup> The rationale is that the outcome of a case based on a technicality relating to the law of evidence would be unlikely to aid the desired settlement of the dispute at hand.<sup>63</sup> As Sir Hersch Lauterpacht stated, ‘the importance of the interests at stake precludes the excessive or decisive reliance upon formal and technical rules’.<sup>64</sup>

But what is the role of the International Court of Justice in establishing the facts in cases brought before it and can its evidentiary regime too be characterised as one governed by the generality, liberality and scarcity of its provisions? This question will be addressed in the next chapter which seeks to evaluate the evidentiary provisions of the Court’s Statute and Rules and the fact-finding powers that the Court possesses and considers the extent to which it has utilised those powers in practice.

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bound by restrictive and purely technical rules of proof and evidence) is cited as an example. Lauterpacht also notes that the same view was expressed by Professor Huber in the *Island of Palmas* Arbitration, Lauterpacht 42

<sup>60</sup> The equality of parties is a generally accepted principle of international adjudication, see Rüdger Wolfrum, ‘International Courts and Tribunals, Evidence’ Max Planck Encyclopedia of Public International Law see also; Valencia-Ospina 202 ‘When litigants are sovereign States, it is perhaps only logical for them to have the main initiative and responsibility in regard to the production of evidence’, see also T.M. Franck, *Fairness in International Law and Institutions* (Clarendon Press 2002) 336 ‘compelled disclosure is inconsistent with the nature of sovereignty’.

<sup>61</sup> Riddell and Plant 2; The Court addressed equality of the parties in the *Nicaragua* case, stating; ‘The provisions of the Statute and the Rules of the Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent’s contention’, see *Nicaragua Case* at para 31

<sup>62</sup> Sandifer 22

<sup>63</sup> See Court in *Free Zones of Upper Savoy and the District of Gex* (1932) PCIJ Series A/B, No 46, 155-6, in which the Court rejected Switzerland’s argument that evidence presented by France late in the oral proceedings should be inadmissible, stating ‘the decision of an international dispute of the present order should not depend mainly on a point of procedure’

<sup>64</sup> H. Lauterpacht, *The Development of International Law by the International Court* (CUP 2011) 366; to this end see also Article 19 of the Nuremberg Charter which states that ‘[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value’ which is a good example in this regard



## *Chapter 1. Rules of Evidence Before the International Court of Justice*

This chapter seeks to evaluate the evidentiary provisions of the Court's Statute and Rules of Court and the fact-finding powers that the Court possesses in order to consider the extent to which it has utilised those powers in practice. It will be shown that whilst the Court in fact possesses relatively broad fact-finding powers, due to a number of factors it has never made use of them to any significant extent. Instead, the Court operates under extremely broad rules of admissibility of evidence that allow almost any piece of evidence to come before the Court that the states parties so choose. That the Court operates in this manner is to a large extent necessitated by the principles of state sovereignty and equality that espouse that states should be able to choose what evidence they place before the Court. Further, the Court is shackled by resource and time constraints that make independent fact-finding in each and every case largely impractical. As a result of its truncated fact-finding role, the Court's fact-assessment role takes on added significance, an issue examined in the second half of the chapter.

### *(i) The Development of the Rules of Evidence Before the International Court of Justice*

Rules of evidence and procedure before international courts and tribunals seek to enable them to establish a factual foundation upon which to base legal determinations, even where the parties before the tribunal cannot come to an agreement on the facts relating to the dispute.<sup>65</sup> The provisions of the Court's Statute relating to evidence were adopted by the First Committee on Draft Statute during the United Nations Conference on International Organization ('UNCIO'), being 'greatly facilitated' by the Washington Committee of Jurists who had met prior to the San Francisco Conference from 9<sup>th</sup> to 20<sup>th</sup> April 1945 to undertake an article-by-article revision of the Statute of the Permanent Court of International Justice.<sup>66</sup> The draft adopted by First Committee took the report of the Washington Committee of Jurists as the basis of its discussions and many articles ('particularly those relating to procedure') were taken over without substantial amendment.<sup>67</sup> In fact, the following provisions relating to the Court's fact-finding powers were adopted at the UNCIO without amendment or

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<sup>65</sup> M. Benzing, 'Evidentiary Issues' in A. Zimmermann and others (eds), *The Statute of the International Court of Justice* (2 edn, OUP 2012) 1236

<sup>66</sup> UN Doc 875 IV/1/74, June 9, 1945 – Committee 1 – ICJ – Draft Report of Rapporteur of Committee IV/1

<sup>67</sup> Report of Committee of Jurists reproduced in Annex 4. Articles 49-51 exactly the same in draft as in final edition. Text of Report omitted – Reproduced in full as Jurist 86 G/73 in Vol. XIV. See further; 1<sup>st</sup> Meeting Commission IV, Rapporteur Progress Report, "the Court has been empowered to promulgate rules in order to exercise its various functions especially in the field of procedure". UN Doc. 435 IV/7, May 19, 1945

deliberation, as the First Commission ‘unanimously approved without discussion, Articles 39-64 *en bloc* of draft Statute of the Committee of Jurists’.<sup>68</sup> It should be noted that the Court’s powers are also supplemented by those contained within the Rules of the Court, most recently updated in 1978. The following section sets out to briefly examine the fact-finding powers that the Court possesses before we turn our attention to the extent to which the Court has made use of these powers in the subsequent subsections of this chapter.

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<sup>68</sup> UN Doc. 264 IV/1/18, May 12, 1945, Committee 1, ICJ

### *1.1. The Fact-Finding Powers of the International Court of Justice*

The Statute of the International Court of Justice and its Rules of Procedure endow the Court with not-inconsiderable fact-finding powers. Although the fact-finding powers set out in the Court's Statute and Rules are broad enough to allow the Court substantial autonomy and flexibility in terms of its evidentiary procedure, the provisions themselves are not particularly detailed.<sup>69</sup> This lack of specificity is most probably due to the influence of the PCIJ whose statute contained similarly sparse evidentiary provisions and the fact that, having primarily dealt with cases involving the application of treaties, the PCIJ 'was in a position to establish and rely on facts that were not in dispute between the parties, obviating, in most cases, the need for detailed rules of evidence.'<sup>70</sup> That having been said, the Court is endowed with a number of significant fact-finding powers which now fall to be considered in greater detail.

#### *1.1.1. The Power to Make Orders*

Article 48 of the Court's Statute is a general provision that represents a central pillar of the Court's statutory fact-finding powers, providing that the Court 'shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.' In utilising its statutory powers to obtain evidentiary information through site visits, requesting evidence from the parties, establishing a commission of inquiry or seeking an expert opinion, by putting questions to the parties, or by requesting a public international organization to bring information before it,<sup>71</sup> (all considered below) the Court must necessarily make use of orders under Article 48. Article 48 has been described as both 'a guarantee for the orderly taking of evidence' and the 'general provision governing arrangement concerning the taking of evidence'<sup>72</sup> although it need not be explicitly referred to by the Court when making orders.<sup>73</sup>

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<sup>69</sup> E. Valencia-Ospina, *Evidence before the International Court of Justice* (1999) 1 202; Sir Arthur Watts, 'Burden of Proof and Evidence before the ICJ' in F. Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 300

<sup>70</sup> Valencia-Ospina, *Evidence before the International Court of Justice* (1999) 1 202

<sup>71</sup> Articles 44(2), 49, 50, 51 and 34 of the Statute respectively

<sup>72</sup> S.T Bernárdez, 'Article 48' in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 1097

<sup>73</sup> Examples include the commissions of inquiry established in the *Corfu Channel Case* and *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment*, *ICJ Reports 1984*, p 246 and the site visit in the *Gabčíkovo-Nagymaros Case*

Having considered this important general provision it is necessary to take a closer look at the Court's specific fact-finding powers as set out in its Statute and Rules of Procedure.

### 1.1.2. The Power to Make Site Visits

The Court has the power to take steps to proactively ‘procure evidence on the spot’. Article 44, paragraph 2 of the Court’s Statute makes specific provision for the possibility of such site visits.<sup>74</sup> Such visits are limited to those undertaken by the full bench of the Court<sup>75</sup> as a result of a decision of the Court and must be distinguished from unofficial visits to the site and visits by experts which cannot be considered as falling under this provision.<sup>76</sup> The practice of the Court in this regard has meant that the importance of Article 44 is somewhat limited.<sup>77</sup> The rare example of a site visit in the practice of the Court is the visit made in the *Gabčíkovo* case during which the agent of Slovakia invited the Court to ‘visit the locality to which the case relates and there to exercise its functions with regards to the obtaining of evidence, in accordance with Article 66 of the Rules of the Court’.<sup>78</sup> The Court subsequently visited various sites along the river Danube that were at the heart of the dispute between Slovakia and Hungary and ‘took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties’.<sup>79</sup> Despite the fact that Judge Schwebel described the site visit in this case as providing the Court with ‘a new dimension of insight into the case and what it meant to the Parties much more than could have been gleaned confining the proceedings to The Hague...’<sup>80</sup> the site visit in *Gabčíkovo* remains the exceptional case in the practice of the Court.<sup>81</sup>

Importantly, whilst such site visits can technically be ordered by the Court without the

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<sup>74</sup> Article 44, paragraph 1 of the Court’s Statute underlines that the Court cannot summon witnesses and experts directly but must instead act through national institutions and ‘as such depends on the application of the municipal law of the State concerned’

<sup>75</sup> It is thought that a delegation or committee of judges, such as was the suggestion of Judge Schwebel in the *Nicaragua Case* (see *Dissenting Opinion of Judge Schwebel at para 132*) would be contrary to ‘general considerations of proper administration of justice’ which are thought to require a visit by the full Court, see Christian Walter, ‘Article 44’ in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 1043, M. Bedjaoui, ‘La “Descente sur les lieux” dans la pratique de la Cour International de Justice et de sa devanciere’ *Liber amicorum Professor Ignaz Seidl-Hohenveldern in Honour of His 80th Birthday* Ed by Gerhard Hafner [et al] The Hague [etc] 1, 9

<sup>76</sup> Such as in the *Corfu Channel Case, Decision of the Court dated 17 January 1949*, in which the commission of experts was asked by the Court to visit the area to clarify certain aspects of the case, which would fall under Articles 48 and 50, see Walter 1042

<sup>77</sup> Walter 1041

<sup>78</sup> *Gabčíkovo-Nagymaros Case*, para 10, although the Permanent Court did also do so in *Diversion of Water from the Meuse* (Netherlands/Belgium), Order of 13 May 1937, PCIJ, Series C, No 81, pp 53; see Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’

<sup>79</sup> *Gabčíkovo-Nagymaros Case*, para 10

<sup>80</sup> Schwebel

<sup>81</sup> *Ibid*; stating that ‘one can imagine only some contentious cases where the situation on the ground may lend itself to carrying out a site visit’

consent of the parties *proprio motu*,<sup>82</sup> in practice such a visit without the consent of the state to whose territory the Court will ‘descend’ will in all likelihood not be practicable (although the Court has never stated lack of consent as a reason for not ordering such a site visit<sup>83</sup>). These visits appear to have an ‘illustrative function’ in helping the Court to ‘understand better the localities in question’, their main advantage being in cases in which technical or scientific facts are disputed between the parties, the visit may provide a helpful background to the complex facts.<sup>84</sup> To date this illustrative function of site visits has ‘prevailed over any type of evidence gathering and evaluation, which one might also envisage.’<sup>85</sup> In light of factually complex cases coming before the Court, whilst it is possible to imagine that more use could be made of this provision in terms of gathering evidence, the utility of a bench of judges who are not necessarily experts in the particular area under investigation visiting the site could be said to be limited when compared to the establishment of a commission of experts, for example. Perhaps this could explain why this provision has not been often mentioned in relation to making greater use of the Court’s statutory fact-finding powers.

### *1.1.3. The Power to Intervene in and Direct Proceedings and Ask Questions*

Either prior to or during proceedings the Court under Article 61 of the Rules may indicate what points or issues it would like the parties to address specifically or on which issues it considers there has been sufficient argument. Articles 61(2) and (3) provide that any judge may at any time during the oral proceedings put questions to ‘agents, counsel and advocates’ and ask for explanations, which may be answered immediately but usually will be answered in accordance with the timeframes set by the President.<sup>86</sup> In practice the Court has generally limited itself to individual judges occasionally asking questions from the bench during the oral proceedings.<sup>87</sup> As we will see in Chapter 3, practice before the ICJ differs substantially from that before the WTO adjudicative bodies which regularly put longer questions to the parties. Foster has argued the WTO panels are able for example ‘to pursue the development of a thorough understanding of all aspects of the case by means of specific, direct questions to

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<sup>82</sup> Walter 1043, Bedjaoui 7

<sup>83</sup> Walter 1044

<sup>84</sup> Ibid

<sup>85</sup> Ibid

<sup>86</sup> See Article 61(4) Rules of the Court; C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press 2011) 87 quoting Rosenne and Ronen 1299; Riddell and Plant 312

<sup>87</sup> Riddell and Plant 88; see for instance *Pulp Mills Case*



the parties after each of the oral hearings, or substantive meetings with the parties'.<sup>88</sup> The issue of whether the Court ought to develop a similar practice will be examined in greater detail in Chapter 4 (at section 4.3.2.).

#### *1.1.4. The Power to Request Information from the Parties*

Relatedly, Article 49 of the Court's Statute contains what has been called the 'central prerogative' of any international court or tribunal<sup>89</sup> to participate in hearings before it.<sup>90</sup> It must be read in conjunction with Article 62(1) of the Court's Rules which states that '[t]he Court may at any time call upon the parties to produce evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose'.<sup>91</sup> In practical terms, Article 49 confers on the Court the ability to become actively involved in proceedings before it by conferring two distinct powers. Article 49 firstly, together with Article 50, regulates the obtaining of evidence by the Court itself (as opposed to the evidence submitted by the parties as part of their pleadings) by calling upon the parties 'to produce any document or to supply any explanations' on a small number of occasions.<sup>92</sup> In other words, Article 49 sets out a general power of the Court to request further documents.<sup>93</sup> Secondly, Article 49 provides the Court with the power to request further explanation or clarification from the parties, such as information on questions of law or fact.

As such, the scope of Article 49 is considerable, covering requests for fresh evidence and clarification of existing evidence, both documentary and testimonial evidence even before the hearing has commenced.<sup>94</sup> Crucially, Article 49 is silent on the issue of whether states are under a legal obligation to disclose information – an issue discussed in greater detail in Chapter 4 at section 4.1. In relation to refusal to comply with the Court's request for

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<sup>88</sup> Foster 88; See for instance *Brazil – Measures Affecting Import of Retreaded Tyres*, Complaint by the European Communities (WT/DS332), Report of the Appellate Body DSR 2007: IV, 1527, Report of the Panel DSR 2007: V, 1649

<sup>89</sup> See also Rule 77 ITLOS Rules of Procedure, ICSID Convention Article 43(a); ICSID Arbitration Rules, Rule 34(2); Article 24(3) Rules of Procedure of the Iran-US Claims Tribunal

<sup>90</sup> Article 49, ICJ Statute; Article 62, Rules of the International Court of Justice, 1978, ICJ Acts & Docs. 4 (as amended April 14, 2005)

<sup>91</sup> Article 62(1) Rules of the Court

<sup>92</sup> Pleadings, vol. IV, p. 428 in *Corfu Channel Case*

<sup>93</sup> Separate from another special means – Article 66 of the Rules

<sup>94</sup> See Article 62 Rules of the Court, *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, ICJ Reports 1980, p10 at p 7, 10, para 7; see Tams 1102

information, under Article 49, ‘formal note shall be taken of any refusal’.<sup>95</sup> However, the Court has not done so in practice this far and whether it would choose to do so would very much depend on the circumstances of each case.<sup>96</sup> The merits of more regularly drawing adverse inferences as is the practice before other international courts and tribunals will also be considered in section 4.2.6.

#### *1.1.5. The Power to Establish an Inquiry or seek Expert Evidence*

Article 50 of the Court’s Statute gives the Court the power to call upon individuals or institutions to provide expert advice or institute an inquiry.<sup>97</sup> The Court has never called a witness *proprio motu* and as such this issue will not be addressed in the following section although Higgins has stated that calling witnesses *proprio motu* ‘is a possibility that is constantly in its view’.<sup>98</sup> The following section will first assess the Court’s power to call upon individual experts under Article 50 before considering the related power to establish commissions of inquiry.

##### *1.1.5. (i) Court-Appointed Experts*

The Court under Article 50 of its Statute, as elaborated in Article 62(2) of its Rules, has the power to appoint an expert to advise it on the case at hand.<sup>99</sup> The Court has not made use of this power to date except in the *Gulf of Maine* case in which Canada and the United States specifically requested the Chamber to appoint experts to assist in determining the maritime boundary and other technical matters.<sup>100</sup> The Chamber appointed Commander P.B. Beazley to assist it in technical matters regarding the maritime boundary and the expert’s report was annexed to the judgment (see section 1.1.5 (ii) regarding Article 50 experts appointed by the

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<sup>95</sup> Article 49 sentence 2

<sup>96</sup> Tams 1106, for example, in the *Corfu Channel Case* 4 the Court stated that it accepted the reasons given for the UK’s refusal to hand over requested document XCU

<sup>97</sup> Article 50 states that ‘The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.’

<sup>98</sup> Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’; S. Talmon, ‘Article 43’ in A. Zimmermann and others (eds), *The Statute of the International Court of Justice* (2 edn, OUP 2012), see paras. 133-136

<sup>99</sup> Article 62(2) states that ‘The Court may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings’

<sup>100</sup> See Article II(3) *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Special Agreement, 25 November 1981

Court).<sup>101</sup> The usefulness of Commander Beazley's assistance is disputed.<sup>102</sup>

Interestingly, in the *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)* Article IV(3) of the 1983 Special Agreement in which the parties agreed to submit their frontier dispute to a Chamber of the Court requests the Chamber 'to nominate, in its Judgment, three experts to assist them in the demarcation operation'.<sup>103</sup> The Chamber accepted this request in the order nominating the experts to assist in the implementation of the Chamber's judgment, however the Chamber did not refer to Article 50 of the Statute but to Article 48 (its power to make orders) in stating that its belief was that the parties had not asked the Chamber to utilise its Article 50 powers (the purpose of which would have been to assist the Court, and would have been paid for by the Court) but rather to exercise a power specifically conferred upon the Court by the Special Agreement.<sup>104</sup>

Similarly, after delivering its judgment in the *Case Concerning the Frontier Dispute (Burkina Faso v. Niger)* the Court in an Order of 12 July 2013 the Court, specifically referring again to Article 48 of its Statute, under Article 7(4) of the Special Agreement between Burkina Faso and Niger of 24 February 2009 asked the Court to 'to nominate, in its Judgment, three experts to assist them as necessary in the demarcation'.<sup>105</sup> The Court, specifically referring to the previous Burkina Faso frontier case, and taking advice from the parties as to what tasks the experts could be expected to undertake, agreed to nominate experts to assist in the implementation of the Court's judgment, all the while stressing that it was not utilising its

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<sup>101</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), (Appointment of Expert, Order of 30 March 1984, ICJ Reports 1984,)* p 165, *Gulf of Maine Case*; see Technical Report annexed to the Judgment, *ibid*, 347-352, 353, para 3 (Art II, para 3 of the Special Agreement)

<sup>102</sup> For instance, Highet, 'Evidence, the Court, and the Nicaragua Case' 27; *Gulf of Maine Case*, at 273-278 states that 'the Chamber did not find that any of this technical evidence was relevant or determinative; instead, it based its opinion primarily on a geographical solution and essentially ignored the factual controversies concerning aspects other than geography' whilst Riddell 238; has stated that 'The expert's involvement in this respect is not strictly the situation envisaged in Article 50 but seems to have worked relatively well in this case, with the expert assisting in several technical aspects of the case such as the preparation of a technical map in relation to the maritime delimitation and being available for consultation by the Chamber throughout the course of proceedings.' See also; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), Judgment, ICJ Reports 1991*, p 53 in which Article 9(2) of the Agreement between the parties stated that if the Agreement was found not to be in force then the Court would delimit the boundary: 'That decision shall include the drawing of the boundary line on a map. To that end, the Tribunal shall be empowered to appoint one or more technical experts to assist it in the preparation of such a map.' Ultimately, however, the pre-existing agreement was found to be in force that this provision did not come into play and the dispute was later removed from the Court's docket

<sup>103</sup> See Article IV(3) of Special Agreement, ICJ Reports, 1986, p. 558

<sup>104</sup> *Frontier Dispute, Judgment, ICJ Reports 1986*, p 554, 648

<sup>105</sup> See Order of 12 July 2013, *Nomination of Experts, Frontier Dispute (Burkina Faso v. Niger)* at 2

Article 50 Statute powers in doing so,<sup>106</sup> but again was exercising ‘a power, conferred on it by Special Agreement’.<sup>107</sup> Just why the Court has been so hesitant to be seen to be using its Article 50 powers is unclear.

The distinction between Court-appointed and party-appointed experts remains significant since the procedure for the examination of a Court-appointed expert and a party-appointed expert differ.<sup>108</sup> For instance, the appointment of experts by the Court is made by an order<sup>109</sup> and with Court-appointed experts ‘the Court is free to define the subject-matter of the testimony...’<sup>110</sup> It is unclear whether the Court could compel parties to cooperate with the Court-appointed expert and provide them with the information required. Whilst this issue is discussed further in section 4.3.2., it would appear that the utility of the Court-appointed expert will at least to some extent depend on voluntary cooperation from the parties.<sup>111</sup> A further crucial distinction is Article 67 of the Rules which refers to the rights of the parties in relation to experts appointed by the Court – providing that ‘every report or record of an enquiry, and every expert opinion shall be communicated to the parties, which shall be given the opportunity of commenting upon it.’ However, this provision does not include any right of the parties to examine the Court-appointed expert – a potentially crucial distinction which we will examine in greater detail in Chapter 4.<sup>112</sup>

#### 1.1.5. (ii) Commissions of Inquiry

The second fact-finding power conferred on the Court by Article 50 of the Court’s Statute is the power to entrust an independent body or commission with the ‘task of carrying out an enquiry or giving an expert opinion’.<sup>113</sup> Article 50 is a potentially useful provision since, as one commentator has stated ‘[g]iven the complexity of many of the disputes submitted to

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<sup>106</sup> Referring to *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya)*, *Judgment*, ICJ Reports 1985, p 192, p. 228, para 65

<sup>107</sup> See Order of 12 July 2013 *Nomination of Experts, Frontier Dispute (Burkina Faso v. Niger)* at 2

<sup>108</sup> Article 51 and the relevant Rules regulate the procedure for examining Court-appointed experts

<sup>109</sup> See Article 67(1) Rules

<sup>110</sup> Tams 1310

<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> Article 50, Statute of the International Court of Justice; see also Article 67 of Rules of the Court. The PCIJ appointed a committee of experts in the *Case Concerning the Factory at Chorzów (Germany v Poland) (Claim for Indemnity) (Jurisdiction)*, Series A, No 9; A 18 (1929) 14; ICJ appointed experts in the *Corfu Channel Case* to assess the facts and to provide an expert evaluation of the damage sustained by the UK. In the *Nicaragua* case the Court refused to use its power; ‘the Court felt it was unlikely that an enquiry of this kind would be practical or desirable...’ See *Nicaragua Case at para 61*

adjudication, it is highly desirable that the Court be in a position to receive independent advice'.<sup>114</sup>

Article 50 Commissions of Inquiry should be distinguished from site-visits discussed above made by the Court as set out in Article 44(2) of the Statute of the Court. As one commentator has stated '[w]hile a site visit will usually help to ascertain the facts of a case (and may thus constitute a specific form of inquiry), Art. 50 only covers inquiries that the Court entrusts to other bodies or institutions.'<sup>115</sup> Evidence sought under Article 50 is not considered *ex parte* evidence: 'evidence sought under Article 50 will usually be preferred over *ex parte* evidence, which is often seen as biased simply because it has been introduced by one party'.<sup>116</sup>

The Court has only twice made use of its powers under Article 50— once in the *Chorzów Factory* case before the PCIJ to, amongst other things, 'enable the Court to fix, with a full knowledge of the facts...the amount of the indemnity to be paid by the Polish Government to the German Government...'<sup>117</sup> and twice in the *Corfu Channel* case before the ICJ, once to examine several factual issues including determining the visibility of the mine-laying activities in the Channel from the Albanian coast, which the Court described as a crucial factor in the case<sup>118</sup> and a second expert commission to determine the damages to be paid by Albania to the United Kingdom.<sup>119</sup> The Commission ultimately concluded that it was 'indisputable' that, all things being equal, the operation would have been visible from the coastline – and the Court subsequently praised the Commission, stating that it could not fail 'to give great weight to the opinion of the experts who examined the locality in a manner giving every guarantee of correct and impartial information'.<sup>120</sup>

It should be noted that parties do not have a right under Article 50 to have the Court appoint a commission of inquiry or expert in the same way that they have the right to appoint their own expert under Article 43 – the establishment of such a commission is completely at the

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<sup>114</sup> Tams, 'Article 50' 1109

<sup>115</sup> *Ibid*

<sup>116</sup> *Ibid*, citing J. Pauwelyn, 'The use of experts in WTO dispute settlement' 51 *International and Comparative Law Quarterly* 325

<sup>117</sup> *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits) Series A No 17*, see Order of September 13th 1928

<sup>118</sup> *Corfu Channel Case*, p. 20; See Experts Report of Dec 1 1949

<sup>119</sup> See *ibid*, Order of December 17th 1948, and Order of April 9th 1949

<sup>120</sup> *Ibid*

discretion of the Court.<sup>121</sup> And indeed there have been no such inquiries in the last few decades.<sup>122</sup> Instead, the Court has ‘more often than not’ refused requests by one of the parties to appoint an inquiry or expert or held that it would find such action unnecessary.<sup>123</sup> In the past the Court has refused to appoint an expert to shed light on the delimitation of the boundary between Tunisia and Libya, noting that its 1982 judgment had left the issue to the parties’ experts,<sup>124</sup> refused a request to send an inquiry to a disputed region on the basis that such an inquiry was not necessary in order to reach a decision on the case at hand<sup>125</sup> and perhaps most famously, rejected Judge Schwebel’s suggestion that a fact-finding inquiry be set up in the *Nicaragua* case to gather facts in Nicaragua, the US, El Salvador, Honduras, Costa Rica, Guatemala and Cuba on the same basis.<sup>126</sup> Judge Schwebel later remarked that the Court at the time had refused the request on the basis that the inquiry, in properly carrying out its function, would have in all likelihood found it necessary to go not only to Nicaragua but also neighbouring states and even the United States, which of course, was not cooperating with the Court.<sup>127</sup>

Unlike provisions in other international courts, the matter on which an expert opinion is sought need not be one of a technical or scientific issue but could deal with more general matters such as an issue of linguistics.<sup>128</sup> It should be noted that Article 50 can only be used where states are willing to cooperate with the Court and as such, Tams concludes that ‘Art. 50 is likely to remain what it has been to date: a helpful, but rarely used, means of obtaining information about the facts of a case’.<sup>129</sup> However, this provision was given explicit backing by a number of judges of the Court as one that could be more readily made use of by the Court to better establish the facts of a case before it – an issue considered in much greater detail in Chapter 4.

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<sup>121</sup> Tams, ‘Article 50’ 1113

<sup>122</sup> Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’

<sup>123</sup> Tams, ‘Article 50’ 1112

<sup>124</sup> *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf at para 65*

<sup>125</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment of 11 September 1992, ICJ Reports 1992, p 455 at paras 22 and 65*

<sup>126</sup> *Nicaragua Case*, see *Dissenting Opinion of Judge Schwebel*, p. 249, 322, para 132; Specifically, Judge Jennings cited the non-appearance of the US and stated that there was a limit to what the Court could do in such cases: ‘[t]here are limits to what the Court can do, in accordance with Article 53 of the Statute, to satisfy itself about a non-appearing party’s case; and that is especially so where the facts are crucial’.; see Judge Jennings, para 69

<sup>127</sup> *Ibid*, para 61

<sup>128</sup> Tams, ‘Article 50’ 1114, unlike Article 13 DSU for example

<sup>129</sup> *Ibid*

### 1.1.6. The Power to Request Information from Public International Organizations

Article 34 (2) of the Court's Statute provides that the Court may request relevant information from public international organizations with regard to cases before it.<sup>130</sup> However, Article 34(2) of the Court's Statute was neither utilised nor referred to in the early years of the Court's operation.<sup>131</sup> The first use came when the Secretary-General informed the Council of the International Civil Aviation Organization (ICAO) that a case pending before the Court potentially affected its interests, namely the *Aerial Incident of 27 July 1955* case.<sup>132</sup> The same organisation was later informed of proceedings under Article 34(3) potentially affecting its interests, this time by the President of the Court, in the *ICAO Council* case<sup>133</sup> although the ICAO Council subsequently did not file any observations on the case.<sup>134</sup> In the following years scarce reference was made to the provision, the only other example being the *Border and Transborder Armed Actions* case in which the Court informed the OAS of the case, but once more the organisation chose not to take any action.<sup>135</sup>

More recently the Court's Registrar communicated to the Secretary-General, as depository, that the Convention on the Prevention and Punishment of the Crime of Genocide would form the basis of the *Bosnian Genocide* case.<sup>136</sup> This was the first time in which the Court had utilised Article 34(3) in relation to an organ of the UN itself.<sup>137</sup> Perhaps the reason that greater use of this provision has not been used to inform UN organs is due to the fact that Article 40 of the ICJ Statute already provides that the Secretary-General be informed of all cases that come before the Court, and Article 69(2) of the Rules give the Secretary-General

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<sup>130</sup> The relevant Rules of the Court, Article 69 (1) to (3) further provide that the Court can 'at any time prior to the closure of the oral proceedings, either *proprio motu* or at the request of one of the parties...request a public international organization...to furnish information relevant to a case before it'; C.M. Chinkin and R. Mackenzie, 'Intergovernmental Organizations as "Friends of the Court"' in L. R. [et al] Chazournes (ed), *International Organizations and International Disputes Settlement - Trends and Prospects* (Transnational 2002) 140

<sup>131</sup> Pierre-Marie Dupuy, 'Article 34' in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 551

<sup>132</sup> *Case concerning the Aerial Incident of July 27th, 1955 (Israel v Bulgaria)*, Preliminary Objections, Judgment of May 26th, 1959: ICJ Reports 1959, p 127; ICAO Doc. C-WP/2609, 21 February 1958, para.5

<sup>133</sup> *Appeal Relating to the Jurisdiction of the ICAO Council*, Judgment, ICJ Reports 1972, p 46

<sup>134</sup> *ibid* p. 48 (para. 5)

<sup>135</sup> *Border and Transborder Armed Actions (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p 69

<sup>136</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Yugoslavia [Serbia and Montenegro])*, Provisional Measures, ICJ Reports (1993) pp 3

<sup>137</sup> Dupuy 553

the right to submit information to the Court. Dupuy has made reference to ‘the striking fact that on the whole, inter-governmental organizations do not seem to be particularly interested in taking the initiative, on the basis of Art. 34, para. 2, of requesting the Court to receive information which they would consider as relevant to a case pending before it’.<sup>138</sup> The possibility of making greater use of this power to coordinate the Court’s fact-finding efforts with those of international commissions of inquiry is also critically examined in Chapter 5.

### 1.1.7. *Amicus Curiae* Briefs

Another means by which information and expert opinion not submitted by the parties could come before the Court is through *amicus curiae* briefs. The issue of *amicus curiae* briefs is one which has attracted much attention in recent years, although usually in relation to international courts and tribunals other than the ICJ.<sup>139</sup>

The practice of the Court, unlike other international courts and tribunals, to date has been extremely limited. In 1950 the Court in the *South-West Africa* allowed an *amicus curiae* brief to be submitted by the International League for the Rights of Man case which had requested to submit a written statement under Article 66(2) of the ICJ Statute.<sup>140</sup> However when the same organisation requested to submit an *amicus curiae* brief in the contentious *Asylum* case, the Court refused on the basis that that organisation could not be considered an international organization as required in Article 34 of the Court’s Statute.<sup>141</sup> And indeed since this case the Court has not agreed to any *amicus curiae* briefs being submitted, even in advisory proceedings.<sup>142</sup>

The Court set out its procedure in relation to the participation of non-governmental

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<sup>138</sup> Ibid

<sup>139</sup> Benzing 1262; see Paolo Palchetti, ‘Opening the International Court of Justice to Third States: Intervention and Beyond’ 6 Max Planck Yearbook of United Nations Law 139, 170

<sup>140</sup> *International Status of South-West Africa*, Pleadings, Oral Arguments, Documents, p. 324 and p. 327

<sup>141</sup> Which states that, in advisory proceedings, the Court ‘shall...notify any...international organisation considered by the Court...as likely to furnish information on the question, that the Court will be prepared to receive...written statements, or to hear...oral statements relating to the question’; *Colombian-Peruvian asylum case, Judgment of November 20th, 1950: ICJ Reports 1950, p 266*, Pleadings, Oral Arguments, Documents, vol. II, p. 227 (no. 63) and p. 228 (no. 66)

<sup>142</sup> See the refusal in *Namibia Advisory Opinion*, Pleadings, Oral Arguments, Documents, vol. II, p. 647 (no. 42) and the refusal of the Court to note the submissions made by the International Physicians for the Prevention of Nuclear War and the Federation of American Scientists in the *WHO Advisory Opinion*, citing Benzing 1262; D. Shelton, ‘The Participation of Non-Governmental Organisations in International Judicial Proceedings’, (1994) 88 American Journal of International Law 611



organisations in its Practice Direction XII of July 2004, in which it clarified that briefs submitted to the Court without the request of the Court would not be considered part of the case file but would rather be treated as publications readily available under Article 56(4) of the Rules of the Court.<sup>143</sup> As such, Benzing concludes that ‘at present, information presented to the Court by non-governmental organizations will only be admissible in advisory cases, whereas individuals may not act as *amici curiae* at all.’<sup>144</sup> As stated previously, this approach stands in contrast with other international courts and tribunals, as we shall see in Chapter 3.

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<sup>143</sup> Benzing 1263

<sup>144</sup> Ibid

## *1.2. Da Mihi Factum, Dabo Tibi Jus – The Court’s Reactive Approach to Fact-Finding*

Consequently, it can be said that the Court possesses ‘powerful tools for collecting evidence, ones that could be used at any time’ in the proceedings<sup>145</sup> the cumulative effect of which arm the Court with both the power to request evidence itself and direct the parties in their fact-finding efforts.<sup>146</sup>

Crucially, however, despite possessing such relatively broad fact-finding powers, the Court has rarely made significant use of them.<sup>147</sup> As we will see, a survey of the Court’s practice in the previous section demonstrates this point and, it is argued, is perfectly summarised by former Judge Schwebel who has stated that ultimately the ‘role of the full Court, in my experience, has tended to be predominantly passive’.<sup>148</sup> Before the ICJ, the general tendency has been to ‘ask the parties to produce the evidence and operate with rules concerning burden of proof, rather than to have investigations into facts led by the Court itself’.<sup>149</sup> Taken together, this practice constitutes what can be termed the Court’s ‘reactive approach’ to fact-finding.

### *1.2.1. A Reluctance to Engage With Complex Factual Situations?*

A number of commentators have argued that the Court has traditionally employed a number of different tactics in order to avoid engaging with complex factual and scientific determinations, what might be termed ‘avoidance techniques’.<sup>150</sup> Such commentators have argued that the Court has shown a tendency to focus on legal reasoning and to use ‘legal rationality to shield itself from scientific [or factual] controversies’.<sup>151</sup>

One such commentator was Thomas Franck who argued that the Court has in the past deliberately sought to shift the focus of the case to legal rather than factual issues, stating ‘...in different questions of fact, the Court tends to make a complicated task of fact-finding unimportant or unnecessary by devising a rule which downgrades the importance of the

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<sup>145</sup> Teitelbaum 122

<sup>146</sup> Halink 19; Franck 21; K. Highet, ‘Evidence, The Chamber, and the ELSI Case’ in Richard B. Lillich (ed), *Fact-Finding Before International Tribunals* (Ardsley-on-Hudson, New York 1992) 74

<sup>147</sup> Benzing, para 12

<sup>148</sup> Schwebel 3

<sup>149</sup> Walter 1041

<sup>150</sup> D’Aspremont and Mbengue 11

<sup>151</sup> *Ibid*; Franck 28

elusive facts.<sup>152</sup> One example given by Franck is the *Temple at Preah Vihear* case in which the Court held that whilst the map drawn up by the Mixed French-Siamese Commission in 1907 alleging to demonstrate title over the disputed area was not determinative in itself, Thailand's failure to object to it and subsequent behaviour was seen by the Court to be equitable estoppel.<sup>153</sup> The Court stated that '[g]iven the grounds on which the Court bases its decision, it becomes unnecessary to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity...or, if not, how the watershed in fact runs'.<sup>154</sup> The reasoning of the Court to this end led Franck to argue that '[a] procedural or evidentiary rule thus saved the Court from having to duplicate the voyage along the Dangrek Escarpment for purposes of locating the disputed watershed line'.<sup>155</sup>

Rosenne has similarly criticised the apparent unwillingness of the Court to conduct its own fact-finding and implied that the Court has placed considerable emphasis on the legal issues in order to circumvent a number of factual issues.<sup>156</sup> Rosenne has in particular cited the *Anglo-Iranian Oil Company* and *Fisheries Jurisdiction* cases in which he characterises the behaviour of the Court as relying 'only on the facts as stated by the applicants in their written and oral pleadings' whilst making no attempt to challenge or verify those facts itself.<sup>157</sup>

The *Legality of Threat or Use of Nuclear Weapons* advisory opinion is another case cited in this regard given the fact that substantial amounts of information were submitted to the Court in the course of proceedings, and the Court did not consider it necessary to 'study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information'.<sup>158</sup> However, in this case it is difficult to definitively argue that the Court was consciously trying to avoid making factual determinations. Instead, the Court stated that it would 'simply address the issues arising in all their aspects by applying the legal rules relevant to the situation'.<sup>159</sup>

It is argued that the accusation that the Court employs avoidance techniques in order to avoid

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<sup>152</sup> Franck 30

<sup>153</sup> *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Merits, Judgment of 15 June 1962: ICJ Reports 1962, p 6, page 35

<sup>154</sup> Ibid, page 35; Franck 25

<sup>155</sup> *Temple of Preah Vihear Case*; Franck 25

<sup>156</sup> Shabtai Rosenne, 'Fact-Finding Before the International Court of Justice' in (T.M.C. Asser Press 1999) 237

<sup>157</sup> Ibid

<sup>158</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p 226, para 15

<sup>159</sup> *WHO Advisory Opinion*, at 15

dealing with the facts is rather difficult to definitively substantiate. In fact, having not been in the Court's position, in such cases it is often difficult to imagine how one could prove that the decision taken by the Court to focus on legal issues and not conduct further fact-finding was the wrong decision. It may be that the Court had sound reasons for not conducting its own fact-finding such as considerations of judicial economy or due to the fact that resolution of those factual issues was not central to the resolution of the dispute at hand.

Taking up this point, it is necessary to emphasise that there are undoubtedly positive aspects of the Court's reactive approach to fact-finding. Whilst there are a number of serious problems with this approach as set out in Chapter 2 it should be made clear that the reactive approach is not without its benefits. For instance, there are a number of practical reasons why it is sensible for the Court to place the emphasis on the parties in terms of fact-finding. This is the case since the Court is often significantly removed from the facts of the dispute, both in terms of distance and time. As such, it arguably more prudent for the parties themselves, who are generally closer to the facts, to put such evidence before the Court, than it is for the Court to embark on a fact-finding expedition from The Hague.

Staying with the nature of the cases that come before the Court, the sheer breadth of legal and factual issues, number of potential witnesses and territory may in some way justify the Court's reactive position. For instance, in cases such as *Armed Activities*, *Bosnian Genocide* and *Croatian Genocide*, the disputes in question involved a dizzying array of factual and legal issues as well as having taken place over many years and often over many different states.<sup>160</sup> Similarly, the highly political nature of cases before the Court mean that it may take many years for the proceedings to get under way.<sup>161</sup> Furthermore, as stated above, many states see it as part of their privilege as a sovereign state to choose which pieces of evidence they put before the Court. Accordingly it would appear to make little sense for the Court to duplicate the fact-finding efforts of the parties. As such, the Court's decision to accept the evidence put before it by the parties and to concentrate on the points of contention as defined by the parties seems like the only viable option.

And indeed the thesis does not argue that the Court should completely disregard all evidence

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<sup>160</sup> See Introduction (i) on the factual complexity of cases

<sup>161</sup> In this regard see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, the application instituting proceedings being filed in 1999 and the final judgment not expected until late 2014 at the earliest

submitted by the parties and to undertake wide-ranging fact-finding on its own accord. Rather, the thesis argues that there are a number of deficiencies regarding the way the Court currently operates and that the practice of other international courts and tribunals in some way provides a helpful blueprint for reform in order to ensure that the Court makes factual determinations that are as accurate as they can be.

As such, it is argued that rather than talking in terms of the Court using ‘avoidance techniques’ in order to negate the need to engage with the facts, the most that can be said is that the Court, since the days of the PCIJ,<sup>162</sup> has very clearly displayed a number of tendencies which, taken together, demonstrate a consistently reactive approach to the facts in cases that have come before it. It is these tendencies and their contribution to the Court’s reactive approach to fact-finding which is the subject of the following section.

### *1.3. The Court’s Reactive Approach to Fact-Finding: Contributing Factors*

Such tendencies evident in the Court’s jurisprudence include the predominance of, and apparent preference for reliance on, documentary evidence before the Court; extremely broad rules of admissibility; the sovereign nature of the parties to cases before the Court and the so-called ‘classical’ approach to the judicial process – each will be assessed in turn in the following subsections.

#### *1.3.1. Predominance of Documentary Evidence*

The first and perhaps most prominent tendency of the Court which contributes to the Court’s reactive approach to evidence is the clear preponderance of documentary evidence before the Court.<sup>163</sup> In keeping with the Court’s liberal evidentiary regime, documentary proof is

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<sup>162</sup> The great American Judge Manley Hudson in 1943 said of the PCIJ that ‘[i]ssues of fact are seldom tried before the Court, and where a question of fact arises the Court must usually base its finding on statements made on behalf of the parties either in the documents of the written proceedings or in the course or oral proceedings’. This description of the practice of the PCIJ suggests that the Court’s current reactive approach has been passed down genetically from its predecessor; see M. Hudson, *The Permanent Court of International Justice 1920-1942* (MacMillan 1943) 565 and Therese O’Donnell, ‘Judicialising History or Historicising Law: Reflections on *Irving v Penguin Books and Lipstadt*’ 62 *N Ir Legal Q* 291, 300

<sup>163</sup> Valencia-Ospina, *Evidence before the International Court of Justice* (1999) 1 204; this preference is demonstrated before other international courts and tribunals also; see Charles Nelson Brower and Jason D Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers 1998) 186 and has existed from the birth of international criminal law at Nuremberg, see; Robert H. Jackson, *The Nurnberg Case*, (1947, New York, Alfred A Knopf) at viii ‘

preferred to oral testimony before the Court,<sup>164</sup> being ‘by far the most common and certainly the most important type of evidence in litigation before the ICJ.’<sup>165</sup> This preference has been credited to the influence of civil law systems ‘given that there are striking similarities – especially in their emphasis on written means of proof...’<sup>166</sup>

Whilst there has been limited use of oral testimony and cross-examination, generally, ‘the use of evidence in written form is the rule...in cases before the ICJ’.<sup>167</sup> The consequence of the Court’s clear preference for written documentary evidence is that the Court has much greater experience in dealing with this type of evidence and as such has had many opportunities to develop a number of rough guiding principles to guide it in its evaluation of such documents, as we will see in Section 1.4.

The Court’s preference for relying on historical documentary evidence can be clearly seen in myriad cases throughout the history of the Court’s operation. For instance, in *Continental Shelf* case between Tunisia and Libya the Court was asked to set out the applicable principles for the delimitation of the continental shelf between these two states, and furthermore to ‘specify precisely the practical way the aforesaid principles and rules apply in this particular situation so as to enable the experts of the two countries to delimit these areas without any difficulties’.<sup>168</sup> Although Libya called one expert, Dr A. Fabricus, a professor of Geology, who was examined and then cross-examined by Professors Bowett and Virally, the Court was able to resolve the legal issues in the case solely through reliance on maps and other documentary evidence placed before it by the parties without having to conduct any of its own fact-finding.<sup>169</sup> Although this case has been cited as one in which the Court employed one of its ‘avoidance techniques’ in order to avoid conducting its own fact-finding, it is again difficult to conclusively argue that doing so would have produced a result more satisfactory to the parties in this particular case. What can clearly be seen, however, is the Court’s

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<sup>164</sup> Chester Brown, ‘Aspects of Evidence in International Adjudication’ in *A Common Law of International Adjudication* (Oxford University Press 2007) 91; quoting J.A. Jolowicz, *On civil procedure* (Cambridge Univ Pr 2000) 211

<sup>165</sup> Riddell and Plant 231

<sup>166</sup> Ibid, see also; Valencia-Ospina, *Evidence before the International Court of Justice* (1999) 1 204; see also the comments of Cassese and Schabas in Marlise Simons, ‘Serbia’s darkest pages hidden from genocide court’ *The New York Times* (New York, Sunday, April 8, 2007) <[http://www.nytimes.com/2007/04/08/world/europe/08iht-serbia.5.5192285.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2007/04/08/world/europe/08iht-serbia.5.5192285.html?_r=1&pagewanted=all)>

<sup>167</sup> 231

<sup>168</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p 18, Special Agreement, Article 1

<sup>169</sup> Ibid, para 62 Highet, ‘Evidence, the Court, and the Nicaragua Case’; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf*, at 117-118

preference for, and adeptness at, using historical documentary evidence to resolve legal issues in cases before it.

This approach can be seen again in the other maritime delimitation case involving Libya's continental shelf during the negotiations on the United Nations Convention on the Law of the Sea (UNCLOS) – namely the case involving Libya and Malta.<sup>170</sup> This case was inevitably influenced not only by the earlier case involving Libya and Tunisia but also by the UNCLOS negotiations which were ongoing at that time. However it should be noted that this influence was mutual, with the Court's decisions on such issues being influential during the negotiation of the UNCLOS.<sup>171</sup> At the start of the 1980s Libya and Malta eventually ratified the special agreement to bring their case before the Court. Again the Court was able to resolve the legal issues asked of it by the parties through reliance on documentary, geographical, information put before it by the parties themselves.<sup>172</sup>

In keeping with the trend of resolving land and maritime delimitation cases solely on documentary and historical evidence placed before it by the parties rather than appointing experts of its own or conducting other forms of fact-finding, the Chamber established by the parties in the *Land, Island and Maritime Frontier Dispute* again resolved the legal issues asked of it in this way. Illustrative of the Chamber's approach was its refusal of El Salvador's request to conduct a site visit, owing to the fact it had experienced serious difficulties in providing evidence for various reasons beyond its control including the fact that information was not stored in any central archives.<sup>173</sup> The Chamber refused El Salvador's request to visit the site to procure the evidence of effectivities, stating simply that it 'did not consider it necessary to exercise its power to obtain evidence, nor to accede to El Salvador's request that it should arrange for an inquiry or expert opinion under Article 50 of the Statute'.<sup>174</sup> The Chamber provided no further explanation of this decision, before relying on the other documentary evidence that had been placed before it in carrying out the delimitation.

Further, in the *Nicaragua* case,<sup>175</sup> one of the cases of non-appearance that we shall discuss in the following chapter, despite being 'not as fully informed as it would wish to be' the Court

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<sup>170</sup> *Continental Shelf (Libyan Arab Jamahiriya v Malta) Judgment, ICJ Reports 1985, p 13;*

<sup>171</sup> S. Rosenne, *The World Court: What it is and how it works* (5 edn, Martinus Nijhoff Publishers 1995) 219

<sup>172</sup> *Continental Shelf (Libya v. Malta)*; Highet, 'Evidence, the Court, and the Nicaragua Case' 27

<sup>173</sup> *Land, Island and Maritime Frontier Dispute*, para 64

<sup>174</sup> *Ibid*

<sup>175</sup> *Nicaragua Case*

took no steps to more proactively procure evidence that may have shed some light on the case.<sup>176</sup> The US Judge Schwebel drafted a lengthy dissent from the majority in the *Nicaragua* case, arguing that the Court was wrong to not make greater use of its fact-finding powers to call for additional evidence or establish a commission of inquiry in light of the US's withdrawal from the case.<sup>177</sup> For example, in relation to the issue of whether El Salvador had ever requested the help of the US in self-defence, the Court merely stated that there was 'no evidence' to suggest so, but never invited El Salvador to submit its further evidence, nor took any steps of its own to procure further evidence – the Court remained passive.<sup>178</sup>

Similarly, in the *Gabčíkovo-Nagymaros* case in 1997 the Court, the parties put before the Court a myriad of scientific expert reports by independent experts,<sup>179</sup> national and international non-governmental bodies<sup>180</sup> and a number of EC expert studies<sup>181</sup> on a broad range of issues including hydrology, seismology, ecology and hydrobiology. However, even with this voluminous factual and scientific information before the Court,<sup>182</sup> (described by the Court as 'an impressive amount of scientific material aimed at reinforcing their respective arguments'<sup>183</sup>) the Court held that it was 'not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.'<sup>184</sup> Instead, the Court based its judgment in treaty law, state responsibility and on the respective legal obligations of the parties before it, relying on the whole on the documentary evidence placed before it by the parties.<sup>185</sup>

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<sup>176</sup> Ibid-20, 123, *ibid*, at 110-11; Schwebel 15

<sup>177</sup> Schwebel 13

<sup>178</sup> *Ibid*

<sup>179</sup> *I.C.J. Pleadings, Gabčíkovo-Nagymaros*, Vol. I at 57, para 2.28; Counter-Memorial of Hungary, Vol 1, at para 1.30 onwards

<sup>180</sup> Counter-Memorial of Hungary, at para 1.33

<sup>181</sup> For instance; see *I.C.J. Pleadings, Gabčíkovo-Nagymaros*, Vol. II, Annexes 12, 19, 22, Volume III Annex 33; EC Working Group of Independent Experts on Variant 'C' of project, 23 November 1992; EC Working Group of Monitoring and Water Management Experts for the project, Data Report of 2 November 1993; EC Fact-Finding Mission 31 October 1992; EC Working Group of Monitoring and Water Management Experts for the Project, 1 December 1993

<sup>182</sup> Riddell 245; Lee Thomson, 'The ICJ and the case concerning the G/N Project: The Implications for International Watercourses Law and International Environmental Law' 3 Centre for Energy, Petroleum, Mineral Law and Policy, Annual Review (1999) Article 8, available at: [www.dundee.ac.uk/cepmlp/car/html/car3\\_article8.htm](http://www.dundee.ac.uk/cepmlp/car/html/car3_article8.htm) accessed 1/2/2012

<sup>183</sup> *Gabčíkovo-Nagymaros Case*, para 54; 'Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.'

<sup>184</sup> *Ibid*, para 54

<sup>185</sup> D'Aspremont and Mbengue 15



The Court's reticence with regards to the appointment of experts in this case has been criticised by commentators and the dissenting opinion of one judge in particular who have argued it was unclear how the Court felt it was able to make a legal determination as to whether 'the immediacy and gravity of the environmental peril without taking into account the scientific data submitted by the parties intending to prove just that'.<sup>186</sup>

However, one must be careful when considering such issues because it is extremely difficult to argue that the Court should have engaged more intimately with particularly complex factual or scientific issues, and further that any such engagement would have made any particular difference to the outcome of the case. That having been said, what we can assess is the means and methods employed by the Court and confidently state that the Court has displayed, and continues to display, tendencies for relying on documentary evidence and demonstrated clear reluctance to conduct its own fact-finding.

The Court's unwillingness or inability to utilise its fact-finding powers is compounded by the fact that the Court employs remarkably broad rules of admissibility. The onus placed on the states to bring evidence before the Court as a result of the Court's reactive approach to fact-finding necessitates that some consideration be given to the limitations that are placed on exactly what evidence can come before Court, or in other words the Court's rules on admissibility.

### *1.3.2. Admissibility*

Consistent with the theme of scarce rules of evidence in international litigation, the admissibility of evidence before the Court is similarly unconstrained by detailed evidentiary rules and procedures. Unlike international criminal tribunals established subsequently, the ICJ has no explicit rules of evidence regarding admissibility.<sup>187</sup> In fact, it has been said that

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<sup>186</sup> Riddell 245; Thomson; This point was made by Judge Herczegh who stated in his dissenting opinion that 'As a judicial organ, the Court was admittedly not empowered to decide scientific questions touching on biology, hydrology, and so on, or questions of a technical type which arose out of the G/N Project; but it could- and even should- have ruled on the legal consequences of certain facts alleged by one Party and either admitted or not addressed by the other, in order to assess their respective conduct in this case' See Dissenting Opinion of Judge Herczegh at 177

<sup>187</sup> See for instance Rule 89(C) of the ICTY which states that 'A Chamber may admit any relevant evidence which it deems to have probative value' which has in fact been described as 'arguably the most frequently used provision in the Rules'; see Patricia Viseur Sellers, 'Rule 89 (C) and (D): At Odds or Overlapping with

there exists a general rule of *liberté de la preuve* or ‘the free admissibility of evidence before the Court’<sup>188</sup> (with only a small number of exceptions.)

Former President of the Court Rosalyn Higgins has summed up the Court’s approach to the admissibility of evidence in stating that ‘[t]he parties are entitled to expect that we will examine every single thing that they put before us, and we do’.<sup>189</sup> Again, the explanation offered for this approach is familiar, as Brower asserts: ‘[f]or obvious diplomatic reasons international tribunals are reluctant to spurn anything proffered by a sovereign.’<sup>190</sup> Unlike domestic courts where there generally exist numerous and sophisticated evidentiary constraints regarding the admissibility of evidence, it has been said that they ‘have no place in international adjudication, where the relevance of facts and the value of evidence tending to establish facts are left to the appreciation of the court.’<sup>191</sup> As a general rule it can be said that any evidence put forward by a state party in a case before the Court will be accepted by the Court unless it is challenged by the other party and is subsequently proved to fall foul of one of the limited exceptions to the principle of free admissibility.<sup>192</sup>

One possible explanation offered to explain the Court’s flexible approach to evidence and broad powers to determine the evidentiary weight of any piece of evidence that comes before it is that ‘[u]nlike a common-law lay jury, this highly-qualified and experienced international bench is not considered to need “protection” from potentially unreliable evidence.’<sup>193</sup> The Court has however imposed a limited number of restrictions on the principle of free admissibility, ostensibly in order to ensure good judicial order.<sup>194</sup>

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Rule 96 and Rule 95?’ in Richard May and others (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Martinus Nijhoff 2001). Rule 89(D) even permits the exclusion of evidence on the grounds that it lacks probative value, although this provision has not been the subject of extensive jurisprudence; see also Gideon Boas, ‘Admissibility of Evidence under the Rules of Procedure and Evidence of the ICTY: Development of the ‘Flexibility Principle’ in Richard May and others (eds), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald* (Martinus Nijhoff 2001) 265

<sup>188</sup> See *Mavrommatis Palestine Concessions*, PCIJ, Ser A No 2, 34 (1924); Brown 90

<sup>189</sup> Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice to the General Assembly of the United Nations, 1 Nov 2007, available at: < <http://www.icj-cij.org/presscom/files/3/141113.pdf>>; in that way ‘at least the state parties cannot feel that a decision rests on an incomplete presentation of the facts and law’; Franck 336

<sup>190</sup> C.N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules* (HeinOnline 1994) 148

<sup>191</sup> Rosenne and Ronen 557 see also C.N. Brower, ‘The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence’ in R.B. Lillich (ed), *Fact-Finding Before International Tribunals* (Transnational 1992)

<sup>192</sup> See Sandifer 176; Valencia-Ospina, ‘Evidence before the International Court of Justice’ 204

<sup>193</sup> Valencia-Ospina, *Evidence before the International Court of Justice* (1999) 1 205; see *Corfu Channel* (United Kingdom v. Albania) Merits, 1949 ICJ Rep. 4 (Judgment of 9 April).

<sup>194</sup> W.M. Reisman and E.E. Freedman, ‘Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in

The first of these limitations is evidence originating from negotiations between parties seeking a resolution of a particular dispute. This has been described as ‘[p]erhaps the only clear-cut example of evidence being considered inadmissible by the Court’.<sup>195</sup> The consistent practice of negotiation between two states seeking to resolve a particular dispute has led to the development of a general rule that the Court will not ‘consider evidence consisting of statements...made in the course of those negotiations, so that the information or documents generated can not then be used against the parties in any pending or future litigation’.<sup>196</sup>

A clear example of this limitation can be seen in the *Chorzów Factory* case in which the PCIJ said it would not take into account ‘declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement’.<sup>197</sup> The Court subsequently followed this reasoning in the *Burkina Faso/Mali* case.<sup>198</sup> Crucially, however, the Court provided a slight nuance in finding that whilst evidence originating from negotiations between the parties was inadmissible, evidence of the circumstances surrounding the agreement may in fact be admissible. This has led commentators to conclude that ‘[e]ven this clear rule as to inadmissibility has been closely proscribed’.<sup>199</sup>

A second, and more complex, limitation is that relating to illegally obtained evidence. Although the Court has never specifically rejected illegally obtained evidence, there has been academic debate on the issue centring around the *Corfu Channel* and *Tehran Hostages* cases.<sup>200</sup> Despite arguments to the contrary,<sup>201</sup> it would seem that the Court in fact has no rule prohibiting the admission of illegal evidence, as Highet has stated ‘[t]he likely result in the future...is that – without specifically ruling on the matter – the Court will consider any such evidence on its own footing and weigh it accordingly, but will not exclude it from consideration on the ground of “illegality” alone’.<sup>202</sup> President Spender in *South West Africa*

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International Adjudication, The’ 76 Am J Int’l L 737, 739

<sup>195</sup> Riddell and Plant 154

<sup>196</sup> M. Kazazi, *Burden of Proof and Related Issues: A study on Evidence Before International Tribunals*, vol 1 (Martinus Nijhoff Publishers 1996) 402

<sup>197</sup> See *Chorzów Factory Case at 19*

<sup>198</sup> *Frontier Dispute Case at para 147*

<sup>199</sup> *ibid at para 147* Riddell and Plant 155

<sup>200</sup> See Reisman and Freedman 739; H. Thirlway, ‘Dilemma or Chimera--Admissibility of Illegally Obtained Evidence in International Adjudication’ 78 Am J Int’l L 622, 633

<sup>201</sup> Thirlway Reisman and Freedman

<sup>202</sup> Highet, ‘Evidence, the Court, and the Nicaragua Case’ 46

stated the position of the Court:

‘The evidence will remain on the record; the Court is quite able to evaluate evidence, and if there is no value in the evidence, then there will be no value given to this part of the evidence...This Court is not bound by the strict rules of evidence applicable in municipal courts and if the evidence established by the witness does not sufficiently convey that the evidence is reliable in point of fact, then the Court, of course, deals with it accordingly when it comes to its deliberation’.<sup>203</sup>

This underlines how far the liberal approach to evidence extends and the subsequent importance of the weighing of evidence (the fact-assessment stage),<sup>204</sup> to which we will later return. It is interesting to note that among the myriad arguments made as to how to reform the Court’s fact-finding procedure, arguments in favour of the introduction of stricter rules of admissibility are rarely made. This is perhaps due to the fact that there are a number of obvious positive aspects of the Court’s policy of *liberté de la preuve*. To briefly mention one by way of example, the Court has avoided the difficulties which beset the United States Supreme Court when it attempted to move away from its traditional *Frye* test for admissibility to the more stringent *Daubert* test which cast the Supreme Court as the gatekeeper in terms of the admission of scientific evidence.<sup>205</sup> This move proved troublesome as the Supreme Court struggled to define purely ‘scientific’ evidence and ultimately in the *Kumho Tyre* case was forced to expand the test to cover ‘technical’ and ‘other specialized’ [sic] forms of knowledge.<sup>206</sup> The ICJ’s approach to date has allowed the Court to avoid becoming embroiled in such technical disputes which could have needlessly consumed much of the Court’s time and effort.

### 1.3.3. *Més que un Court – the Continuing Influence of the Sovereign Nature of the Parties*

A further facilitating factor is the sovereign nature of parties in cases before the Court which continues to influence the operation of the Court to this day. To elaborate, owing to the fact that the Court deals exclusively with states, there remains an extent to which the Court must

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<sup>203</sup> South West Africa, Second Phase, [1966] Pleadings-X, 122; XI, 460

<sup>204</sup> Benzing 1243, para 29

<sup>205</sup> See *Daubert v Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); for commentary see Eric Helland and Jonathan Klick, ‘Does Anyone Get Stopped at the Gate? An Empirical Assessment of the Daubert Trilogy in the States’ 20 Supreme Court Economic Review 1; Sophia I Gatowski and others, ‘Asking the gatekeepers: A national survey of judges on judging expert evidence in a post-Daubert world’ 25 Law and Human Behavior 433; O’Donnell

<sup>206</sup> *Kumho Tire Co. v. Carmichael*, 119 S. Ct.; Michael J Saks, ‘Banishing ipse dixit: The impact of Kumho Tire on forensic identification science’ 57 Wash & Lee L Rev 879, 882

take into account issues beyond the purely legal. This being the case, the ICJ is much more than a Court, both symbolically and functionally it is concerned with more than the narrow adjudication of the legal issues raised in the case that has come before it. The Court, despite (or perhaps because of) the proliferation of international courts and tribunals in recent times, remains unrivalled in terms of the informal influence and authority of its legal pronouncements.<sup>207</sup>

Indeed, a recurring theme of this thesis is the influence (waning or otherwise) of the principle of sovereign equality on the fact-finding and assessment processes of the Court. The significance of the principle of sovereign equality cannot be ignored and is a key factor in terms of explaining the current reactive approach of the Court to fact-finding in two distinct but related senses.

First of all, it is argued that the Court has traditionally felt compelled to accommodate sovereign states' notions of the most appropriate way of presenting and substantiating its own version of events.<sup>208</sup> For instance, the Court in the *Nicaragua* case addressed the issue of sovereign equality and cited its influence as a key factor for explaining the Court's approach to the production of evidence:

‘The provisions of the Statute and the Rules of the Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contention’.<sup>209</sup>

The sovereign equality of states is part of the genetic makeup of international adjudication and the ensuing deference to the wishes of states in terms of fact-finding would appear to be a corollary.<sup>210</sup> This position is echoed in international legal scholarship by commentators who argue that when the parties before an international Court such as the ICJ are sovereign states ‘... it is perhaps only logical for them to have the main initiative and responsibility in regard

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<sup>207</sup> This is so despite the Court's legal pronouncements having no binding force apart from between the parties to the case before it under Article 59 of the Court's Statute, and despite there existing no formal doctrine of *stare decisis*, the Court's pronouncements have always been accorded significant respect by states, scholars and other international tribunals; see M. Shahabuddeen, *Precedent in the World Court*, vol 13 (Cambridge University Press 1996)

<sup>208</sup> Foster 80; Riddell and Plant 2

<sup>209</sup> *Nicaragua Case at para 31*

<sup>210</sup> Wolfrum

to the production of evidence.’<sup>211</sup> And indeed, it has even been argued that the failure to accurately establish the facts in an inter-state case can have more far-reaching consequences than a similar failure in a trial before a domestic court.<sup>212</sup> For instance, Sandifer has argued that this is the case, citing the fact that the not only are the ‘vital interests of states’ at stake in a case before the Court that could potentially affect the lives of thousands of people, the functioning of the international community and friendly relations between states could turn on the procedural establishment of the facts.<sup>213</sup> Similarly, Franck has made the link between the principle of sovereign equality and the next explanatory factor to be examined, that of compelled disclosure, which Franck argues is absolutely ‘...inconsistent with the nature of sovereignty’.<sup>214</sup>

Secondly it is argued that the sovereign nature of the parties before the Court affects its approach to fact-finding in that the Court’s jurisdiction is ultimately consensual. In other words, since the parties before the Court could in theory revoke their consent to appear before the Court at any time, the Court is forced to adopt a ‘softly-softly’ approach to evidence gathering in order to avoid states feeling as if their right to a fair hearing is being hindered by the Court’s procedural approach to fact-finding.<sup>215</sup> As such, in order to ensure that states are not discouraged from consenting to the Court’s jurisdiction it is felt that the Court must avoid narrow procedural technicalities.<sup>216</sup> In addition to the sovereign nature of the parties the Court’s reactive approach to fact-finding is facilitated by a number of other factors. One of the most significant of these factors is the Court’s apparent inability to compel the parties before it to produce evidence.<sup>217</sup>

#### *1.3.4. Inability to Compel the Production of Evidence*

Whilst it will be argued in Chapter 4 that the Court can in fact be more proactive in terms of guiding the production of evidence, for now it can be said that the fact the Court does not possess an *explicit* power to compel the production of evidence has contributed to the mainstream belief that it is not competent to do so.

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<sup>211</sup> Valencia-Ospina, ‘Evidence before the International Court of Justice’ 202; Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules* 148

<sup>212</sup> Sandifer 4

<sup>213</sup> Ibid

<sup>214</sup> Franck 336

<sup>215</sup> Schwebel 4

<sup>216</sup> Watts 289

<sup>217</sup> Hightet, ‘Evidence, the Court, and the Nicaragua Case’ 10

Neither the Court's Statute nor Rules provide any concrete guidance on when the Court should call upon states to produce evidence<sup>218</sup> and as a result it has only ever asked a state party to produce evidence on a few occasions (and has never drawn negative inferences from a state's failure to do so).<sup>219</sup> The Court's reluctance to draw negative conclusions from a refusal to produce requested evidence is symptomatic of the Court's general reluctance to take a proactive role in the fact-finding process.<sup>220</sup> Consequently, the onus falls very much on the state parties before the Court to do so.<sup>221</sup> As such, contributing to the Court's reactive approach to fact-finding, cases are generally defined by the evidence the parties seek to rely upon and by the facts they decide to contest.<sup>222</sup>

### 1.3.5. 'Classical' Approach to the International Judicial Function

A further factor that arguably could have contributed to the Court's current reactive approach to evidence is the so-called 'classical' account of the international judicial function. This account sees the process of judicial reasoning from the perspective of the 'judge in isolation, detached from his institutional surrounding and function in a juristic vacuum, freed from the restraints imposed by the requirements of evidence and procedure'.<sup>223</sup> As a result of this traditional conception of adjudication, it is suggested that the Court has in the past played down the significance of the procedural side of international adjudication. For example, the Court stated in the *Mavrommatis* case that '[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they possess in municipal law'.<sup>224</sup> This sentiment has been echoed again by the Court through the years in cases such as *Aegean Sea Continental Shelf* in which the Court stated that:

'[n]either the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court's

<sup>218</sup> See Art 49 ICJ Statute and Art 62(1) Rules of the Court

<sup>219</sup> Halink 19 Teitelbaum 129

<sup>220</sup> See Christian J. Tams, 'Article 49, 50' in *The Statute of the International Court of Justice : a commentary* (Oxford University Press 2006) 1099

<sup>221</sup> Bernárdez; see also *Armed Activities Case at paras 58-9*, (again citing the *Nicaragua Case at 14, 50*, and the practice followed in *Tehran Hostages Case at 3*. See also; *Bosnian Genocide Case at para 212*; see Halink 21

<sup>222</sup> Article 49, Statute of the International Court of Justice, June 26, 1945, 58 Stat. 1055, 33 UNTS. 993.

<sup>223</sup> Scobbie 808, see B.N. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921), J.C. Hutcheson Jr, 'Judgment Intuitive The Function of the Hunch in Judicial Decision' 14 Cornell Lq 274, E. Levi, 'An Introduction to Legal Reasoning'(1948)' 15 University of Chicago Law Review 501

<sup>224</sup> *Mavrommatis Palestine Concessions Case Preliminary Objections Judgment*

jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law'.<sup>225</sup>

A similar sentiment was expressed by Vice-President Wellington Koo in the preliminary objections phase of the *Barcelona Traction* case:

‘...international law...attaches less importance to form and appearance than municipal law...International law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic consideration which are often given importance in municipal law’.<sup>226</sup>

The so-called ‘*Mavrommatis* view’ that matters of form and procedure can be discounted is one which places the judge at the centre of the judicial process, and sees the procedural and institutional framework of the Court as secondary to the will of the judge (who, as we have seen, is generally deferential to the sovereign nature of the state parties before the Court) ruling on the case at hand. This is a position that has come in for some criticism,<sup>227</sup> but for our purposes it should be noted that the traditional view of matters of procedure as a subsidiary concern is a possible reason for the current reactive approach of the Court to fact-finding.<sup>228</sup>

It should also be noted that the Court has never taken the position that complex factual or scientific issues are non-justiciable, as has occasionally been argued before adjudicative bodies in the past.<sup>229</sup> Such arguments have not been often made and have never been explicitly endorsed by an international tribunal.<sup>230</sup> Nevertheless, Mbengue has argued that

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<sup>225</sup> *Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978*, p 3at para 42 (see also paras. 41-47)

<sup>226</sup> *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, ICJ Reports 1964*, p 6, paras 15, 32; to this end see also Article 19 of the Nuremberg Charter which states that ‘[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value’

<sup>227</sup> For example; Scobbie argues that greater emphasis must be placed on the institutional context of judicial decision making – and highlights recent theoretical analysis of judicial activity and the restraints placed on judicial discretion by judges themselves as the main driving factor for this shift in emphasis. Scobbie 809; In terms of the theoretical analysis, see R. Alexy, R. Adler and N. MacCormick, *A Theory of Legal Argumentation. The Theory of Rational Discourse as a Theory of Legal Justification* (Oxford 1989), N. MacCormick, *Legal reasoning and legal theory* (Clarendon Press Oxford 1978)

<sup>228</sup> Watts 289

<sup>229</sup> For instance, in the *Southern Bluefin Tuna* case Japan argued that ‘questions of scientific judgment ... are not justiciable.’ See *Southern Bluefin Tuna (New Zealand. v. Japan, Australia. v. Japan)*, 23 *R.I.A.A.* 2000, 1, at 40(a); On justiciability see Ian Brownlie, ‘Justiciability of Disputes and Issues in International Relations, The’ 42 *Brit YB Int'l L* 123

<sup>230</sup> D’Aspremont and Mbengue 11



international adjudicators including judges of the ICJ are put off conducting fact-finding into issues that are scientifically controversial since science is ‘irresolutely oriented towards the unknown – ie the ‘not known yet’: the uncertain.’<sup>231</sup> As a result there is a conflict between the objectives that scientists and judges are trying to achieve: international adjudicators aim to ‘freeze’ the ‘facts’ and talk of ‘findings’ and ‘veracities’ whilst scientific fact-finding talks of ‘probabilities’.<sup>232</sup> As such, this reluctance to engage in fact-finding in relation to complex scientific situation is one of the main reasons that international courts and tribunals have displayed a preference for relying on settled and uncontroversial facts.

And indeed various international courts and tribunals have at different times described their *modus operandi* as being to ‘establish which relevant facts [they] regard as having been convincingly established by the evidence’,<sup>233</sup> to rely on facts ‘not suggesting the slightest doubt’<sup>234</sup> or ‘clear and compelling evidence’<sup>235</sup> in order to determine the ‘established facts’.<sup>236</sup> By the same token they have been reluctant to engage in claims based on unconvincing evidence<sup>237</sup> and have refused to ‘weigh intangible and elusive points of proof’.<sup>238</sup>

As such, the argument goes that since international adjudicators have shown a preference for relying on ‘those facts which they have found to have existed’,<sup>239</sup> they are somewhat stumped ‘in situations in which the facts in question are so uncertain that they have not been “found to

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<sup>231</sup> Mbengue 513; Mbengue states that scientific facts ‘are precisely typified by their volatility, their circularity, their paucity, their impalpability...’ *ibid*; Foster 5; ‘In disputes involving scientific uncertainty and potential future harm, international courts and tribunals are called upon to make judicial decisions in circumstances where potentially decisive facts about future events clearly cannot be obtained at the time of adjudication... Here the concept of “certainty” is to be taken literally: an absence of certainty has to be accepted from the start’)

<sup>232</sup> Mbengue 513

<sup>233</sup> *Armed Activities Case*, para 72

<sup>234</sup> *Fisheries Jurisdiction (Germany v Iceland)*, Judgment, 1973 ICJ 49, para 18 (2 February) Jurisdiction of the Court, para 24

<sup>235</sup> *Saluka Investments B.V. (Netherlands v. Czech Republic)*, Partial Award, para 273 (Permanent Court of Arbitration 2006)

<sup>236</sup> *Polis Fondi Immobiliare di Banche Popolare S.G.R.p.A. v. International Fund for Agricultural development*, Case No 2010-8, para 156

<sup>237</sup> *Abyei Arbitration (Sudan/Sudan People’s Liberation Movement/Army)*, para 489 (Permanent Court of Arbitration 2009); *Delimitation of Maritime Boundary (Guyana v. Suriname)* para 424 (Permanent Court of Arbitration 2007); *Delimitation of the Exclusive Economic Zone and Continental Shelf (Barbados v. Trinidad and Tobago)* 27 RIAA 147 (Permanent Court of Arbitration 1910), *Delimitation of the Border (Eritrea v. Ethiopia)* 25 RIAA 83 (Permanent Court of Arbitration 2002); *Delimitation of the Exclusive Economic Zone and Continental Shelf (Barbados v. Trinidad and Tobago)* 27 RIAA 147 (Permanent Court of Arbitration 1910), para 266

<sup>238</sup> *Maritime Delimitation (Eritrea v. Yemen)* 22 RIAA 335 (Permanent Court of Arbitration 1999)

<sup>239</sup> *Pulp Mills Case, Joint Dissenting Opinion of Judges Al-Kasawneh and Simma*, paras 167-8

exist”<sup>240</sup> which in turn results in judicial caution.<sup>241</sup>

Undoubtedly there are a number of aspects of this argument that ring true. However this argument is not entirely convincing since judges are regularly asked to engage in similar ‘probabilistic’ assessments when dealing with complex economic or public policy issues in cases that come before them. Similarly, as in science, standards and burdens of proof vary from case to case and court to court in international law. As such, in the words of Alvarez ‘[d]eciding on the basis of uncertainty is what international and domestic courts do every day’.<sup>242</sup>

In addition, the extent to which Mbengue’s criticisms of international courts relate only to scientific fact-finding is unclear. The main question in this regard becomes; what exactly is ‘scientific’ evidence? It is difficult to justify why ‘scientific’ evidence *per se* is the only form of evidence which poses problems for the Court as a result of its complexity. For instance, extremely complex ICSID awards dealing with injury to investors, or WTO cases dealing with countervailing duties or zeroing may be just as complex factual issues as any controversial scientific issues.<sup>243</sup> The example of the US Supreme Court is a cautionary tale in this regard. As mentioned above in section 1.3.2., the US Supreme Court in recent years has faced major difficulties in seeking to define purely ‘scientific’ knowledge in implementing the famous *Daubert* test for the admissibility of scientific evidence before US Courts.<sup>244</sup> Ultimately the US Supreme Court in the *Kumho Tyre* case was forced to expand the test to cover ‘technical’ and ‘other specialized’ [sic] forms of knowledge.<sup>245</sup> In this case Judge Breyer conceded that;

‘[I]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machines. And conceptual efforts to

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<sup>240</sup> Mbengue 515

<sup>241</sup> Lauterpacht, *The Development of International Law by the International Court*

<sup>242</sup> J. Alvarez, ‘Are International Judges Afraid of Science?: A Comment on Mbengue’ 34 *Loyola of Los Angeles International and Comparative Law Review* 12, 88

<sup>243</sup> Alvarez argues that ‘[m]any, perhaps most, such decisions involving sophisticated investors in complex, on-going enterprises require heavily expert-laden assessments of fair market or going concern value’

<sup>244</sup> See *Daubert v Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); for commentary see Helland and Klick

<sup>245</sup> *Kumho Tire Co. v. Carmichael*, 119 S. Ct.; Saks 882

distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.<sup>246</sup>

Consequently, the focus in the following chapters will be on how the ICJ and other inter-state tribunals deal with ‘factually-complex’ cases which, as Alvarez has stated, necessarily require the assistance of experts who have specific skills that can help to shed light on these issues which are beyond the comprehension of the average judge, learned as they are.<sup>247</sup> As such, the thesis does not refer to the narrow term of ‘scientific evidence’ or ‘scientific fact-finding’ but rather refers to the broader category of factually complex evidence for the reasons just explained.

The preceding subsections have sought to outline that the Court has very clearly displayed a number of tendencies which, taken together, demonstrate a consistently reactive approach to the facts in cases that have come before it. Such tendencies evident in the Court’s jurisprudence include the predominance of, and apparent preference for reliance on, documentary evidence before the Court; extremely broad rules of admissibility; the sovereign nature of the parties to cases before the Court and the so-called ‘classical’ approach to the judicial process amongst a number of others. This reactive approach necessarily has a knock-on effect on the Court’s fact-assessment practice which is the subject to which we now turn our attention in the following subsections.

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<sup>246</sup> *Kumho Tire Co. v. Carmichael*, 119 S. Ct. at 1174; Edward J Imwinkelried, ‘Evaluating the reliability of nonscientific expert testimony: A partial answer to the questions left unresolved by *Kumho Tire Co. v. Carmichael*’ 52 Me L Rev 19, 25

<sup>247</sup> Alvarez 86

#### 1.4. A Natural Counterpart – Fact-Assessment & the Weighing of Evidence

The preceding sections have illustrated that the Court plays a limited role in regulating the evidence that comes before it. As such, the Court is obliged to pay particularly close attention to the evaluation of this evidence (in particular if it is the basis for a legal pronouncement). As Judge Sir Hersch Lauterpacht stated ‘[a] substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevant facts...’<sup>248</sup> and that ‘[n]othing a court does affects the public perception of its fairness so clearly’ as weighing of the facts.<sup>249</sup>

The weighing of the facts is here termed the Court’s ‘fact-assessment’ role and is the central focus of the following sections. It is first necessary to more clearly differentiate the Court’s fact-finding and fact-assessment roles by considering what exactly we mean when we talk about fact-assessment. As we have seen, evidence before the court is not filtered in accordance with (detailed) rules of admissibility at the start of a case as it is in domestic law. Further, there are no provisions in the Court’s Statute or Rules which specifically address the probative weight that the Court should give to evidence submitted to it. In this regard the Court has substantial discretion in assessing and attributing weight to the evidence put before it.<sup>250</sup> As Judge Keith has stated; ‘[w]hat are issues of admissibility of evidence in some legal systems are often dealt with internationally as matters of weight or evaluation.’<sup>251</sup> As such, some forms of evidence considered inadmissible before national courts can come before the Court.<sup>252</sup>

The Court’s own evaluation of the evidence in which it attributes *weight* to different forms of evidence, the ‘discretionary power to assess the evidence’, is described as the ‘natural counterpart’ of the principle of free admissibility<sup>253</sup> and one of singular importance.<sup>254</sup> This process of weighing the probative value of the evidence put before it, the fact-assessment

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<sup>248</sup> Alford Jr 56

<sup>249</sup> Lauterpacht, *The Development of International Law by the International Court* 48

<sup>250</sup> Benzing 1264

<sup>251</sup> ‘As mentioned, arguments that in some legal systems might lead to a court ruling that the evidence is inadmissible, for instance, as hearsay, opinion or the rulings of other courts, are generally directed instead at the weight to be given to the item’; Keith 905; see also Katherine Del Mar, ‘Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice’ 2 *Journal of International Dispute Settlement* 393, 396

<sup>252</sup> Del Mar 396 gives the example of hearsay (“preuve par oui-dire”) - the Court has stated ‘Nor is testimony evidence not within the direct knowledge of the witness, but known to him only from hearsay, of much weight’, *Nicaragua Case at para 68*

<sup>253</sup> Registry, Training and Research 25 Rosenne and Ronen 257

<sup>254</sup> Del Mar 396 Halink 21; Valencia-Ospina, ‘Evidence before the International Court of Justice’ 202

process in other words, is not only important in the abstract but in practical terms too since traditionally the material admissibility of evidence has ‘rarely been disputed on formal grounds, with parties instead focussing on challenging the weight of evidence relied upon by the other side’<sup>255</sup> or ‘probative value’.<sup>256</sup>

The Court itself has stated that in assessing the weight of evidence before it, its task is to categorise evidence under different headings then allocate ‘probative value to them accordingly’<sup>257</sup> or in other words to ‘identify the documents relied on and make its own clear assessment of their weight, reliability and value’.<sup>258</sup>

The Court is the final arbiter in the assessment of the evidence that comes before it.<sup>259</sup> As Franck has stated, the Court must ‘strive mightily to resolve cases on the facts - credible findings of fact - and avoid to the greatest degree possible the temptation to mitigate shortages of factual evidence, or lack of fact-analysis, by recourse to doctrines of law intended, wittingly or not, to bypass recourse to facts’.<sup>260</sup> However, just because the Court is the final arbiter, this does not mean that the Court acts in an arbitrary manner, as we will see in the following section.

#### *1.4.1. Assessment of Evidence – Guiding Principles*

In recent times a number of commentators have argued that there are a number of discernible principles which the Court has developed (admittedly in a piecemeal fashion and in a manner that is far from explicit<sup>261</sup>) in cases before it over the last thirty years which guide the Court in determining the weight, reliability and value that the Court will accord to evidence before it and vary from case to case.<sup>262</sup> It has been suggested that the trend towards a clearer articulation of the principles which guide the Court in its assessment of the evidence, which

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<sup>255</sup> S. Rosenne, *The Law and Practice of the International Court* (3 edn, Martinus Nijhoff, The Hague 1985) 584

<sup>256</sup> Riddell and Plant 185

<sup>257</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary Objections, Judgment, ICJ Reports 1998*, p 315, Dissenting Opinion of Judge Koroma, para 8, Riddell and Plant

<sup>258</sup> *Armed Activities Case at paras 58-9*; the Court itself referred to *Nicaragua Case 50*, and the practice followed in *Tehran Hostages Case at 3*

<sup>259</sup> Registry, Training and Research 25

<sup>260</sup> Franck

<sup>261</sup> Halink argues that a study of the practice of the Court shows that it has merely hinted at as opposed to explicitly spelled out exactly how it weighs evidence in case brought before it; Halink 21

<sup>262</sup> See for instance Registry, Training and Research 25 Riddell and Plant 186, Halink 22, S. Rosenne, ‘The Law and Practice of the International Court’ 1 Vol 431, 582

has gained pace in the recent jurisprudence of the Court,<sup>263</sup> has its roots in the *Nicaragua* case,<sup>264</sup> to which we now turn.

#### 1.4.2. Practice of the Court

The non-appearance of the United States before the Court in the *Nicaragua* case meant that the Court was forced to ‘articulate its scrutiny of the evidence in more detail than ever before’.<sup>265</sup> The Court acknowledged that a situation in which one party had refused to appear before the Court (a situation which the Court has faced in the past on more than eight occasions<sup>266</sup>) was a challenge to its traditional approach to fact-assessment in that it could not assume that the truth lay somewhere between the competing assertions of the parties before it. Despite the absence of one party, however, the Court stated that Article 53 of its Statute nevertheless obliged it to ‘employ whatever means and resources may enable it to satisfy it whether the submissions of the Applicant State are well founded *in fact and law*’.<sup>267</sup> The Court noted that its role in such circumstances is modified somewhat, and necessitates that the Court does not play a passive role, but instead utilises its ‘freedom in estimating the value of the various elements of evidence...’ (a topic that will be explored in more detail in Chapter 2 at 2.2.)<sup>268</sup>

The Court gave careful consideration to how the facts put before the Court by Nicaragua were weighed and evaluated, in particular giving particular guidance on certain issues. Importantly, the Court explicitly indicated a preference for certain types of evidence in its fact-assessment capacity, making reference to the general practice of Courts and remarking that there were forms of testimony which were to be regarded as being of ‘*prima facie* superior credibility’.<sup>269</sup> The forms of evidence referred to by the Court include the evidence of a disinterested witness, defined as ‘one who is not party to the proceedings and stands to gain or lose nothing from its

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<sup>263</sup> Riddell and Plant 186

<sup>264</sup> *ibid*

<sup>265</sup> *ibid* Highet, ‘Evidence and Proof of Facts’ 2

<sup>266</sup> *Corfu Channel Case, Anglo-Iranian Oil Co (United Kingdom v Iran), Preliminary Objection, Judgment, ICJ Reports 1952, p 107, Nottebohm Case (second phase), Judgment of April 6th, 1955 : ICJ Reports 1955, p 4., Nuclear Tests (Australia v France), Judgment, ICJ Reports 1974, p 253, Nuclear Tests Case 1974, Aegean Sea Continental Shelf Case, Tehran Hostages Case and Nicaragua Case*

<sup>267</sup> *Nicaragua Case at paras 59-60* (emphasis added). C.f. The opinion of Judge Jennings who nevertheless was of the opinion that America had prejudiced its chances of success by not taking part in the proceedings and submitting evidence. Highet, ‘Evidence, the Court, and the Nicaragua Case’ 3

<sup>268</sup> *Nicaragua Case at paras 59-60*

<sup>269</sup> *ibid* at paras 59-60

outcome',<sup>270</sup> and the evidence of a party 'as is against its own interest'.<sup>271</sup> The Court held that such statements against the interest of the state made by 'high-ranking official political figures' are to be seen of particular probative value since they can be construed as a form of admission.<sup>272</sup>

Furthermore, in the absence of the United States, the Court was forced to evaluate facts which were 'for the most part, matters of public of knowledge which have received extensive coverage in the world press...' - an issue that the Court had previously had to consider in the *Tehran Hostages* case.<sup>273</sup> It was in this context that the Court expressed clear suspicion of what was termed 'evidence emanating from a single source'.<sup>274</sup> Instead, the Court indicated a strong preference for contemporaneous evidence from those with direct knowledge of the situation<sup>275</sup> stating that any evidence emanating from a single source had 'no greater value as evidence than the original source'.<sup>276</sup>

In stating that such forms of evidence are of superior credibility in the eyes of the Court in the process of its fact-assessment, the Court made explicit for the first time the type of consideration it takes into account when assessing evidence before it.<sup>277</sup> Whilst the Court only went as far as saying that such evidence was of *prima facie* credibility, such guidance was significant in elucidating the Court's reasoning in fact-assessment and would subsequently be relied on and developed in later cases such as the *Armed Activities* case.<sup>278</sup>

In the *Armed Activities* case the Court gave what has been called '[t]he clearest statement of the Court's general approach to the assessment of evidence' to date, developing the position it had taken in earlier cases such as *Nicaragua*.<sup>279</sup> In this case the Court stated that its role in fact-assessment was to 'identify the documents relied on and make its own clear assessment of their weight, reliability and value' and crucially went on to explain what items it had eliminated from its consideration.<sup>280</sup> This was the first time that the Court had expressly

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<sup>270</sup> *ibid* at paras 59-60

<sup>271</sup> *ibid* at 14, 41; *Armed Activities Case* at para 61

<sup>272</sup> *Nicaragua Case* at 14, 41; *Armed Activities Case* at para 61

<sup>273</sup> *Tehran Hostages Case* at p 9, para 12

<sup>274</sup> *Halink 22 Nicaragua Case* at 14, 41

<sup>275</sup> *Nicaragua Case* at 14, 41

<sup>276</sup> *Halink 22; Nicaragua Case* at 14, 41

<sup>277</sup> *Nicaragua Case* at 41, paras 59-60

<sup>278</sup> Riddell and Plant 189

<sup>279</sup> See *Nicaragua Case* at 85; see also; *Tehran Hostages Case* at 3

<sup>280</sup> *Armed Activities Case* at 59

stated what pieces of evidence it had excluded due to their limited evidentiary value.<sup>281</sup>

The Court proceeded to elaborate on the forms of evidence that it considered to be of superior credibility, very much following the *Nicaragua dicta*, stating that it would treat with caution any evidence put before it which had been specifically prepared for the case at hand<sup>282</sup> and would treat with similar caution any evidentiary materials ‘emanating from a single source’.<sup>283</sup> In giving further guidance, the Court stated that it would instead give preference to evidence from persons with direct knowledge and would give ‘particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the by the person making them’ – making direct reference to the *Nicaragua* case in this regard.<sup>284</sup>

The Court went on to provide that it would give weight to evidence that has not been challenged ‘by impartial persons for the correctness of what it contains’ and that special attention was to be given to evidence obtained by examination of persons directly involved, and who were subsequently cross-examined ‘by judges skilled in examination and experienced in assessing large amounts of factual information’ (an issue to which we shall return).<sup>285</sup> The Court subsequently confirmed this *dicta* in the *Bosnian Genocide* case in relation to this issue, stating that the Court ‘should in principle accept as highly persuasive findings of fact made by [the ICTY] at trial, unless of course they have been upset on appeal’.<sup>286</sup>

In the *Pulp Mills* case the Court explicitly laid out its task in evaluating the evidence brought before it, stating that;

“it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate.”<sup>287</sup>

As Judge Keith echoed, the task of the Court is to ‘decide disputes of fact which have to be

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<sup>281</sup> Riddell and Plant 190

<sup>282</sup> *Armed Activities Case 61*

<sup>283</sup> *ibid*

<sup>284</sup> *ibid*; see also; *Nicaragua Case at para 64*; see Franck 338

<sup>285</sup> *Armed Activities Case at para 61*

<sup>286</sup> *Bosnian Genocide Case at para 223*

<sup>287</sup> *Pulp Mills Case at para 168*



resolved in determining whether a party to the proceedings has breached its legal obligations.’<sup>288</sup> Judges Al-Khasawneh and Simma further argued that ‘the task of a court of justice is not to give a scientific assessment of what has happened, but to evaluate the claims of parties before it and whether such claims are sufficiently well-founded so as to constitute evidence of breach of a legal obligation’.<sup>289</sup>

Interestingly, in the recent *Georgia v. Russia* case, the Court seemed to develop what has been termed the ‘legal significance’ guiding principle.<sup>290</sup> In this case the Court set aside a large amount of evidence that had been brought before it by the parties, essentially conferring legal significance on ‘only two exchanges’ between Georgia and Russia in arriving at the conclusion that the crucial dispute arose between 9 and 12 August 2008.<sup>291</sup> In doing so the Court categorised all evidence dated earlier than 9 August 2008 as not being ‘legally significant’ for the purposes of showing the existence of a dispute through finding specific faults or defects with each individual piece of documentary evidence. The faults or defects with the evidence can be categorized as; (i) formal defects, where, for example, circulation of documents to the United Nations under agenda heading items other than the crucial ‘racial discrimination’,<sup>292</sup> (ii) defects relating to authorship, such as where, for example, a document is not authored or endorsed by one or other of the parties,<sup>293</sup> (iii) defects due to inaction, where, for example, the judgment stated that the Georgian military did not act after complains against Russian peacekeepers,<sup>294</sup> (iv) defects relating to attribution where, for example, documents did not show a clear attribution of violations to the Russian Federation,<sup>295</sup> and (v) and defects relating to matters of notice where, for example, there appeared to be a lack of notice or proof that Russia received allegations of misconduct.<sup>296</sup>

Taken as a whole, the statements of the Court in the cases examined demonstrate that whilst the Court is happy to delegate its fact-finding function to the parties, there are some general

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<sup>288</sup> Ibid, Separate Opinion of Judge Keith at para 8

<sup>289</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 4

<sup>290</sup> *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) 2011 <<http://www.icj-cij.org/docket/files/140/16398.pdf>>, Separate Opinion of Judge Simma

<sup>291</sup> These being statements of the Georgian and Russian Representatives in the Security Council debate on 10 August 2008 and a statement of the Georgian President Saakashvili in a CNN interview and the reply of the Russian Foreign Minister at the OSCE, *ibid*, Separate Opinion of Judge Simma at para 3

<sup>292</sup> See *ibid* at paras 53, 55-56, 59-62, 70, 75-76, 65-68, 78, 80-82, 84-87, 89, 91-103, 108

<sup>293</sup> *Ibid* at paras 54, 55, 71-73, 76, 80-81

<sup>294</sup> *Ibid* at paras 55, 74, 77, 79, 83, 84, 91

<sup>295</sup> *Ibid* at paras 51-53, 57-61, 81

<sup>296</sup> *Ibid* at paras 61, 104

principles upon which the Court can draw when weighing evidence brought before the Court. Riddell and Plant in their study on this issue (as cited by Judge Simma in his Separate Opinion in the *Georgia v. Russia* case) have suggested that the Court takes into account seven factors which can be summarised as including the following:

1. *Source*: whether the source of the evidence is independent from the parties and whether it has been corroborated,
2. *Interest*: whether the fact-finding in question has been carried out by a disinterested party;
3. *Relation to events*: whether the fact-finding is a direct observation of the events by someone who was present at the time or whether it is secondary information (or hearsay);
4. *Method*: whether the fact-finding was carried out in a methodologically sound manner,
5. *Verification*: whether the evidence has been previously cross-examined or corroborated;
6. *Contemporaneity*: less weight will be given to evidence not prepared at the time when the facts occurred due to the Court's wariness of documents provided specifically for the case before the Court; and;
7. *Procedure*: whether the evidence has come before the Court in accordance with its rules of procedure.<sup>297</sup>

To these seven principles it is suggested that a further two could be included. The first is that of the principle of *legal significance*, as relied upon by the Court in the *Georgia v. Russia* case through which, as we have seen above, a number of formal defects can deprive a piece of evidence of its evidentiary worth. The second is the principle of *executive-administrative finality*, a principle which grants greater weight to evidence origination from within the United Nations or similar organisation - a guiding principle discussed in detail in the following chapter at 2.2.4.

However, the main aim of this section has merely been to briefly explore the Court's current fact-assessment practice and to elucidate more clearly those guiding principles the Court has indicated it takes into consideration in cases that come before it. Having done so, considering

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<sup>297</sup> Riddell and Plant 192 as cited by Judge Simma in his Separate Opinion in *Georgia v. Russia Case*, at para 20

the Court's reluctance to utilise those fact-finding powers that it possesses and preference for developing guiding principles for fact-assessment, a picture begins to emerge of the Court's reactive approach to fact-finding. Whilst some commentators have praised the Court's evaluation of evidence brought before it and its recent pronouncements setting out more clearly the factors it considers when assessing the facts, it is not the aim of this thesis to make a judgement in this regard.<sup>298</sup> Rather, these principles are articulated here only in order to reinforce the point made in this chapter: the practice of the Court is to eschew its considerable fact-finding powers in favour of assessing the evidence put before it by the parties themselves. The following chapter seeks to critically examine this reactive approach in order to determine whether it is fit for purpose in contemporary international dispute settlement.

### *1.5. Chapter 1 Summary – The Court's Reactive Approach to Fact-Finding*

This chapter sought to evaluate the evidentiary provisions of the Court's Statute and Rules and the fact-finding powers that the Court possesses in order to consider the extent to which it has utilised those powers in practice. It was shown that whilst the Court in fact possesses relatively broad fact-finding powers in its Statute and Rules of Procedure due to a number of factors it has never made use of them to any significant extent. Instead, the Court operates under extremely broad rules of admissibility of evidence that allow almost any piece of evidence to come before the Court that the states parties so choose.

These factors taken together; the apparent reluctance to conduct fact-finding, the broad rules of admissibility, and the emphasis on fact-assessment amount to what it is argued can accurately be described as the Court's reactive approach to evidence. This is an approach that, as shown above, was developed for a number of reasons including the sovereign nature of the parties before the Court, the Court's inability to compel evidence and what could be termed the 'classical' approach to judicial reasoning. However, in recent times, the reasons underpinning this reactive approach have begun to be questioned and the approach as a whole has come in for criticism. These criticisms of the current reactive approach to fact-finding form the basis of the following chapter.

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<sup>298</sup> Paul S. Reichler, 'The Impact of the Nicaragua Case on Matters of Evidence and Fact-Finding' 25 *Leiden Journal of International Law* 149, 149



## *Chapter 2. Criticisms of the Court's Current Reactive Approach to Fact-Finding*

### *(i) Introduction – is the ICJ Factually Challenged?<sup>299</sup>*

Chapter 1 assessed the Court's traditional reactive approach to fact-finding. It was argued that the Court's approach has been influenced by a number of factors including its status as an international judicial body with no compulsory jurisdiction and by the sovereign nature of the states party to cases that come before it. However, in recent times there has been considerable criticism of the Court's reactive approach to fact-finding. Whilst it is acknowledged that there are a number of reasons that explain why the Court has historically taken this reactive approach to fact-finding, and that in some situations the Court's reactive approach is justifiable, it is these recent criticisms that Chapter 2 sets out to assess. It is argued that the criticisms explored in this chapter at the very least merit a re-examination of the Court's approach to the facts. To what extent these deficiencies can be overcome is a topic to which we will return in Chapters 4 and 5.

It is argued that recent criticisms can be divided into two main groups: (i) those relating to abundant or particularly complex or technical facts before the Court and (ii) those relating to a lack of evidence before the Court. The first group of criticisms are diverse and relate to the Court's difficulties in dealing with copious, complex or scientific evidence that are increasingly prevalent in international adjudication. Criticisms of the Court's reactive approach when faced with this kind of evidence will be considered in the first half of this chapter.

The second group of criticisms, concerning the lack of evidence before the Court, includes (but is not limited to) the non-appearance of states before the Court and is the issue to which we will turn our attention presently. It is argued that in cases where a party fails to appear before the Court, its reactive approach to fact-finding is found wanting due to the fact it only has the evidence of one party upon which to make its findings of fact. Without conducting its own investigations into the factual background of the case at hand the Court's reactive approach, which makes the court dependent on states to submit the facts to it, is a handicap for the Court. In such cases the Court is forced to cast its net wider to obtain facts from fact-finding commissions or to rely on public knowledge in order to attempt to fill the void in the

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<sup>299</sup> 'Factually challenged' is a turn of phrase used by Alvarez 83

evidentiary record left by the non-appearing party.

## 2.1. Group 1 – Problems Relating to Abundant, Particularly Complex or Technical Facts

The first group of criticisms are diverse and relate to the Court's difficulties in dealing with cases involving abundant, particularly complex or technical facts that are increasingly prevalent in international adjudication. In other words, the issues explored in the following section do not arise out of a lack of facts before the Court, but rather result from the difficulty of assessing those facts.<sup>300</sup>

It has been suggested that the Court's current reactive approach to fact-finding in placing the emphasis on the parties to put relevant information before the Court to meet the burden of proof to satisfy their case could incentivise the parties to conduct new research and seek out existing information in support of their position.<sup>301</sup> And indeed there is some evidence of such research being carried out in the recent practice of the Court.<sup>302</sup> However, it is argued that the validity of this argument is called into question by the fact that the Court has explicitly stated that it will accord less probative value to inquiries or studies carried out specifically for the purposes of the case at hand (see Chapter 1 at 1.4.1).<sup>303</sup> As such, and for the myriad reasons set out below, it is argued that the disadvantages of the Court's current reactive approach to fact-finding outweigh the advantages.

Criticisms of the Court's reactive approach when faced with this kind of evidence relate to: (i) the problematic practice of experts appearing as counsel, (ii) the Court's unwillingness to appoint its own experts or request necessary information and (iii) problematic reliance on international commissions of inquiry. Each of these issues is discussed in turn in the following sections.

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<sup>300</sup> Bruno Simma, 'The International Court of Justice and Scientific Expertise' [American Society of International Law] 106 Proceedings of the Annual Meeting (American Society of International Law) 230; See for instance J.G. Sandoval and E. Sweeney-Samuelson, 'Adjudicating Conflicts over Resources: The ICJ's Treatment of Technical Evidence in the Pulp Mills Case' 3 Goettingen J Int'l L 447, 449 stating that '[t]he Court's current reactive approach means that it 'might not be properly equipped to solve disputes'

<sup>301</sup> Foster 85

<sup>302</sup> See; Argentine Uruguay River Environmental Surveillance Programme; *Pulp Mills*, Wednesday 16 September 2009, 24 September 2009, 35

<sup>303</sup> *Armed Activities Case*, 201, para 61; *Bosnian Genocide Case*, para 213

### 2.1.1. Blurred Lines - The Practice of Experts Appearing as Counsel

The present subsection examines the problematic consistent practice of the Court to date regarding a blurring of the distinction between counsel and experts.<sup>304</sup> As we have seen, the practice of the Court is essentially reactive with the onus being very much placed on the parties to put whatever information they so choose before the Court. However, instead of putting forward their own experts under Article 43(5) of the Court's Statute, states in the past have tended to include experts as counsel or have their counsel present complex factual and scientific evidence to the Court themselves.<sup>305</sup>

This practice can be seen consistently throughout the jurisprudence of the Court, even in technical cases such as *Botswana/Namibia*.<sup>306</sup> In this case experts appeared as counsel to give evidence as to whether the northern channel of the River Chobe around the Kasikili/Sedudu Island ought to be considered its main channel (and ultimately which state had sovereignty over the island).<sup>307</sup> Similarly, in the *Gabčíkovo-Nagymaros* case scientific experts for Hungary appeared as counsel rather than as experts (for instance Slovakia's scientists were listed as 'counsel and experts',<sup>308</sup> whereas in *Pulp Mills* both parties listed members of their delegation as 'scientific advisors and experts') – speaking as advocates rather than experts *stricto sensu*.<sup>309</sup> Given the somewhat unclear position of individuals appearing before the Court in the past, it is necessary to more carefully examine the distinction between witnesses, experts and counsel.

What guidance can be gleaned from the Statute of the Court? Given the traditional focus on documentary evidence before the Court (see section 1.3.1.), it is perhaps not surprising that the provisions of the Court's Statute relating to the hearing of witnesses and experts have been described as rudimentary.<sup>310</sup> This is especially the case in relation to individuals put forward by the parties in support of their case with the Statute providing very little guidance in this respect.<sup>311</sup> That having been said, taking into account the few provisions in the Court's Statute, the Rules of the Court and the practice of the Court into account something

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<sup>304</sup> Rosenne and Ronen 1137; Riddell 236; Riddell and Plant 321

<sup>305</sup> Rosenne and Ronen 1137; Riddell 236; Riddell and Plant 321

<sup>306</sup> *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, p 1045

<sup>307</sup> *Ibid*

<sup>308</sup> *Gabčíkovo-Nagymaros Case*

<sup>309</sup> *Pulp Mills Case*; see oral proceedings 22 September 2009

<sup>310</sup> Tams 1301

<sup>311</sup> *Ibid*



meaningful can be said about the position of witnesses and experts before the Court. First of all, Article 42(1) and (2) of the Statute states that parties ‘shall be represented by agents’ and ‘may have the assistance of counsel or advocates before the Court’. In addition, Article 43(5) states that proceedings before the Court will consist of a written and an oral part and that ‘the oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates’.<sup>312</sup> Whilst stipulating that witnesses and experts must take different oaths before appearing before the Court,<sup>313</sup> somewhat unhelpfully neither the Court’s Statute nor its Rules define any of these positions - leaving it open for the common understanding of these terms to be inferred.<sup>314</sup>

The approach of the Court to date has been to simply accept that any individual put forward by the parties as counsel, advocate, expert or witness appear as such.<sup>315</sup> The Court’s approach in this respect is similar to the procedure before civil law systems where it is entirely within the discretion of the court to determine who can be qualified as an expert’.<sup>316</sup> The Court’s ‘relaxed view of the matter’ is illustrated well by the fact the Court has not insisted that ‘counsel’ be members of the bar of their domestic state, or indeed that persons who appear as counsel be a qualified lawyers at all.

Consequently, the task of the witnesses has been interpreted as being to speak to facts that they experienced first hand.<sup>317</sup> In contrast, the task of experts is to speak to their own specialised knowledge, training or skill.<sup>318</sup> Whilst a witness’s testimony must be limited to

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<sup>312</sup> See Article 43(5) ICJ Statute

<sup>313</sup> Under Article 64(a) Rules of the Court a witness must make a solemn declaration to speak the truth, but under Article 64(b) an expert makes a declaration as to his solemn belief

<sup>314</sup> Whilst the position of ‘agent’ can be considered somewhat unique: it should be noted that the agent is not restricted to representing the State politically and may for instance act as counsel and examine witnesses and experts (Article 65 Rules of Court); The agent has the role of reading the party’s final submissions (Article 60(2) Rules) and to make or authorise binding statements regarding procedure during proceedings (Fifth Annual Report, PCIJ, Series E, No. 5, o. 250); see Talmon

<sup>315</sup> Sir Arthur Watts, ‘Enhancing the Effectiveness of Procedures of International Dispute Settlement’ (2001) 21 Max Planck Yearbook of United Nations Law 21, 25

<sup>316</sup> Illias Bantekas & Susan Ntah, *International Criminal Law*, 2003, 307-316

<sup>317</sup> Colleen M. Rohan, ‘Rules Governing the Presentation of Testimonial Evidence’ in Karim A.A. Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (OUP 2010) 529; For instance in the *Corfu Channel* case the parties both called and cross-examined witnesses, with the UK presenting naval officers as witnesses who made submissions regarding the damage done to the British fleet and the source of the mines that were alleged to have done the damage and Albania also presenting naval officers as witnesses to contest these claims; See also Article 62 Rules, *Corfu Channel Case*, *Temple of Preah Vihear Case*, *Namibia Advisory Opinion*, *Nicaragua Case* and the *Elettronica Sicula SpA (ELSI)*, *Judgment*, *ICJ Reports 1989*, p 15

<sup>318</sup> See Article 64(a) and (b) of the Rules; Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’; this definition comes from *Prosecutor v. Galić* (Decision Concerning the Expert Witness Ewa Tabeau and Richard Philipps) IT-93-29-T

issues they witnessed first hand, experts can give opinions on the issues in question and present conclusions on the basis of their expertise.<sup>319</sup>

In practice parties have put forward experts in support of their case for examination before the Court in a number of cases.<sup>320</sup> In the course of the oral pleadings during the *South West Africa* case, one of the grounds on which Mr Gross for Liberia and Ethiopia sought to challenge the evidence given by Mr P. J. Cillie, editor of the newspaper *Die Burger*, put forward by South Africa as a ‘witness and expert’, was that he was speaking to issues on which he had no formal qualifications.<sup>321</sup> However, President Spender rejected this position, stating that the issue is often the weight to be given to the opinion presented rather than the qualification of the individual:

‘Experts may qualify in other fields than that which is their normal qualification, if they reveal a special knowledge which is far in excess of that which is normally held by a lay person and, where a witness so qualifies, it is a question of the weight to be accorded to his opinion, not a question of the admissibility of the expert view which is expressed’<sup>322</sup>

In addition, the practice of the Court reveals that parties have put forward so-called ‘expert witnesses’ - in other words an individual who is both an expert and someone who has witnessed the relevant event personally.<sup>323</sup> Expert witnesses have troubled the *ad hoc* international criminal tribunals in the past, but the main point to bear in mind for our purposes is that expert witnesses can be examined before the Court not only on events that they have witnessed first hand but their expertise and prior statements relating to their area of expertise can also be questioned (in the same way that an ordinary expert can).<sup>324</sup> The practice of

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(3 July 2002) at 2; see also Prosecutor v. Blagojević (Decision on Prosecution’s Motion for Admission of Expert Statements) IT-02-60-T (7 November 2003) at 19

<sup>319</sup> Watts, ‘Enhancing the Effectiveness of Procedures of International Dispute Settlement’ 25; Rohan 529

<sup>320</sup> Experts and witnesses were called by the parties in *Corfu Channel* – Pleadings, vol. III, p 425-694, vol. IV, p. 9-468, *Temple of Preah Vihear*, Pleadings, vol. II, 331-442, *South West Africa* cases, Pleadings, Vol. X, pp 88-182, 238-558; vol. XI, pp. 3-708; 300-4, 313-25, *Bosnian Genocide* case- pp, 43, 60 (para 57). Experts only in *Tunisia/Libya Continental Shelf*, 155, Pleadings, vol. V, p 182-98, *Gulf of Maine*, Pleadings, vol. VI, 393-435; *Libya/Malta Continental Shelf*, Pleadings, vol. IV, 197-282

<sup>321</sup> *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p 6, Pleadings, Vol. X, 514

<sup>322</sup> *Ibid*, Vol. X, 525; see also Talmon 1146

<sup>323</sup> Avi Singh, ‘Expert Evidence’ in Karim A.A. Khan, Caroline Buisman and Christopher Gosnell (eds), *Principles of Evidence in International Criminal Justice* (OUP 2010) 623

<sup>324</sup> Rohan 529; For instance see *Ndindilyimana* in which ‘it was held that when a party chooses to call a witness as a factual witness rather than an expert witness, it implicitly makes the choice to limit the witness’ testimony to matters that he personally saw, heard or experienced, and any irrelevant details and matters of personal opinion or expertise beyond the remit of factual witness must be excluded’; Prosecutor v. *Ndindilyimana et al* (Decision on the Prosecutor Opposing the Testimony of Witness DE4-30 as a Factual

presenting such witnesses, arguably blurring the distinction between witnesses and experts, is not inherently problematic since the expert witness will be examined in open Court where both testimony as to events witnessed first hand and opinion given on the basis of the witness's expertise can be tested by the parties.

However, leaving the issue of expert witnesses aside, it is argued that the failure to properly maintain the distinction between counsel and experts appearing before the Court is problematic. Indeed the blurring of the distinction between experts and counsel has presented the Court with a number of difficulties in relation to fact-finding in practice. The most significant of these difficulties relates to the fact that experts appearing as counsel, despite presenting *ex parte* evidence, due to their status as counsel and not as experts cannot be cross-examined by the other party in the course of oral proceedings.<sup>325</sup> Only those experts put forward by the parties under Article 43(5) of the Court's Statute (as opposed to Court-appointed experts or experts appearing as counsel<sup>326</sup>) come within the scope of Articles 57, 58, 63 and 64 of the Rules of the Court.<sup>327</sup> In practical terms this means that only those individuals put forward as experts under Article 43(5) of the Statute are required to make a solemn declaration under Article 64(b) of the Rules of the Court, and only they can present statements that may be treated as evidence and crucially, can be cross-examined.<sup>328</sup>

As Boyle and Harrison have pointed out, denying the opposing party the opportunity to cross-examine witnesses prevents the achievement of the main goal of cross-examination: to test the credibility of the expert or witness.<sup>329</sup> Cross-examination is a crucial tool in testing the credibility of witnesses or experts, providing real scrutiny of the 'professional aura'

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Witness) ICTR-00-56-T (16 May 2007) at 9; see also Prosecutor v. Karemera [Decision on 'Requete de la Defense de M. Ngirumpatse en Retrait de la Deposition du Temoin GFJ et des Pieces Afferentes'] ICTR-98-44-T (6 August 2008) at 4 citing Prosecutor v Nindiliyimana (Decision on the Prosecution's Motion Opposing the Testimony of Witness DE4-30 as a Factual Witness) ICTR-00-56-T (16 May 2007) at 9  
<sup>325</sup> Tams 1303; Watts, 'Burden of Proof and Evidence before the ICJ' 299; See Libya/Malta Continental Shelf Case – Pleadings, vol. IV pp 518-519; Talmon 1136

<sup>326</sup> Talmon 1146

<sup>327</sup> Article 63(1), added to the Rules of the Court after the Court's experience in the *South West Africa* case; Shabtai Rosenne, *Procedure in the International Court: a Commentary on the 1978 Rules of the International Court of Justice* (M. Nijhoff 1983) 136; It should be noted that the right of parties to call experts may be waived, see *Maritime Delimitation and Territorial Questions* case – Qatar and Bahrain, p. 112-114 (para 8)

<sup>328</sup> See Rosenne Rosenne and Ronen 1137; Talmon 1146; this also means that only experts appearing before the Court at the request of a party must make a solemn declaration that they will speak in accordance with their sincere belief under Article 64(b) of the Rules of the Court.

<sup>329</sup> Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' 4 *Journal of International Dispute Settlement* 245, 271

surrounding experts that might not otherwise be questioned.<sup>330</sup> Providing a concrete example of the problems this practice creates, Judge Simma has criticised the proceedings in the *Pulp Mills* case, stating that the evidence given by the party-appointed experts was diminished by the fact the experts appeared as counsel and not experts, meaning that they were not subject to examination by their own party and cross-examination by the other party. As such, the experts, their professional aura intact, simply ‘merrily contradicted each other’ leaving the Court none the wiser.<sup>331</sup>

As such, when experts appear as counsel their credibility will potentially escape scrutiny. The issue of cross-examination before the Court and the significant change in practice regarding the presentation of experts by parties that has occurred in recent times are considered in greater detail in Chapter 4. However, for our purposes, it should be noted that this practice, in circumscribing the examination of experts is potentially problematic and has been criticised as such. In addition to the problematic practice of experts appearing as counsel before the Court, the following section argues that the Court has made a number of clear factual errors arguably as a result of its current reactive approach to fact-finding.

### *2.1.2. Factual Inaccuracies Arguably Made as a Result of the Court’s Reactive Approach to Fact-Finding*

First of all it should be clarified that this section only speaks of a reluctance of the Court to make *explicit* use of the fact-finding powers it possesses in order to assist it in the assessment of complex facts. That we can only talk of explicit reluctance is due to the fact that we know that, to some extent, the Court does in fact informally consult experts to assist in the assessment of the facts. As Sir Robert Jennings openly stated;

‘...the Court has not infrequently employed cartographers, hydrographers, geographers or linguists, and even specialised legal experts to assist in the understanding of the issues in a case before it; and it has not on the whole felt any need to make this public knowledge or even to apprise the parties’.<sup>332</sup>

It is thought that the Court has chosen to seek expert assistance from so-called *experts*

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<sup>330</sup> O’Donnell 311

<sup>331</sup> Simma 231

<sup>332</sup> Sir Robert Jennings, ‘International Lawyers and the Progressive Development of International Law’ in J. Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 413

*fantômes* informally rather than appointing its own experts under Article 50 of the Statute in order to avoid the procedure set out in Article 50 and Articles 67 and 68 of the Rules which could be perceived as cumbersome, especially in relation to a minor point on which the Court needs some clarification.<sup>333</sup>

However, in not informing the parties that it is seeking expert assistance and by circumventing the procedure set out in its Statute and Rules ‘the Court disregards a procedural right of the parties – namely the right to comment on the results of independent expert advice envisaged in Art. 67, para. 2 of the Rules.’<sup>334</sup> Accordingly, the use of informal expert evidence is extremely problematic. Such criticisms have in recent years been raised by members of the Court, with Judges Al-Khasawneh and Simma arguing that whilst use of such experts may be pardonable if the scientific issue in dispute forms part of the margins of the case, the situation is different if the scientific issue forms part of the crux of the case.<sup>335</sup> As such, it has been argued that the use of informal expert evidence is extremely problematic and that in the interests of the proper administration of justice the practice of the Court in seeking informal advice from experts should be restricted.<sup>336</sup>

In addition to the problematic use of *experts fantômes*, Anna Riddell has written of fact-finding errors made by the Court in a number of cases. One example cited by Riddell is that of *Qatar v Bahrain* in which the Court was called upon to determine whether there had been a channel navigable even at low tide between the islands of Fasht al Azm and Sitrah Island.<sup>337</sup> Neither party was able to produce evidence relating to the state of the channel before 1982 and the party-appointed experts produced conflicting evidence.<sup>338</sup> As such, aware that unless the Court were to utilise its own fact-finding powers in order to shed more light on the issue it would be extremely difficult for it to make a factual finding on this issue, ‘...in the end the Court chose to base its decision on other matters without coming to a conclusion as to the existence of the channel’.<sup>339</sup> The Court’s decision not to conduct its own fact-finding or to choose to favour one expert over the other could arguably have been overlooked had the Court not subsequently, in drafting the maritime boundary, drawn the boundary over dry land that belonged to both parties – an aberration which, Riddell has argued, could ‘have been

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<sup>333</sup> Tams, ‘Article 50’ 1118

<sup>334</sup> Ibid

<sup>335</sup> *Pulp Mills Case, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 14*; see also Simma 231

<sup>336</sup> Tams, ‘Article 50’ 1118

<sup>337</sup> Riddell 243

<sup>338</sup> Ibid; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, ICJ Reports 2001*, p 40, at 98 para 189

<sup>339</sup> *Qatar v. Bahrain, Judgment, para 218*; Riddell 243

avoided if experts had been recruited to help with the task'.<sup>340</sup>

Similarly, Riddell cites the factual errors made by the Court in its judgment in the *Cameroon v. Nigeria* case. In this case the Court drew a land and maritime boundary that could not be applied due to errors in the drafting and delimitation 'because of the Court's apparent failure to understand that latitudes and longitudes cannot be applied without defining the geodetic datum on which they are based'.<sup>341</sup> Riddell has suggested that the errors made by the Court in its delimitation of the land boundary can be attributed to an erroneous use of the 'Minna Datum' – a particular model of the earth used in this part of the world used for topographical or, as in the this case, delimitation purposes. However, even if the Minna Datum is taken into account 'the boundary line as described by the Court is still difficult to demarcate because of further errors made in the coordinates'.<sup>342</sup> For example, the Judgment states that the Court was convinced by Cameroon's argument regarding the position of the River but confusingly gave the coordinates of the source of the river being at 13° 44' 24' longitude east and 10° 59' 09' latitude north<sup>343</sup> –the coordinates submitted by Nigeria.<sup>344</sup> In addition, the Court's sketch map shows the source of the river as around 1.5 km from where the coordinates in the Judgment site it as being.<sup>345</sup>

Riddell's work clearly highlights the uncertain factual foundations upon which the Court's judgment was based, and indeed there were a number of additional substantial errors in the judgment. For instance, Paragraph 102 of the Judgment describes the boundary between Cameroon and Nigeria joins the Kohom to River Bogaza rising on Mount Ngosi by a straight line 'until it reaches the peak...of 861m'.<sup>346</sup> However, in actual fact, the height of 861m refers to a point on the River Bogaza and not to the 'peak' and, crucially, the map drawn by the Court does not correspond with the coordinates given in the judgment – the location 'annotated on the sketch map roughly 3 km away from the point the Court clearly intended to describe'.<sup>347</sup>

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<sup>340</sup> Riddell 243; see Tim Daniel 'Expert Evidence before the ICJ' – Paper presented at the Third Bi-Annual Conference of ABLOS (2003) at 5

<sup>341</sup> Ibid

<sup>342</sup> Ibid

<sup>343</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) Judgment, ICJ Reports 2002*, p 303, 303, para 102

<sup>344</sup> Riddell 246

<sup>345</sup> Ibid

<sup>346</sup> *Land and Maritime Boundary between Cameroon and Nigeria case*, 303, para 102

<sup>347</sup> Riddell 247; see also Riddell and Plant, at 348

In relation to the maritime boundary the Court based its delimitation on the ‘largest scale chart available to it’, namely British Admiralty Chart 3433, demarcating the median line and ‘basepoints’ from this chart alone (without geographical coordinates) which mean that it was impossible to demarcate the boundary with any precision.<sup>348</sup> Riddell has noted that in doing so the Court did not comply with Articles 16(1), 75(1) and 84(1) UNCLOS which explicitly required geodetic datum to be specified where geographic coordinates regarding boundary lines.<sup>349</sup> The Court made a further error in the location of so-called Point X – which it said should be equidistant between two specified basepoints, West Point and East Point, at 8° 21’ 20’ longitude east and 4° 17’ 00’ latitude north.<sup>350</sup> However in actual fact the position of Point X in the judgment is around 330 meters to the west of the equidistant point between the given basepoints.<sup>351</sup>

As such the Court drew a line that it did not intend to ‘straight through a Nigeria-operated oil field which is not, it is thought, the result that the Court intended’.<sup>352</sup> As Riddell concludes in her extremely important work on this topic whilst some errors are understandable in relation to extremely complicated subject matter before it, simple factual errors that are not the result of a lack of evidence and could have been prevented by greater reliance on experts are less forgivable.<sup>353</sup> It is indeed concerning that the Court made so many factual errors in its Judgment and one must seriously question whether had the maps been prepared (or at the very least fact-checked<sup>354</sup>) ‘by someone who could combine a sufficient knowledge of cartography with an ability to understand and comment on the geographical aspects of the judgment’ there would have been so many errors.<sup>355</sup>

It is argued that the errors in the judgment contributed materially to the substantial difficulties

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<sup>348</sup> See Riddell 247; C.H. Schofield and C.M. Carleton, ‘Technical Considerations in Law of the Sea Dispute Resolution’ in A. Elferink and D.R. Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Brill 2004) 251

<sup>349</sup> See Schofield et al – criticising the fact that the Court did not mention datum to accompany the coordinates that it gave – ‘This suggests that either the Chart was not examined properly by the Court or that none of the Judges at the ICJ was aware that coordinates need to be referred to a datum to be meaningful’; Schofield and Carleton 251

<sup>350</sup> *Land and Maritime Boundary between Cameroon and Nigeria case*, para 307

<sup>351</sup> *Ibid*, para 292; Schofield and Carleton 245

<sup>352</sup> Tim Daniel ‘Expert Evidence before the ICJ’ – Paper presented at the Third Bi-Annual Conference of ABLOS (2003) at 7; Schofield and Carleton 247

<sup>353</sup> Riddell 248

<sup>354</sup> *Ibid*

<sup>355</sup> *Ibid*

that the two states have encountered in implementing the judgment. In fact, after the Court's judgment was handed down in 2002 the UN Secretary-General, at the request of the parties, established the Cameroon/Nigeria Mixed Commission to implement the judgment. However more than ten years and thirteen meetings later the Commission has still to complete the delimitation of the boundary (although the parties agreed on the maritime boundary in 2007). The parties recently agreed to appoint a Joint Technical Team of surveyors and experts in 2013 in attempts to expedite the troubled process.<sup>356</sup> Riddell has stated that '[t]he fact that such a lengthy and detailed procedure has to be carried out in order to render the judgment of the ICJ of any practical effect is rather telling of the suitability of the Court at present to deal with such technically complex cases.'<sup>357</sup> Indeed this much seems clear, any judgment of the Court's containing numerous factual errors and requiring the establishment of a further Mixed Commission to implement its flawed judgment, entailing additional expense (in this case incurred by the UN) and delays speaks to a less than optimal handling of the factual issues in the case.

However, such blatant factual errors are not the only manifestation of the problems generated by the Court's approach to fact-finding – it is not always possible to point to a factual determination and determine it to be erroneous. Rather, many other problematic aspects of the Court's approach to fact-finding are harder to quantify, although this does not mean that they are any less real as we will see in the following subsections.

### *2.1.3. Other Problems Arising out of the Court's Reactive Approach to Fact-Finding*

A further example of the problems that may arise from the Court's current reactive approach to fact-finding can be found in the recent controversy surrounding the Court's failure to utilise its fact-finding powers to pursue items of redacted evidence presented by Serbia to the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Bosnian Genocide* case before the Court.<sup>358</sup> Bosnia and Herzegovina did not have access to these documents due to the fact they had been protected by a confidentiality order at the ICTY under the terms of an agreement signed between Serbia and the Prosecutor of the ICTY.<sup>359</sup> Consequently Bosnia

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<sup>356</sup> See; <http://unowa.unmissions.org/Default.aspx?tabid=804> and;

<http://www.un.org/apps/news/story.asp?NewsID=43779&Cr=cameroon&Cr1=nigeria#.Uja9kxaZbww>

<sup>357</sup> Riddell 249

<sup>358</sup> *Bosnian Genocide Case*

<sup>359</sup> Richard J. Goldstone and Rebecca J. Hamilton, 'Bosnia v. Serbia: Lessons from the Encounter of the



and Herzegovina requested that the Court utilise its Article 49 ICJ Statute powers to request that Serbia disclose a number of redacted documents.<sup>360</sup> It has been subsequently argued that the Court's decision to rule on the merits of the case (and specifically on whether Serbia had incurred state responsibility for its role in relation to the genocide at Srebrenica) without seeking access to a considerable amount of redacted evidence put before the ICTY by Serbia is a critical weakness in the Court's judgment and represents a clear failure of the Court's judicial fact-finding responsibility.<sup>361</sup>

The Court described these documents as 'the "redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible'.<sup>362</sup> Serbia had claimed that these documents were redacted 'by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest'.<sup>363</sup> However, the Court refused to call on Serbia to produce these documents,<sup>364</sup> merely stating that Bosnia and Herzegovina had 'extensive documentation and other evidence available to it, especially from readily accessible ICTY records' and noted the use already made by Bosnia and Herzegovina of such evidence and the testimony of one of its witnesses, General Sir Richard Dannatt who gave evidence on the relationship between the authorities in the Federal Republic of Yugoslavia and those in the Republika Srpska.<sup>365</sup>

In addition, the Court refused to draw adverse inferences from Serbia's failure to put the redacted documents before the Court. Bosnia and Herzegovina had, whilst accepting that as the applicants they principally carried the burden of proof, argued that in relation to 'the attributability of alleged acts of genocide to the Respondent' the burden should be reversed 'given the refusal of the Respondent to produce the full text of certain documents'.<sup>366</sup> The Court, however, rejected this argument, somewhat elliptically concluding its statement on this

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International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' 21 *Leiden Journal of International Law* 95, 107

<sup>360</sup> The original request was made by a letter dated 28 December 2005, then refined in subsequent letters dated 19 and 24 January 2006; see; *Bosnian Genocide Case*, para 44

<sup>361</sup> Marlise Simons, 'Genocide Court Ruled for Serbia Without Seeing Full War Archive' *The New York Times* (New York, April 9, 2007)

<[http://www.nytimes.com/2007/04/09/world/europe/09archives.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2007/04/09/world/europe/09archives.html?_r=1&pagewanted=all)>

<sup>362</sup> *Bosnian Genocide Case*, para 205

<sup>363</sup> *Ibid*, para 205

<sup>364</sup> By letters dated 2 February 2006; see *ibid*, para 44

<sup>365</sup> *Ibid*, para 204

<sup>366</sup> *Ibid*, para 204

matter by stating that:

‘Although the Court has not agreed to either of the Applicant’s requests to be provided with unedited copies of these documents, it has not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions’<sup>367</sup>

Just what the Court meant by this statement is unclear. It would appear that whilst the Court, reluctant to draw explicit adverse inferences, is suggesting that the significance of these documents not being produced is not lost on it. However, it is suggested that this is a needlessly complicated and convoluted way of dealing with the situation and a number of commentators have criticised the failure of the Court to request the documents in this regard. For instance, Goldstone and Hamilton argue that this line of argument is ‘hardly persuasive, given that Bosnia and Herzegovina’s reason for requesting unredacted versions of these documents was that it believed these documents would provide evidence on the issue of attribution that was not clear from the documentation it already had available to it.’<sup>368</sup>

Bosnia and Herzegovina had, during the oral pleadings, argued that the documents would show orders given by the FYR, and records of payments made, to Bosnian Serb forces which would have been potentially crucial to proving the state responsibility for the commission of, or at least complicity in, genocide.<sup>369</sup> Diane Orentlicher seconded this position, stating that ‘the fact that they [the documents in question] were blacked out clearly implies these passages would have made a difference’.<sup>370</sup> A number of lawyers, under strict conditions of anonymity, confirmed that the redacted documents shed light on key issues such as the extent of Serbian influence over the Bosnian Serb forces.<sup>371</sup> In fact, this is a position echoed from within the Court itself. The dissenting opinion of Judge Al-Khasawneh stated that ‘it is a reasonable expectation that those documents would have shed light on the central questions’ and criticised not only the Court’s failure to act, but also its elliptical reasoning which he described as ‘worse than its failure to act’.<sup>372</sup> Similarly, the dissenting opinion of Judge Mahiou argued that the reasons given for the Court for not pursuing the evidence more thoroughly were not convincing and attributed its failure to act to a desire to avoid encroaching on Serbia’s sovereignty and to avoid potential embarrassment were Serbia to

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<sup>367</sup> Ibid, para 204

<sup>368</sup> Goldstone and Hamilton 108

<sup>369</sup> *Bosnia v. Serbia*, *supra* note 1, CR 2006/30, 18 April 2006, para. 19 (Beisen); *ibid*

<sup>370</sup> Simons, ‘Genocide Court Ruled for Serbia Without Seeing Full War Archive’

<sup>371</sup> Ibid

<sup>372</sup> *Bosnian Genocide Case*, dissenting opinion of Judge Al-Khasawneh at 35

refuse to comply with the Court's request.<sup>373</sup> Ultimately, Goldstone and Hamilton describe the Court's refusal to even request the documents as 'a sad legacy to leave following 14 years of litigation on this case.'<sup>374</sup>

It should be emphasised that the significance of this affair lies not in the particular facts of the *Bosnian* and *Croatian Genocide* cases.<sup>375</sup> Indeed, it may even be the case that, contrary to the views of those mentioned above, the Defence Council minutes are revealed to be relatively unimportant in terms of the legal issues in the two genocide cases. Rather, the significance of this affair for our purposes is the fact that, apparently deprived of crucially significant information requested by one of the parties, the Court seemed unwilling to take any steps towards acquiring this information through use of its fact-finding powers in order to determine their significance for itself.<sup>376</sup> Such high profile criticism of the Court's handling of the evidence, and the Court's behaviour in these circumstances, act as a cautionary tale for similar cases that may arise in the future and beg the question as to whether a more proactive approach to fact-finding could avoid future incidents.

As we have already seen, the Court has also encountered significant criticism in relation to its use of evidence and experts in the *Pulp Mills* case. In particular the Court's approach to evaluation of the complex and scientific evidence put before it by the parties was heavily criticised by Judges Al-Khasawneh and Simma in their Joint Dissenting Opinion as being 'flawed methodologically'.<sup>377</sup> The main thrust of the judges' criticism of the Court was that the Court 'omitted to resort to possibilities provided by its Statute' leading to a constricted approach to the evaluation of the disputed scientific facts.<sup>378</sup> In not fully utilising its statutory fact-finding powers, the Court's approach has been criticised for failing to do what was '...necessary in order to arrive at a basis for the application of the law to the facts as

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<sup>373</sup> Ibid, dissenting opinion of Judge Mahiou at 59

<sup>374</sup> Goldstone and Hamilton 110

<sup>375</sup> Relatedly, in the recent preliminary objections phase of the *Croatian Genocide* case, the Court refused a similar request made by Croatia, stating that it was 'not satisfied that the production of the requested documents was necessary for the purpose of ruling on preliminary objections'; *Croatian Genocide Preliminary Objections*, 416, p. 13-15

<sup>376</sup> Alternatively there is the possibility that the Court did indeed have access to, or information about, these documents that it did not disclose to the parties on the basis of which the decision was taken that the information would not play a decisive role in proceedings. If this were the case, however, this would be equally concerning, violating the principles of transparency and due process

<sup>377</sup> *Pulp Mills Case*, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 2

<sup>378</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 2

scientifically certain in possible in a judicial proceeding’.<sup>379</sup>

Despite huge amounts of conflicting scientific evidence placed before the Court by the parties, again the Court maintained its reactive approach, examining and weighing the scientific evidence in relation to the impact of discharges of dangerous chemicals from the mills on the environment itself without utilising its own powers to appoint experts or a commission of inquiry.<sup>380</sup> The Court’s decision in this regard was questioned by a number of judges such as Judge ad hoc Vinuesa who questioned ‘the Court’s ability to make appropriate determinations of fact...based on sound scientific findings’<sup>381</sup> despite the ‘lack of specialized expert knowledge’.<sup>382</sup> In particular Judge ad hoc Vinuesa took umbrage with the Court making legal determinations whilst clearly being unable to speak in certain terms about the scientific issues.<sup>383</sup> In particular it is the method of the Court that is the object of the judges criticism – criticism is voiced particularly of the Court’s practice of hearing the arguments of the parties, ‘asking a few token questions’ then retiring to deliberate *in camera*.<sup>384</sup> It is for this reason that Judges Al-Khasawneh and Simma censured the Court for ‘clinging to the habits it has traditionally followed in assessing and evaluating evidence’.<sup>385</sup>

The judges criticise sections of the majority judgement which state that it ‘sees no need’<sup>386</sup> and ‘is not in a position’ to arrive at specific conclusions,<sup>387</sup> that ‘there is no [clear] evidence to support’ certain claims,<sup>388</sup> that ‘certain facts have not been established to the satisfaction of the Court’<sup>389</sup> or that certain evidence ‘does not substantiate the claims’.<sup>390</sup> The judges criticised the practice of the Court in obliging Argentina to substantiate certain claims on issues that the Court, without specific expert assistance, could not ‘fully comprehend’. The judges rejected the suggestion that scientific expertise ought to only come before the Court

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<sup>379</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 2; Simma 232

<sup>380</sup> *Pulp Mills Case*, para 236; Riddell 250

<sup>381</sup> *Pulp Mills Case, Dissenting Opinion of Judge Ad Hoc Vinuesa* at para 44

<sup>382</sup> Ibid, Dissenting Opinion of Judge Ad Hoc Vinuesa at para 71

<sup>383</sup> Ibid, Dissenting Opinion of Judge Ad Hoc Vinuesa at para 70; For instance, at various points the Court makes states that “Argentina has not convincingly demonstrated that Uruguay” (Judgment, para. 189); “the Court is not in a position to conclude that Uruguay” (ibid., para. 228); it has “not been established to the satisfaction of the Court” (ibid., para. 250); “there is insufficient evidence” (ibid., para. 254); “there is no clear evidence to link” (ibid., para. 259); “a clear relationship has not been established” (ibid., para. 262); “the record does not show any clear evidence” (ibid., para. 264).’

<sup>384</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 5

<sup>385</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 2

<sup>386</sup> Ibid at para 213

<sup>387</sup> Ibid at para 228

<sup>388</sup> Ibid at paras 225, 239, 259

<sup>389</sup> Ibid at para 250

<sup>390</sup> Ibid at para 257

through experts acting as counsel on behalf of the parties under Article 43 of the Court's Statute outright.<sup>391</sup>

That the judges went to far as to describe the methodological approach taken by the Court as having the potential to 'increase doubts in the international legal community whether it, as an institution, is well-placed to tackle complex scientific questions' is undoubtedly significant.<sup>392</sup> The judges argued that the Court ought to cease 'willingly depriving itself of the ability fully to consider the facts submitted to it' – instead advocating that the Court make better use of inquiries and experts before the Court in an open and public manner, in contrast to the practice of relying on *experts fantômes* as has been the case in the past.

Such criticisms of the Court's fact-finding process are often accompanied by a plea to resort to more proactive fact-finding procedures in order to ascertain the information needed to make sound legal determinations and this was no different in the *Pulp Mills* case. For instance Judge ad hoc Vinuesa stated that '[g]iven the scientific complexity of the case, it is my considered belief that the Court should have availed itself of the provisions in its Rules aimed at enabling the Court to gain a clearer understanding of technical evidence', in particular commissions of inquiry under Article 50 of the Court's Statute in this case.<sup>393</sup> In this vein, Judge Yusuf stated that he believed 'that the Court should have had recourse to expert assistance, as provided in Article 50 of its Statute, to help it gain a more profound insight into the scientific and technical intricacies of the evidence submitted by the Parties'.<sup>394</sup> Judge Yusuf advocated a commission of inquiry to assist the Court owing to the voluminous amount of evidence put before the Court and due to the fact that the information related to 'a wide range of scientific and technical fields including hydrology, hydro-biology, river morphology, water chemistry, soil sciences, ecology and forestry'.<sup>395</sup> Complicating matters was the fact that this information 'proved very difficult to compare because they were derived from monitoring at different stations, at different depths, and on different dates'.<sup>396</sup> Judge Yusuf made a lengthy argument in favour of greater utilisation of Article 50 of the Court's Statute in order to ensure that the Court had 'necessary assistance and support in acquiring

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<sup>391</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 6

<sup>392</sup> Ibid, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 3

<sup>393</sup> Ibid, Dissenting Opinion of Judge Ad Hoc Vinuesa at para 92, 93, 95

<sup>394</sup> Ibid, Declaration of Judge Yusuf at 1

<sup>395</sup> Ibid, Declaration of Judge Yusuf at 1

<sup>396</sup> Ibid, Declaration of Judge Yusuf at 4

such full knowledge of the facts.<sup>397</sup>

The viability of taking a more proactive approach to the facts will be addressed in Chapter 4 but for now it can be said that it is at the very least striking that judges of the Court would go so far in their criticisms of the Court's fact-finding process.<sup>398</sup> Such criticism from within the Court illustrates that the current weaknesses of the Court's approach to fact-finding are known to those on the bench and suggests a growing awareness that in cases in which the facts are particularly complex the Court's reluctance to undertake its own fact-finding is an increasingly real concern. Despite the wide range of criticisms made by judges Simma, Al-Khasawneh, Vinuesa and Yusuf in the *Pulp Mills* case, there are several problematic aspects of the Court's approach to fact-finding which they did not address.

One such additional problematic aspect is the Court's reliance on publicly available information such as information contained in UN Commissions of Inquiry. The considerable reliance on this type of information by the Court in recent times as well as the facts presented by the parties themselves is a corollary of the Court's reactive approach to fact-finding. For instance, in the *Bosnian Genocide* case, whilst reluctant to utilise its fact-finding powers to request documents held at the ICTY, the Court not only relied on the information put before it by Bosnia and Herzegovina and Serbia but also heavily relied on the fact-finding reports of the UN Commission of Experts<sup>399</sup> and the report of the Special Rapporteur of the Commission on Human Rights.<sup>400</sup> For this reason it is necessary to turn our attention to this aspect of the Court's reactive approach to fact-finding.

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<sup>397</sup> Ibid, Declaration of Judge Yusuf at 5

<sup>398</sup> Tullio Treves, 'Law and Science in the Interpretation of the Law of the Sea Convention: Article 76 Between the Law of the Sea Tribunal and the Commission on the Limits of the Continental Shelf' 3 *Journal of International Dispute Settlement* 483, 485; Rosenne, *Essays on International Law and Practice*

<sup>399</sup> Final Report of the United Nations Commission of Experts (S/1994/674/Add.2)

<sup>400</sup> Report of the Special Rapporteur of the Commission on Human Rights, 22 August 1995 (E/CN.4/1996/9)

#### 2.1.4. *From Our Own Correspondent: The Court's Deference to UN Fact-Finding*

A further weakness brought about by the Court's current reactive approach to fact-finding is its problematic reliance on commissions of inquiry, particularly those conducted under the auspices of the UN.<sup>401</sup> Del Mar's analysis of the Court's jurisprudence reveals that the Court has always tended to attribute 'significant weight' to factual determinations made by UN fact-finding commissions and to the factual determinations included in the resolutions of the General Assembly and Security Council.<sup>402</sup> It is this issue that is critically examined in the following section, starting with consideration of the practice of the Court in the *Bosnian Genocide* case.

##### 2.1.4. (i) *Bosnian Genocide*

Akin to the Court's elucidation of the principles which guide it in assessing facts put before it generally (see Chapter 1 at 1.4.), the Court has in a number of recent cases addressed the issue of how it assesses fact-finding reports from official or independent bodies. The Court in *Bosnian Genocide* provided explicit guidance on the factors it takes into consideration when assessing the facts brought before it that have been gathered by a UN body, stating;

'Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).'<sup>403</sup>

The Court stated that these factors were cumulative, to be taken together to determine the weight to be attributed to certain fact-finding reports. One commentator has praised the enunciation of such guiding principles and has argued that if applied consistently they have the potential to 'greatly improve the quality of the Court's fact-assessment.'<sup>404</sup>

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<sup>401</sup> A preliminary word of clarification regarding terminology is necessary: the terms 'commission of inquiry', 'international investigatory process', 'inquiry', 'enquiry', 'fact-finding mission' and 'investigation' have all traditionally been used interchangeably in international legal scholarship to refer to the same process. This semantic variety, however, is not of any great significance. Instead, we must focus our attention on the substance of these inquiries to consider the substantial development of the concept over the years; Christine Chinkin, 'U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza' in Arsanjani et al (ed), *Looking to the Future: Essays on International Law in Honour of W Michael Reisman* (Martinus Nijhoff 2011) 476

<sup>402</sup> Del Mar

<sup>403</sup> *Bosnian Genocide Case* at para. 227

<sup>404</sup> Halink 23

Commentators have pointed out that whilst the Court in *Bosnian Genocide* explicitly stated that it was to make its own determination of the facts,<sup>405</sup> almost all of the Court's treatment of the facts in the judgment could be termed as 'second hand', coming from reports of fact-finding bodies or decisions of judicial bodies such as the ICTY (a point to which we will return in section 2.2.4).<sup>406</sup>

Reliance on factual determinations made in UN fact-finding reports is demonstrated in relation to the issue of the weight that ought to be attributed to a UN report disputed by the parties before the Court (the *Fall of Srebrenica* Report).<sup>407</sup> The Court's factual determinations relied significantly on this report, (a report to the General Assembly by the Secretary-General) with the Court in particular highlighting that:

'...the care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained *substantial assistance from this report*.'<sup>408</sup>

The Court further demonstrated a preference for findings-of-fact made by UN Reports in stating that 'the authoritative evidentiary status of UN documents is a clear reflection of the fact that the UN has, above all other institutions, public or private, the resources and political access to produce reports of this calibre.'<sup>409</sup> This can be seen in the considerable reliance on the UN Commission of Experts<sup>410</sup> and the report of the Special Rapporteur of the Commission on Human Rights.<sup>411</sup> For example, in relation to the establishment of mass killings having taken place in various locations throughout Bosnia and Herzegovina during the conflict, and the fact that the majority of those killed in this way were members of a protected group but that the specific intent (*dolus specialis*) required was not present, the Court relied almost exclusively on those UN reports mentioned, stating that it believed that it had 'established by conclusive evidence' the points it needed to in order to make its

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<sup>405</sup> *Bosnian Genocide Case* at para 212

<sup>406</sup> José E. Alvarez, *Burdens of Proof* (ASIL 2007); see also Gattini 900

<sup>407</sup> Report of the Secretary-General pursuant to General Assembly Resolution 53/35, 'The Fall of Srebrenica', 15 November 1999, UN Doc A/54/549; see Riddell and Plant 240

<sup>408</sup> *Bosnian Genocide Case* at para 230 (emphasis added)

<sup>409</sup> Riddell and Plant 240

<sup>410</sup> Final Report of the United Nations Commission of Experts (S/1994/674/Add.2)

<sup>411</sup> Report of the Special Rapporteur of the Commission on Human Rights, 22 August 1995 (E/CN.4/1996/9); *Bosnian Genocide Case*, see, by way of illustration, paras 246, 250, 252, 253, 255, 258, 259, 260, 262, 271; Goldstone and Hamilton 104



subsequent legal determinations in relation to the perpetration of genocide.<sup>412</sup> As we will see in section 2.1.5. below, the Court dealt with the particular case of the Massacre at Srebrenica in much the same way, although in this case relied to a greater extent on the jurisprudence of the ICTY.

The *Bosnian Genocide* case is not, however, an isolated example of this kind of reliance on findings-of-fact made in UN commissions of inquiry, as the *Armed Activities* case demonstrates.

#### 2.1.4. (ii) *Armed Activities*

In the course of proceedings of the *Armed Activities* case the Court placed considerable reliance on several UN fact-finding reports. For example, in relation to the issue of whether Uganda had breached human rights law and international humanitarian law, the Court based its conclusions entirely on the facts as they were set out in reports by the Secretary-General, United Nations Mission in the Democratic Republic of the Congo (MONUC) and the Special Rapporteur of the then Commission on Human Rights.<sup>413</sup> Similarly, the Court held that there was ‘clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power’ – relying heavily on the Sixth Report of the Secretary-General on MONUC<sup>414</sup> and that there had been massive human rights violations and grave breaches of IHL the Court relying on ‘credible sources’<sup>415</sup> including the Third Report of the Secretary-General on MONUC.<sup>416</sup>

In general terms the Court stated that it had established the facts upon which it based its legal determinations on ‘the coincidence of reports from credible sources’<sup>417</sup> including UN reports, ‘to the extent that they are of probative value and are corroborated, if necessary by other

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<sup>412</sup> *Bosnian Genocide Case* at paras 276, 277 and for particular locations see paras 242 - 276

<sup>413</sup> Halink 27; Report of the Special rapporteur of the Commission on Human Rights, January 18, 2000, the Third Report on the United Nations Mission in the Democratic Republic of Congo (MONUC), Security Council Resolution 1304 (2000) and the Report of the Special Rapporteur of the Commission on Human Rights February 1, 2001 and January 2000-December 2000 Special Report by MONUC, *Armed Activities Case at paras 34-5, 60, 182*; Riddell and Plant 237

<sup>414</sup> UN Doc S/2001/128, 12 February 2001

<sup>415</sup> UN Doc S/2001/128, 12 February 2001, para 207

<sup>416</sup> Third Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo, 12 June 2000, UN Doc S/2000/566, para 79, para 206; See ‘Convincing Evidence’ consisting of two reports of the SG and a special report by MONUC – Sixth Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo, 12 February, 2001, UN Doc S/2001/128, para 56, 239, para 209.

<sup>417</sup> *Armed Activities Case at para 207*

credible sources'.<sup>418</sup> The Court gave no further detail on what reports had to be corroborated and went on to state that 'it is not necessary for the Court to make findings of fact with regard to each individual incident alleged'<sup>419</sup> instead appearing to adopt a cumulative approach to the evidence.<sup>420</sup> This would suggest that the Court does not enquire into the methods of UN fact-finding or question related issues such as the standard of proof applied. In addition, commentators have criticised the Court's approach in this regard for obfuscating the individual evidentiary significance of each report by simply referring to 'reports from credible sources', 'sufficient evidence of a reliable quality', 'persuasive evidence' making it near-impossible to assess the relevance of one report over another.<sup>421</sup> We will return to such criticism of the Court's use of UN fact-finding in the following sections.

In short, from the guidance given by the Court on individual reports it is clear that the Court placed considerable emphasis on the significance on UN Reports.<sup>422</sup> In fact, the Court was so lenient in its review of fact-assessment carried out by other UN bodies that one commentator has argued that in such cases as *Armed Activities*, the Court effectively delegated its fact-assessment to the United Nations.<sup>423</sup> Whereas the Court was dismissive of much of the secondary evidence presented by the parties,<sup>424</sup> stating that it did not rely on numerous items of evidence proffered by the DRC finding them 'uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by the DRC, or even partisan',<sup>425</sup> the Court found evidence contained within UN reports, in the words of one commentator 'virtually conclusive'.<sup>426</sup>

#### 2.1.4. (iii) *The Wall Advisory Opinion*

UN Reports are also of considerable value to the Court in advisory proceedings, even if the advisory opinion request contains a specific reference to the facts being set out in UN fact-finding report.<sup>427</sup> In *The Wall* advisory opinion the Court stated that it believed its task to be

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<sup>418</sup> *ibid* at para 205

<sup>419</sup> *ibid* at para 237

<sup>420</sup> *ibid* at para 237

<sup>421</sup> Halink 28; *Armed Activities Case* at paras 207-209

<sup>422</sup> *Armed Activities Case* at para 176

<sup>423</sup> Halink 26

<sup>424</sup> *Armed Activities Case* at paras 64-5, 72-91 and 106-147

<sup>425</sup> *ibid* at para 159

<sup>426</sup> Halink 27

<sup>427</sup> The question being 'what are the legal consequences...as described in the report of the Secretary-General'; this

to determine the obligation of the state in question ‘in light of the facts which had been reported to the General Assembly at the time’<sup>428</sup> but, importantly, also stated that this did not mean that it should ‘close its eyes to subsequent events of possible relevance to, or capable of throwing light on, that question’.<sup>429</sup> Regardless of the fact this is an advisory opinion, as opposed to a contentious case, the Court remains under the same obligation to make solid factual determinations upon which to make legal judgments.

The Court relied on the factual qualifications made by UN commissions of inquiry and by the principal organs.<sup>430</sup> Arguments were made by states time and time again during the oral proceedings that the Court would be justified in relying on UN fact-finding commissions in order to make its factual determinations.<sup>431</sup> The Court’s reliance on UN Documentation (at least partly) as a result of Israel’s refusal to participate in the oral proceedings led Judge Burgenthal to argue that the Court should have refused to offer an advisory opinion on the basis that the Court ‘did not have before it the requisite factual bases for its sweeping findings.’<sup>432</sup>

However, Judge Burgenthal was alone in finding so and the rest of the Court had little trouble in attributing significant weight to the factual qualifications made by the UN organs. Judge Higgins detailed the information that the Court attributed particular weight to;<sup>433</sup> ‘[p]articular evidentiary weight was attributed to the Report of the Secretary-General, and the Written Statement of the UNO submitter therewith, by the Court in making a number of important factual findings in its Advisory Opinion’.<sup>434</sup> The report of the Secretary-General especially was relied upon for example, in providing the basis for the Court's finding that the building of the wall ‘led to increasing difficulties for the population concerned regarding access to health

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was also the case in *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p 12, 22, para 23 in which the question similarly directed the court to take particular account of the reports of the Secretary-General; UN Doc. A/42/915 and Add.1; see *Del Mar* 405; *Riddell and Plant* 240

<sup>428</sup> *Applicability of the Obligation to Arbitrate Advisory Opinion*, 22, para 23

<sup>429</sup> *Ibid*, 22, para 23

<sup>430</sup> Although they did present a Written Statement on 30 January 2004, thus participating in the written stage – available at: [www.icj-cij.org](http://www.icj-cij.org)

<sup>431</sup> See for instance; *I.C.J. Pleadings, The Wall A.O.*, CR 2004/1, 24/2/2004, page 52, para 27; and *I.C.J. Pleadings, The Wall A.O.*, CR 2004/1, 25/2/2004, page 25-26

<sup>432</sup> See Declaration of Judge Burgenthal in *Legal Consequences of the Construction of a Wall (Advisory Opinion)* 2004 <<http://www.icj-cij.org/icjwww/idocket/imwp/imwframe.htm>> accessed 13 April 2012 240 at para 1

<sup>433</sup> See Separate Opinion of Judge Higgins in *ibid* at para 40

<sup>434</sup> See Separate Opinion of Judge Higgins in *ibid* at para 57

services, educational establishments and primary sources of water'.<sup>435</sup>

But what is the significance of the Court's practice of relying on factual determinations made in UN commissions of inquiry? The emergence of this practice, the advantages to the Court of adopting such an approach as well as the problematic aspects of this practice are examined in the following sections.

#### *2.1.4. (iv) The Resurgence of Executive-Administrative Finality as a Guiding Fact-Assessment Principle*

In 1959 Neil Alford Jr. highlighted how the Court's unwillingness to undertake independent fact-finding of its own resulted in a tendency to regard executive administrative findings-of-fact as near conclusive.<sup>436</sup> The notion of executive-administrative finality is one that has its roots in both the common and civil law traditions.<sup>437</sup> However, this notion has not simply been carried over into international judicial practice by judges trained in one or other of these traditions, there are a number of factors which explain the Court's preference for this principle. Such factors include the Court's reluctance (or inability, in some cases) to conduct independent fact-finding, as discussed above, as well as its inability to compel evidence.<sup>438</sup>

The notion can be traced as far back as the PCIJ to cases such as *Prince of Pless*<sup>439</sup> and *Jurisdiction of the European Commission of the Danube*.<sup>440</sup> In the latter case, the substance of the dispute had been investigated by a special committee of inquiry established by the Technical Committee for Communications and Transit of the League of Nations. In assessing the facts put before it, the PCIJ displayed a reluctance to test the veracity of the facts, instead

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<sup>435</sup> Ibid, Separate Opinion of Judge Higgins, 189-190, para 133 – for further reliance on the Secretary-General's Report and Written Statement by the United Nations see 168-171, paras 80-85, and 184, para 122

<sup>436</sup> Alford Jr 52

<sup>437</sup> As a result of a combination of factors such as the Constitutional Separation of Powers, a need for efficiency in dealing with large quantities of fact or the inability of the Court to assess 'remote events'; see *ibid*

<sup>438</sup> *ibid*; as Alford states, 'Lacking the necessary power to compel the production of the evidence it may need, the Court tends to rely heavily upon evidence submitted without positive efforts to police the truth of the facts'

<sup>439</sup> *Case Concerning the Prince Von Pless (Preliminary Objection) PCIJ Ser A/B No 52 (Order of Feb 4, 1933)* at 16; in which the Court agreed to uphold the argument made by Poland that the Court ought to delay its consideration of the case before it until the Polish Administrative Tribunal had published its decision. In agreeing to do so the Permanent Court stated that it would 'certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decisions...' of the domestic administrative tribunal

<sup>440</sup> *Jurisdiction of the European Commission of the Danube Between Galatz and Braila, PCIJ Ser B No 14 (1927)*

stating that since the facts had already been investigated by the Special Committee appointed by the League of Nations, ‘the Court does not think it proper to make new investigations and inquiries’.<sup>441</sup>

It is argued that the Court’s preference for executive-administrative finality as seen in recent cases such as *Armed Activities* and *Bosnian Genocide* illustrates that the Court continues to lend ‘greater weight to UN reports than to other types of secondary evidence such as press reports’ ostensibly due to the presumption that such UN reports are based on solid, objective and impartial fact-finding.<sup>442</sup> The Court’s increasing resort to such bodies was noted by Australia in its oral argument before the Court in the *Whaling in the Antarctica* case,<sup>443</sup> as they dedicated part of their submissions to arguing that there was no such independent body that Japan could rely on in this case.<sup>444</sup> The fact that Australia sought to make this argument highlights the extent to which the Court’s preference for relying on such independent reports is increasingly being recognised by states.

Relatedly, the Court, demonstrating its preference for findings-of-fact contained within UN documents, has gone as far as introducing an edition of the Journal of the United Nations as evidence during the Preliminary Objections phase of the *Cameroon v Nigeria* case in order to determine whether or not Nigeria was aware of Cameroon’s intentions to bring the matter before the Court.<sup>445</sup> Whilst arguably the Court could justify such action through declaring the UN report as being ‘public knowledge’, in going one step further by referring *proprio motu* to this UN document the Court departed from the earlier practice of only relying on evidence submitted to it by the states party to the case before it. Judge Koroma made known his strenuous objection to this development in practice clear in his Dissenting Opinion in that case.<sup>446</sup> And indeed, in recent times doubt has been cast upon the precise reliability of such reports and the Court’s use of fact-finding reports in recent cases that have come before it.<sup>447</sup>

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<sup>441</sup> *ibid* at 46

<sup>442</sup> Teitelbaum 145 Riddell and Plant 237; Further, it has been suggested that a case recently removed from the Court’s docket, the *Aerial Spraying* case would also have raised issues of reliance on evidence emanating from UN sources, namely UN Special Rapporteurs appointed to examine the Ecuador-Colombia border; see Boyle and Harrison 270

<sup>443</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 26/6/2013, at page 16

<sup>444</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 26/6/2013, at page 61, para 18

<sup>445</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, at para 40, *see also; Dissenting Opinion of Judge Koroma*, 386

<sup>446</sup> Riddell and Plant 237

<sup>447</sup> Teitelbaum 146; C. Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts be Avoided?* (JSTOR 2006)

It is argued that whilst reliance on findings-of-fact made in UN commissions of inquiry is not problematic *per se*, a number of significant issues regarding their operation taint their factual determinations and should caution the Court against singular reliance on such commissions of inquiry. This point is further explored in the following sections.

#### 2.1.4. (v) *Are Weaknesses in UN Fact-Finding Undermining the Court's Factual Findings?*

‘Croyez ceux qui cherchent la vérité, doutez de ceux qui la trouvent’,<sup>448</sup>

The previous section attempted to highlight what has been termed the Court’s preference for executive-administrative finality, or in other words, its deference to findings-of-fact made by UN bodies. However, in tandem with increasingly prevalent UN fact-finding activity a number of criticisms have begun to be voiced regarding the operation of such bodies. It is argued that fundamental weaknesses in UN fact-finding have the potential to seriously undermine the Court’s factual-findings.

UN fact-finding is carried out by a range of bodies for a range of different purposes – at times for monitoring, at times for assessing allegations of violations of International Humanitarian Law or even for assessing the existence of a threat to international peace and security in the case of the Security Council.<sup>449</sup> A brief summary of the fact-finding activity of the most significant UN organs is provided to illustrate the broad range of fact-finding conducted by the Organisation.<sup>450</sup>

The General Assembly does not possess any explicit powers of inquiry under the UN Charter (‘the Charter’). However, under Article 22 of the Charter the Assembly is competent to ‘establish such subsidiary organs as it deems necessary for the performance of its functions’.<sup>451</sup> Such authority to establish an investigative body,<sup>452</sup> should it so choose, can be implied by virtue of the fact that, as Kelsen has noted, ‘...the General Assembly may not be able to perform a function conferred upon it by the Charter without an investigation of the matter to which the function refers’.<sup>453</sup> However, in contrast to the Security Council (as we shall see), the General Assembly would be required to first seek the consent of the state in question before it could conduct fact-finding on its territory – a significant impediment to

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<sup>448</sup> Gide, A. *Ainsi Soit-Il, Ou Les Jeux Sont Faits*, 1952, Gallimard, Paris [Believe those who seek the truth, doubt those who find it]

<sup>449</sup> M. Bothe, ‘Fact-finding as a Means of Ensuring Respect for International Humanitarian Law’ in (Springer 2007) 258

<sup>450</sup> For the League of Nations Organs with power to investigate, see Arts 5(2), 12 and 15 Covenant of League of Nations

<sup>451</sup> Article 22 UN Charter

<sup>452</sup> Theodor Schwisfurth, ‘Article 34’ in B. [et al] Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, Oxford University Press 2002) 515

<sup>453</sup> H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (The Lawbook Exchange, Ltd. 1950) 166

fact-finding in many cases (as becomes clear in examination of Human Rights Council fact-finding, below).

Similarly, the Secretary-General has no explicit powers of investigation under the Charter and despite possessing implied powers of investigation necessary to the proper execution of the that office,<sup>454</sup> like the General Assembly, the Secretary-General would be required to obtain the consent of the state on whose territory they wish to investigate. In addition, and perhaps because of its consent-based constraints, unless explicitly mandated by the Council or General Assembly, the Secretary-General is 'likely to exercise considerable discretion before relying on his powers to investigate *proprio motu*'.<sup>455</sup>

Despite this, the Secretary-General plays a pivotal role in contemporary fact-finding as a result of being regularly mandated to investigate particular situations by the Security Council (or, less frequently, by the General Assembly).<sup>456</sup> The crucial role of the Secretary-General can be seen as a result of the Security Council's reluctance to set up its own commissions of inquiry under Article 34 of the Charter and its preference to mandate the Secretary-General to conduct fact-finding on its behalf instead.<sup>457</sup>

Under Article 34 of the United Nations Charter, the Security Council possesses an explicit power to investigate 'any dispute or situation...in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security'.<sup>458</sup> Article 34 equips the Council with a fact-finding competence to assess the gravity of the situation at hand to determine whether it ought to take further action to maintain or restore international peace and security first of all and, secondly, with the power to gather its own facts – in other words, facts other than those put before the Council by states.<sup>459</sup>

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<sup>454</sup> Schwisfurth 515

<sup>455</sup> Del Mar 401 See Legal Opinion of the Secretariat of the United Nations, Office of Legal Affairs, 'Memorandum to the Under-Secretary-General for Political and General Assembly Affairs', 17 July 1973, United Nations Juridical Yearbook, 1973, 163, para 2

<sup>456</sup> *ibid*

<sup>457</sup> In addition, see the General Assembly Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security' of December 9 1991 which lists the organs competent to investigate as SC, GA and SG by which 'fact-finding missions may be undertaken in the context of their respective responsibilities for the maintenance of international peace and security. Interestingly, paragraph 15 of this Declaration suggests that the SC and GA should give preference to the SG in terms of conducting investigations, although this suggestion has not been strictly adhered to

<sup>458</sup> United Nations Charter, Article 34

<sup>459</sup> T. Bensalah, *L'enquête internationale dans le règlement des conflits: règles juridiques applicables* (Librairie générale de droit et de jurisprudence 1976) 5



In practical terms, the Council's powers under Article 34 provide the Court with the competence to ask for others to provide it with information (or to otherwise assist it),<sup>460</sup> to give an investigative function to a subsidiary organ established under Article 29 UN Charter, to request the Secretary-General to investigate a particular situation and provide recommendations,<sup>461</sup> or even to request the Secretary-General to make periodic reports on a particular situation.<sup>462</sup>

However, in practice, much like the Court (see Chapter 1), the Council has rarely relied on its explicit statute-based powers of investigation, having only done so in UNSC Resolution 15 establishing a commission of investigation into the *Greek Frontier Question*,<sup>463</sup> and UNSC Resolution 39 in relation to the *Indo-Pakistan Question*.<sup>464</sup> Aside from this limited number of commissions explicitly established under Article 34, the history of establishment of inquiries under this provision has been distinctly chequered.<sup>465</sup>

Several factors have been suggested as potential explanations for why the Council has made relatively little use of its explicit fact-finding powers.<sup>466</sup> In contrast to the Council's sparse

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<sup>460</sup> Rule 39 of the Provisional Rules of Procedure of the Security Council

<sup>461</sup> See Iraq/Iran frontier incidents in 1974 – SC asking SG to investigate events – Statement of the President of the Security Council, 28 February 1974, UN Doc S/11299 (1974) and East Timor in 1975, UN SC Resolution 384 (1975), 22 December 1975 – SC asked SG 'to send urgently a special representative to East Timor for the purpose of making an on-the-spot assessment of the existing situation.'

<sup>462</sup> Usually in relation to a peacekeeping mission; see Del Mar 401

<sup>463</sup> UNSCR 15 (1946), 19 December 1946 making explicit reference to Article 34 in operative paragraph 1.

<sup>464</sup> UNSCR 39 (1948), 20 January 1948, operative paragraph A establishing the commission – operative paragraph C making reference to Article 34

<sup>465</sup> For instance, the Council established a sub-committee to investigate the *Spanish Question* in 1946, quoting the wording of Article 34 without specifically referring to it; UNSC Resolution 4 (1946), 29 April 1946, Similarly, Article 34 was expressly referred to in the *Complaint by Cuba* case although no commission of inquiry was ultimately established; UNSC Resolution 144 (1960), 19 July 1960; Again, in relation to the *Western Sahara*, the Council made explicit reference to Article 34 in a resolution without ultimately establishing a commission (instead asking the Secretary-General to consult with the parties and to report back to the Council); UNSC Resolution 377 (1975), 22 October 1975.

<sup>466</sup> One such potential explanation involves the unanimity required between all permanent members of the Council before a resolution can be passed establishing such a commission of inquiry under Article 34, under Article 27(3) of the UN Charter. Such unanimity, even in the post-Cold War, revitalised Security Council era continues to be no mean feat, as recent Security Council friction continues to demonstrate; See for example the current failure to come to consensus on the situation in Syria; <http://www.guardian.co.uk/world/2012/jan/31/un-syria-resolution-opposed-russia?INTCMP=SRCH>. In addition, it is suggested that the Council may find itself unduly constrained by the wording of Article 34 as a result of its explicit reference to its operation in situations in which 'the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security'; Del Mar 399; (despite the fact the definition of such a threat to international peace and security is relatively broad); see S. Talmon, 'The Security Council as World Legislature' 99 *The American Journal of International Law* 175, 181 who notes the wide range of incidents which have been classified as constituting a threat to international peace and security in recent times, including *inter alia* the proliferation of weapons of mass destruction, (UN Doc.

use of its explicit Charter-based fact-finding powers, it has made much greater use of its implied powers of investigation.<sup>467</sup> The Council's implied power is much broader than the specific Article 34 power as a result of not being dependent on the existence of a dispute the continuance of which could represent a threat to international peace and security.<sup>468</sup> Put simply, despite relatively far-reaching Charter powers,<sup>469</sup> the Council has not made explicit use of its Charter-based powers to any significant extent.<sup>470</sup> The Council has, however, been notably active in utilising its implied powers of investigation, carrying out fact-finding missions into situations including (but not confined to) the Corfu Channel,<sup>471</sup> Laos,<sup>472</sup> Congo,<sup>473</sup> Cambodia/Vietnam,<sup>474</sup> Guinea,<sup>475</sup> Senegal,<sup>476</sup> Zambia,<sup>477</sup> Seychelles<sup>478</sup> and Angola.<sup>479</sup>

For instance, in the 1990s the Council, most often through the auspices of the Secretary-General, made relatively frequent use of its implied powers of investigation to establish commissions of experts to assess the situations in Yugoslavia<sup>480</sup> and Rwanda<sup>481</sup> and an

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S/PRST/1996/17, para. 4, UN Doc. S/PRST/1998/12, para. 4) the use of mercenaries (GA Res. 48/92 (Dec. 20, 1993) and emergency situations (GA Res. 57/337, annex, para. 28, July 3, 2003)

<sup>467</sup> See E. Jiménez de Aréchaga, 'Le traitement des différends internationaux par le Conseil de Sécurité' Recueil des cours, 85 (1954-I), 1-105, 41 Solene Bouffror, 'Article 34' in Jean Pierre Cot and Alain Pellet (eds), *La Charte des Nations Unies, commentaire article par article* (3rd edn, Economics 2005) 1062, Schwisfurth 516

<sup>468</sup> The first explicit mention of the Council's implied power of investigation appears in the *Repertoire of the Practice of the Security Council* for the years 1989-92 and 1993-5, Part II of both stating that 'Article 34 does not...limit the Council's general competence to obtain knowledge of the relevant facts of any dispute or situation by dispatching a fact-finding mission'; *Repertory of the Practice of the Security Council*, Supplement 1989-1992, UN Doc ST/PSCA/1/Add.11, Part II, 31 'Repertory of the Practice of the Security Council', Supplement 1993-1995, UN Doc ST/PSCA/1 Add 12, Part II, 9; see also; Schwisfurth 516

<sup>469</sup> Including, of course, the Security Council's Article 29 right to establish subsidiary organs allows the SC to give investigative function to such subsidiary organs

<sup>470</sup> Security Council Resolution 446 [1979] 22 March 1979; although note involvement of the Council in the Spanish and Greek Frontier Questions in establishing a sub-committee with the power to 'conduct such inquiries as it may deem necessary' and a Commission of Investigation under Article 34 UN Charter – Security Council Resolution 4 [1946] 29 April 1946 and Security Council Resolution 15 [1946] 19 December 1946 respectively

<sup>471</sup> UNSC Resolution 19 (1947), 27 February 1947

<sup>472</sup> UNSC Resolution 132 (1959), 7 September 1959

<sup>473</sup> UNSC Resolution 161 (1961), 21 February 1961

<sup>474</sup> UNSC Resolution 189 (1964), 4 June 1964

<sup>475</sup> UNSC Resolution 289 (1970), 23 November 1970

<sup>476</sup> UNSC Resolution 294 (1971), 15 July 1971

<sup>477</sup> UNSC Resolution 326 (1973), 2 February 1973

<sup>478</sup> UNSC Resolution 496 (1981), 15 December 1981

<sup>479</sup> UNSC Resolution 571 (1985), 20 September 1985; Strong criticism of such fact-finding endeavours from certain sources regarding lack of funding and the Council's apparent reluctance to follow up the reports of these commissions has not reversed the trend towards increasing use of such fact-finding missions that continues to this day; Agnieszka Jacheć-Neale, 'Fact-Finding' Max Planck Encyclopedia of Public International Law

<sup>480</sup> Security Council Resolution 780 [1992] 6 October 1992

<sup>481</sup> Security Council Resolution 935 [1994] 1 July 1994

international commission of inquiry in relation to the situation on the ground in Burundi.<sup>482</sup> Similarly, the Security Council mandated the Secretary-General to ‘rapidly establish an international commission of inquiry in order to immediately investigate reports of violations of international humanitarian law and human rights in Darfur by all parties’.<sup>483</sup> Whilst Security Council fact-finding is undoubtedly important, it is not the only, or even the most active, UN body in terms of fact-finding.

The fact-finding reports of the United Nations human rights bodies are increasingly prominent in contemporary international law. For instance, since its establishment,<sup>484</sup> the Human Rights Council has adopted resolutions which have established fact-finding inquiries into situations including the Middle East Conflict,<sup>485</sup> the Gaza Flotilla incident<sup>486</sup> and the events surrounding the Governmental repression of protestors in Syria.<sup>487</sup> These reports, it will be argued in due course are potentially problematic in a number of ways as a result of unclear working methods and a tendency to exceed their mandates. Having painted a broad-brush picture of fact-finding under the auspices of the United Nations, we can consider the question originally posed; namely, what are the potential positive and negative legal effects of the Court’s reliance on findings-of-fact made by UN fact-finding bodies?

#### *2.1.4 (vi) The Consequences of the Court’s Reliance on Findings-of-Fact made by UN Fact-Finding Bodies*

There are a number of positive aspects of the Court’s reliance on findings-of-fact made by UN fact-finding bodies.<sup>488</sup> The first relates to the establishment of UN inquiries. The establishment of such bodies is not dependent solely on the individual states involved in the

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<sup>482</sup> Security Council Resolution 1012 [1995] 28 August 1995

<sup>483</sup> UNSC Resolution 1564 (2004), 18 September 2004

<sup>484</sup> By the General Assembly in Resolution A/Res/60/250, 3 April 2006

<sup>485</sup> HRC Resolution S-1/1, 6 July 2006; HRC Resolution 3/1, 8 December 2006; HRC Resolution 4/2, 27 March 2007; HRC Resolution S-3/1, 15 November 2006, HRC Resolution 6/18, 28 September 2007, HRC Resolution 9/18, 24 September 2008; HRC Resolution 9/1, 12 January 2009; HRC Resolution 10/21, 26 March 2009; HRC Resolution S-12/1, 16 October 2009; HRC Resolution A/HRC/16/L.31, 25 March 2011; HRC Resolution 15/6, 29 September 2010

<sup>486</sup> HRC Resolution A/HRC/14/L.1; HRC Resolution 15/1, 29 September 2010; HRC Resolution 16/20, 25 March 2011; HRC Resolution 16/32, 25 March 2011; HRC Resolution 17/10, 17 June 2011

<sup>487</sup> HRC Resolution S-17/1, 23 August 2011; see First Report A/HRC/S-17/1/2/Add.1 and Second Report A/HRC/19/69, 22/2/12

<sup>488</sup> A. Cassese, ‘Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding’ in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 302

matter but comes about as a result of a majority decision of a UN body. These UN inquiries are also (in theory) composed of impartial experts with no interest in the outcome of the inquiry. As such, it could be presumed that findings-of-fact made by such bodies have a relatively strong claim to credibility and could arguably even be said to ‘represent the views of disinterested witnesses in proceedings before the Court’<sup>489</sup> – defined as ‘one who is not a party to the proceedings and stands to gain or lose nothing from its outcome’.<sup>490</sup> One commentator has argued that, on the basis of being considered a disinterested witness, findings-of-fact made by UN organs should be considered to have ‘*prima facie* superior credibility’.<sup>491</sup>

The case for considering UN bodies as disinterested witnesses rests on the argument that these bodies are unable to be party to any proceedings before the Court and as such arguably have no material interest in the case at hand. For instance, there can be no parties to advisory proceedings and whilst the Secretary-General might participate by submitting a dossier of documents and a written statement (and by participating in the oral proceedings), he does so not on behalf of the Secretariat or in his personal capacity but under Article 97 of the UN Charter as ‘the chief administrative officer of the Organization’. Further, in contentious cases, organs of the UN cannot be parties to the case. One commentator has argued that whilst an individual member of the General Assembly or Security Council may have a vested interest in the outcome of an advisory opinion or a contentious case– ‘these organs cannot be said to “stand to gain or lose” from the judicial proceedings in the same way as an individual state...may gain or lose from the outcome of a case’.<sup>492</sup>

Secondly, although obvious, it should be noted that ‘[t]here has never been an instance where a document generated by the Security Council, the General Assembly or the Secretariat has been questioned by the Court on the basis of its authenticity, in contrast to the evidence produced by parties to a contentious case.’<sup>493</sup> Taking all of the above into account, Del Mar

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<sup>489</sup> For a succinct summary of some of the advantageous and problematic aspects of UN Commissions of Inquiry see; J. G. Devaney, ‘Killing Two Birds with One Stone: Can Increased use of Article 34(2) of the ICJ Statute Improve the Legitimacy of UN Commissions of Inquiry & the Court's Fact-Finding Procedure?’ STALS Research Paper n 2/2013; see also; Del Mar at 398

<sup>490</sup> *Nicaragua Case*, para 64

<sup>491</sup> *ibid*, para 64

<sup>492</sup> Del Mar at 398

<sup>493</sup> Del Mar at 402; for instance see the problematic evidence in Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain) (Order of 30 March 1998) [1998] ICJ Rep 243, 246; CR 2000/5 (Dr Al Muslemmi, Agent for Qatar) 29 May 2000, 16, 17

argues that since states have such a huge influence on the evidence that comes before the court otherwise, the factual qualifications made by the principal organs of the UN are even more important – ‘[s]uch factual qualifications constitute *prima facie* credible and reliable evidence.’<sup>494</sup>

However, in recent times doubt has been cast upon the reliability of such reports and the suggestion that *prima facie* credibility be accorded to findings of fact made by UN bodies – which leads us to the more troublesome legal implications of their operation.<sup>495</sup> There are a number of deficiencies that deserve highlighting. Firstly, on a purely procedural level, a number of difficulties present themselves. For instance, it has been pointed out that after fifty years of UN fact-finding there is no standard operating procedure regarding organization and planning for fact-finding missions,<sup>496</sup> preventing the development of a consistent standard of practice.<sup>497</sup> The Office of the High Commissioner for Human Rights (OHCHR) which has reviewed the practice of UN commission of inquiries does have an internal set of guidelines dealing with operational issues but these have not been made public and as such cannot be utilised in order to improve the operation of UN commissions of inquiry.<sup>498</sup>

In practice there are a number of ways in which the procedural legitimacy of fact-finding inquiries can be adversely affected such as where the particular way in which a mandate has been worded suggests a prejudging of certain factual elements of the situation under investigation.<sup>499</sup> Similar factors adversely affecting the procedural legitimacy of fact-finding inquiries include allegedly disproportionate focus on some situations (such as the Middle East Conflict),<sup>500</sup> and criticism in the composition of the panel<sup>501</sup> such as those surrounding the

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<sup>494</sup> Del Mar 402

<sup>495</sup> Teitelbaum 146; reference to Van den Wyngaert Passage about applying more rigorous examination to UN reports (especially MONUC) in *Armed Activities Case* as ICTY did; Alvarez – description of the facts in paragraphs 231-379 of the *Bosnian Genocide* case

<sup>496</sup> Bassiouni at 40; As Bassiouni has said, ‘there is nothing to guide, instruct, or assist the heads and appointees to these missions of how to better carry out their mandates.’

<sup>497</sup> Bassiouni at 41-2

<sup>498</sup> Rob Grace and Claude Bruderlein, ‘On Monitoring, Reporting, and Fact-finding Mechanisms’ (2012) 1 ESIL Reflections 1, 4

<sup>499</sup> See Chinkin 494; see for instance the criticism of the Security Council’s Panel Reports in the *Armed Activities* case; *I.C.J. Pleadings, Armed Activities*, CR 2005/09, 20/4/2005, page 14, para 29; ‘... apparently “putting the cart before the horse”, the Security Council created a “Panel of Experts on the *Illegal* Exploitation of the Natural Resources of the Congo”. This suggests that the facts had been characterized as “illegal” even before it was known whether they actually existed!’

<sup>500</sup> T.M. Franck and H.S. Farley, ‘Procedural Due Process in Human Rights Fact-Finding by International Agencies’ 74 *Am J Int’l L* 308, 312; Chinkin notes that by early 2009, five out of ten special sessions had been directed towards criticising Israel (a trend that has continued)– echoing the shortcomings of the Commission on Human Rights; Chinkin 494

appointment of certain members to the Goldstone Panel which prompted its authors to publicly defend their personal impartiality and the impartiality of the report itself.<sup>502</sup>

Secondly, although the consent of states is not required for the initial establishment of a fact-finding inquiry, it is usually required in order to gain entry to the territory of a state.<sup>503</sup> The dispatch of a fact-finding inquiry could, after all, be seen as an 'intrusive act' which 'may be resented as unwarranted interference into events deemed to be within a state's own domestic jurisdiction'.<sup>504</sup> And indeed in practice it is not uncommon that consent is denied, meaning that reports in such cases have to be compiled based on interviews with victims outside the territory itself and information from NGOs without any members of the panel ever having travelled to the state in question, as was the case in relation to the Human Rights Council's recent report on Syria.<sup>505</sup>

Furthermore, whilst ostensibly entitled 'fact-finding' missions, in reality these inquiries often make determinations on points of international law,<sup>506</sup> such as determining that a certain factual situation amounts to a violation of IHL or human rights.<sup>507</sup> For example, the Goldstone Report established by the Human Rights Council in April 2009 to 'investigate all

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<sup>501</sup> For example, see the Commission set up after the Six-Day War in 1968, GA Res 2443 (XXIII) (December 19, 1968) in which, due to the allegedly partisan makeup of the commission, Israel refused to cooperate. Similar objectives to personnel led to a proposed inquiry into the Jenin refugee camp in the West Bank resulted in it being called off in 2002, See SC Res 1405 (Article 19, 2002) then UN Doc S/PV 4525 (May 3, 2005). See; Chinkin 498; There exists no ad hoc representative element to fact-finding missions. Instead, in the case of the Human Rights Council, members are appointed by the President of the Council (unless otherwise specified in the mandate – usually in this case special rapporteurs). In the case of fact-finding missions undertaken by the Security Council or the General Assembly, they usually invite the Secretary-General to form the commission; see Declaration on Fact-Finding states that SC and GA should give preference to the SG 'in deciding to whom to entrust the conduct of a fact-finding mission', see para 15

<sup>502</sup> See <http://www.guardian.co.uk/commentisfree/2011/apr/14/goldstone-report-statement-un-gaza>; for an interesting account of Goldstone's thinking see; Goldstone, Richard J. 'Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes', in Morten Bergsmo, *Quality Control in Fact-Finding* (Morten Bergsmo ed, Torkel Opsahl 2013) 35; see also; Wu Xiaodan, 'Quality Control and the Selection of Members of International Fact-Finding Mandates', in *ibid*

<sup>503</sup> Despite the Declaration on Fact-Finding urging states to adopt a policy of allowing such fact-finding missions into their territory; GA Res 46/59, (Declaration on Fact-Finding), paras 6, 21.

<sup>504</sup> Chinkin 488. Such refusal of admittance is in fact commonplace in practice; See; D. Weissbrodt and J. McCarthy, 'Fact-Finding by International Nongovernmental Human Rights Organizations' 22 Va J Int'l L 1, 59; 'the great bulk of human rights fact-finding by both IGOs and NGOs is accomplished without on-site visits'; see also; for example, Israel refused to allow the Human Rights Council's fact-finding mission to visit the Occupied Palestinian Territory under HRC Resolution S-1/1. Similarly, the high-level fact-finding mission to Darfur was unable to obtain visas from the government of Sudan. HRC Res 4/8 (March 30, 2007).

<sup>505</sup> See for example HRC Resolution S-17/1, 23 August 2011; see First Report A/HRC/S-17/1/2/Add.1 and Second Report A/HRC/19/69, 22/2/12

<sup>506</sup> Dapo Akande and Hannah Tonkin, 'International Commissions of Inquiry: A New Form of Adjudication?' <EJIL: Talk!> accessed 16 April 2012

<sup>507</sup> *Ibid* B.G. Ramcharan, *Introduction to International Law and Fact-Finding*, at 1, 6

violations of international human rights law and international humanitarian law' committed in Gaza between 2008 and 2009 has been praised for providing an incisive analysis of the role that IHL and IHRL play in the conflict.<sup>508</sup> Similarly, the Legal Annex of the Palmer Report established by the Secretary-General on 2 August 2010 following the Gaza Flotilla Incident carefully manages the difficult distinction between IHL and IHRL in relation to whether Israeli soldiers had used 'excessive force'.<sup>509</sup>

In making findings on legal issues the question arises as to what standard of proof the commissions of inquiry, being at most quasi-judicial, ought to apply when making legal determinations.<sup>510</sup> In reality the standard of proof applied is often ambiguous and the judicial skills and experience demonstrated by some commissions dubious.<sup>511</sup> Research shows that in the practice the standard of proof applied has varied widely between different commissions of inquiry.<sup>512</sup> To be clear, it is not argued that UN Commissions of Inquiry should apply the same rigorous standard of proof as would be expected of a judicial body. Rather it is argued that the considerable variation in standards of proof between inquiries threatens the development of a consistent standard of practice. Concerted focus on this important issue from the outset and throughout is essential for the future operation of such commissions of inquiry.

Relatedly, it is suggested that there exists a tendency to provide cursory consideration of the relevant legal issues and legal arguments of dubious soundness. A few examples illustrate this potentially problematic practice. The Goldstone report asserted that, despite ostensibly disengaging in 2005, Israel retained effective control over the Gaza strip and that 'the international community continues to regard [Israel] as the occupying Power'.<sup>513</sup> In support of this position the Goldstone report cited a Security Council Resolution<sup>514</sup> and a Human Rights Council Resolution.<sup>515</sup> In doing so, the Goldstone Report presented the legal issues as straightforward and generally accepted whilst failing to note a significant number of

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<sup>508</sup> See Goldstone Report, *supra* note 19 at paras 379-436

<sup>509</sup> See Palmer Report, *supra* note 51 at paras 117, 134

<sup>510</sup> T. Boutruche, 'Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice' *Journal of Conflict and Security Law*

<sup>511</sup> Halink 32

<sup>512</sup> Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions* (Geneva Academy of International Humanitarian Law and Human Rights, 2012) 25

<sup>513</sup> HRC Resolution A/HRC/12/48, 25/9/2009, para 277

<sup>514</sup> Security Council Resolution 1860 [2009] 8 January 2009

<sup>515</sup> Human Rights Council Resolution S-9/1, [2009] 12 January 2009

competing legal positions, or considering the precise legal effect of the resolutions relied upon by the Report.<sup>516</sup> The report also stated that ‘non-State actors that exercise government-like functions over a territory have a duty to respect human rights’ without providing any state practice or *opinio juris* in support of this position.<sup>517</sup>

Similarly, the Philips Report established by the Human Rights Council following the Gaza Flotilla Incident<sup>518</sup> made the legal determination that Gaza was occupied by Israel relying solely on the findings of the Goldstone Report<sup>519</sup> and that it was under an illegal blockade without considering the relationship between Israel’s status as an Occupying Power and the legality of the blockade.<sup>520</sup> This is significant since an Occupying Power need not invoke the concept of a naval blockade in international law to justify its barring access to a territory it effectively controls.<sup>521</sup>

Another example is the Palmer Report’s straightforward characterisation of the Middle East Conflict as an International Armed Conflict<sup>522</sup> without providing any justification for this determination. The Palmer Report simply states that its determination to this effect was ‘based on facts as they exist on the ground’<sup>523</sup> and that the conflict had ‘all the trappings of an international armed conflict’.<sup>524</sup> Similarly, both the Palmer and the Philips reports<sup>525</sup>

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<sup>516</sup> Including a strict reading of Article 42 of the Hague Regulations

<sup>517</sup> *Report of the United Nations Fact-Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories, Human Rights Council, 12th Session, 25 September 2009, A/HRC/12/48* (2009) at para 305; In actual fact, it is far from clear that non-state actors who exercise government-like functions over a territory have a duty to respect human rights. Marko Milanovic, ‘Goldstone Report on Gaza: A Question of Trust’ EJIL: Talk! <<http://www.ejiltalk.org>> Whilst reference to a former Special Rapporteur and one commentator are made earlier in the report – these do not provide adequate support for such a broad assertion is open to criticism. Disagreement is also evident in international legal scholarship on this issue, compare: E. Samson, ‘Is Gaza Occupied? Redefining the Status of Gaza under International Law’ *American University Law Review* 915, 923; Y. Shani, ‘Faraway, so close: the legal status of Gaza after Israel’s disengagement’ 8 *YIHL* 369, 11

<sup>518</sup> *Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla Ships Carrying Humanitarian Assistance, Human Rights Council, 15th Session, 27 September 2010, A/HRC/15/21* (2010) - Human Rights Council Resolution 14/1 of 2 June 2010

<sup>519</sup> *Ibid* at para 64

<sup>520</sup> *Ibid* at paras 59-61

<sup>521</sup> Yuval Shany, ‘Know Your Rights! The Flotilla Report and International Law Governing Naval Blockades’ EJIL: Talk! <<http://www.ejiltalk.org>>

<sup>522</sup> The Palmer Report, ‘Report of the Secretary-General’s Panel of Inquiry on 31 May 2010 Flotilla Incident, July 2011’ at para 73; Tamar Feldman, ‘A Tale of Two Closures: Comments on the Palmer Report Concerning the May 2010 Flotilla Incident’ EJIL: Talk! <<http://www.ejiltalk.org>>

<sup>523</sup> Palmer Report at para 73

<sup>524</sup> *Ibid* at para 73 The Panel justifies this position by highlighting the thousands of rockets fired into Israel from Gaza; D. Guilfoyle, ‘The Palmer Report on the Mavi Marmara Incident and the Legality of Israel’s Blockade of the Gaza Strip’ EJIL: Talk! <<http://www.ejiltalk.org>> ; Whether or not the Middle-East Conflict can be characterised as international in nature or not, it is clear that simply classifying rocket fire as ‘all the trappings



suggested that Israel had a right to self-defence under the UN Charter in these circumstances despite the fact the doctrine of self-defence is traditionally considered a concept of the *jus ad bellum* applicable only in inter-state conflicts.<sup>526</sup>

Similar concerns were raised regarding the Court's reliance on reports of the 'Panel of Experts' established by the Security Council in the *Armed Activities* case (see above at section 2.1.4.(i)). The Court's reliance on these reports to make legal determinations can be seen as problematic owing to the fact that the Security Council itself stated that the Panel was not set up to gather facts for judicial purposes.<sup>527</sup> Further, the Panel was criticised for 'failing even to respect the methodology which it claimed to be seeking to apply and, in its first report, betraying a degree of bias which provoked criticism from a number of States.'<sup>528</sup> Additionally, the Security Council in paragraph 15 of Resolution 1457 (24 January 2003) urged all states 'to conduct their own investigations, including as appropriate through judicial means, in order to clarify credibly the findings of the Panel, taking into account the fact that the Panel, which is not a judicial body, does not have the resources to carry out an investigation whereby these findings can be considered as established facts.' As such we can see that the Panel reports were not intended to be fact-finding instruments and as such the Court's reliance on them to this end is somewhat problematic.<sup>529</sup>

Crucially, the Court did add an important caveat that whilst UN Reports are of course persuasive, 'it should be borne in mind that the Court's ultimate assessment of them depended on their concordance with other evidentiary sources presented during the proceedings'.<sup>530</sup> Further, the Court found parts of the Secretary-General's MONUC Report that relied on second-hand reports in the passages concerning the issue of whether or not the Congo

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of an international armed conflict' is problematic legal reasoning; *ibid*; The Report's Legal Annex uses different reasoning in reaching the same conclusion. The Annex relies on the US Civil War *Prize Cases* as the sole basis for its assertion that a blockade can be invoked against a non-State actor. However, a major weakness of the legal reasoning displayed in the Annex is its sole reliance on this authority – as it has been noted, 'the idea that the modern law can be completely exposed by reference to a single set of national proceedings 150 years old is dubious at best'; *ibid*; D. Guilfoyle, 'The Mavi Marmara incident and blockade in armed conflict' 81 *British Yearbook of International Law* 171

<sup>525</sup> Palmer Report at para 73

<sup>526</sup> For a fuller discussion of this issue see; C. J. Tams and J. G. Devaney, 'Applying Necessity and Proportionality to Anti-Terrorist Self-Defence' 45 *Israel Law Review* 91

<sup>527</sup> *I.C.J. Pleadings, Armed Activities*, CR 2005/09, 20/4/2005, page 6, para 14; see also Opinion of Judge Kateka at para 52

<sup>528</sup> *I.C.J. Pleadings, Armed Activities*, CR 2005/09, 20/4/2005, page 6, para 15

<sup>529</sup> The Porter Report itself criticised the Panel Reports stating that "it would seem that the majority of evidence likely to be obtained by such a methodology [of flexible data collection] would be either hearsay, biased or pure gossip, all untested"; Porter Commission Report, page 7

<sup>530</sup> Riddell and Plant 238

Liberation movement had been created by Uganda to be unreliable.<sup>531</sup> And it has been argued that the Court's statement that it would only take into account evidence contained within UN Reports 'to the extent that they are of probative value and are corroborated, if necessary, by other credible sources',<sup>532</sup> shows that it appreciates that some doubt exists with regard to the evidentiary weight to be attributed to them.<sup>533</sup>

However, these qualifications are not enough to spare the Court from criticism. Indeed, there was even some limited criticism from within the Court regarding its over-reliance on UN reports such as Judge Kateka's dissenting opinion in the case which described the UN reports methodological approach as so flexible that its findings 'would be either hearsay, biased or pure gossip, all untested'.<sup>534</sup> Judge Kateka urged caution in relation to reliance on just one source (as has been the practice of the Court consistently over many years) even if that source was a UN source.<sup>535</sup>

On this issue, Halink has called into question whether reliance on numerous reports, such as those of the Secretary-General and MONUC could truly be said to come from 'multiple sources'. This commentator argues that since these reports all operate as part of the same apparatus doubts surround 'possible overlap in mandate and potential mutual reliance of missions in reporting on overlapping areas, thus creating a false impression of confirmation and reliability'.<sup>536</sup> And indeed as we have seen already such reports cite each other as authority (see section 2.1.4 (vi)).

This makes it all the more surprising that the Court has placed such importance on them in recent cases. In acknowledging that flaws in the reports potentially exist but in not subjecting UN reports to the same scrutiny as other items of evidence the Court is open to criticism.<sup>537</sup> As Van den Wyngaert has stated; '[i]t would be interesting to see what the result...would have

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<sup>531</sup> *Armed Activities Case* 225 at para 159; Although *Del Mar* has stated that such action is 'a rare occurrence'; *Del Mar* 407

<sup>532</sup> *Armed Activities Case at para 237-50*; examples of corroboration related to UN Reports in Halink at FN 70

<sup>533</sup> Halink 28, Teitelbaum 147

<sup>534</sup> *See the Dissenting Opinion of Judge Kateka in Armed Activities Case at para 53*

<sup>535</sup> The Court operates a rule that evidence should not come completely from one single source – (see 'widespread reports of fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case, have no greater value than their original source'; *Nicaragua Case at 40-41*)

<sup>536</sup> Halink 33 cites M.C. Bassiouni, 'Appraising UN Justice-Related Fact-Finding Missions' 5 Wash UJL & Pol'y 35, 41

<sup>537</sup> Halink 28; see also Teitelbaum 147

been had the ICJ applied the same test to the MONUC report and other documentary evidence on which (some of) its holdings were based'.<sup>538</sup>

The Court has also been criticised for basing so many of its findings on the Porter Commission (a domestic judicial fact-finding commission established by Uganda).<sup>539</sup> In the course of proceedings, the Court stated that it:

‘had already expressed its view with regard to the evidentiary role of the Porter Commission materials in general...and considers that both the Porter Commission Report, as well as the United Nations Panel reports, to the extent that they have later proved to be probative, furnish sufficient and convincing evidence for it to determine whether or not Uganda engaged in acts of looting...’<sup>540</sup>

In its judgment the Court claimed that its considerable reliance on the Porter Commission was justified by the fact that it had obtained evidence from people under oath ‘by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information’ and since neither party had challenged the Report’s credibility.<sup>541</sup>

However, the Court has been criticised for relying on the Commission’s findings ‘in the way an appellate body would rely on the fact findings of a trial court’,<sup>542</sup> since any allegation confirmed by a finding of the Porter Commission appeared to be accepted by the Court as ‘having met a clear and convincing standard of proof’.<sup>543</sup> Whilst it could be said that the Porter Commission fulfils the criteria for favoured evidence set out in paragraph 214 of the *Bosnian Genocide* judgment, that of being “evidence obtained by examination of persons directly involved”, tested by cross-examination, the credibility of which has not been challenged subsequently’,<sup>544</sup> the Porter Commission itself had admitted that it had serious flaws and as such it is surprising that the Court attributed it so much weight.<sup>545</sup>

Furthermore, Uganda criticised the Security Council’s decision to name the Panel as the

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<sup>538</sup> Van den Wyngaert 67

<sup>539</sup> Halink 27

<sup>540</sup> *Armed Activities Case at 273*

<sup>541</sup> *ibid* at paras 60-61; see Teitelbaum 152

<sup>542</sup> Teitelbaum 154; citing paragraphs 114 and 115 of the *Armed Activities Case*, see FN 126.

<sup>543</sup> Teitelbaum 153

<sup>544</sup> *Armed Activities Case at p. 35, para 61 (see also paras 78-9, 114 and 237-242)*

<sup>545</sup> Teitelbaum 151 See Report of the Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001, 3

‘Panel of Experts on the *Illegal* Exploitation of the Natural Resources of the Congo’ which it argued clearly pre-empted the outcome of the report.<sup>546</sup> Uganda argued that whilst the Security Council is not a judicial body, such determinations acquire ‘a certain force, even in this Court, having been used in the reports of the Security Council’s “Panel of Experts”, as well as in the Memorial, Reply and oral argument of the DRC, in which Uganda is accused of “illegal” exploitation of the DRC’s natural resources.’

The evidentiary value of the MONUC report, also heavily relied upon by the Court (see above at section 2.1.4. (ii)) was also questioned by Uganda which it described as ‘inappropriate as a form of assistance accompanied by judicial rigour’.<sup>547</sup> In particular Uganda argued that MONUC had not been given an appropriate mandate to investigate facts in a way that they could be utilised in future judicial proceedings and that the Panel had encountered significant problems accessing the area in question, amongst other arguments.<sup>548</sup>

Potentially troublesome treatment of international law can also be seen more recently in the reports of the HRC inquiries which were established to investigate alleged breaches of international human rights law and to identify those responsible in relation to the situation in Syria in 2012.<sup>549</sup> For instance, in its February 2012 report, the Commission went further than the Goldstone Report in finding that the Free Syrian Army, an armed group opposed to the government, was bound to comply with human rights obligations.<sup>550</sup> The Commission stated that ‘at a minimum, human rights obligations constituting peremptory international law (*jus cogens*) bind states, individuals and non-State collective entities, including armed groups.’<sup>551</sup> In taking such a position on this issue of international law, the report leaves itself open to contradiction on the basis that, as stated above, human rights obligations are traditionally only thought to apply to States, or non-State entities carrying out the functions of a state or those having effective control over territory.<sup>552</sup> Although armed groups are arguably under a duty

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<sup>546</sup> *I.C.J. Pleadings, Armed Activities*, CR 2005/09, 20/4/2005, page 14, para 29

<sup>547</sup> *I.C.J. Pleadings, Armed Activities*, CR 2005/09, 20/4/2005, page 9, para 8

<sup>548</sup> *I.C.J. Pleadings, Armed Activities*, CR 2005/09, 20/4/2005, page 9, para 10

<sup>549</sup> See First Report A/HRC/S-17/1/2/Add.1; Second Report A/HRC/19/69, 22/2/12

<sup>550</sup> See A/HRC/19/69, at p. 20; the mandate being set out as ‘to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic, to establish the facts and circumstances that may amount to such violations and of the crimes perpetrated and, where possible, to identify those responsible with a view of ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable.’

<sup>551</sup> A/HRC/19/69, at p. 20

<sup>552</sup> In this regard see the legal position taken in the Report of the International Commission of Inquiry to Investigate all the alleged violations of international human rights law in the Libyan Arab Jamahiriya,

not to commit breaches of norms constituting *jus cogens* at the very least under contemporary international law, it is argued that it is unclear whether a fact-finding commission is the ideal forum in which to determine whether acts breaching *jus cogens* norms have been committed, or indeed whether such acts could be attributed to the group in question and any subsequent responsibility arising out of such a breach being found.

The issue of whether armed groups are bound by certain human rights obligations is currently an unsettled issue in international law and one commentator has argued that the Commission's position could be seen as an attempt to progressively develop the law on this issue.<sup>553</sup> However, doubts surround the prudence of such a course of action. To elaborate, it could be argued that the law is being broadened in order to be applicable to entities it was not intended to apply to and that, perhaps more importantly, it is arguably being done so in a manner lacking in procedural rigor and legal justification. To give one example, it has been noted that the Commission did not examine a number of potentially important factors such as the organisational make up of the Free Syrian Army, the extent to which it controlled territory on the ground or any of the non-military functions that the entity was also engaged in. Whilst such omissions from the Commission's report are perhaps understandable due to the fact it was not permitted entry to Syria and as such was forced to rely on accounts of others within the country, it is nevertheless argued that in attempting to extend the law to armed groups, it is problematic that so little attention was paid to legal argumentation in the Commission's report.

Whilst no position is taken on these legal issues at this stage, it should be pointed out that issues such as the occupation of Gaza and the human rights obligations of Palestine or the Free Syrian Army are extremely complex legal issues. In making such broad-brush generalisations without proper substantiation, acknowledging different legal positions or authority, the reports potentially undermine their legitimacy and makes reliance on them by the Court problematic. However, we should also note that the Court's reliance on findings-of-

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A/HRC/17/44 1 June 2011, para 72; and UN Secretary General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, para. 188. For a detailed discussion of this issue see Henckaerts, Jean-Marie & Wiesener, Cornelius 'Human rights obligations of non-state armed groups: a possible contribution from customary international law?' in Robert Kolb and Gloria Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (Robert Kolb and Gloria Gaggioli eds, Edward Elgar Publishing Ltd 2013) 148

<sup>553</sup> Tilman Rodenhäuser, 'Progressive Development of International Human Rights Law: The Reports of the Independent International Commission of Inquiry on the Syrian Arab Republic' EJIL: Talk! <<http://www.ejiltalk.org>>

fact made by other entities is not just problematic in the context of UN Commissions of Inquiry but also raises significant problems in the context of reliance on the jurisprudence of other courts and tribunals – an issue which is the subject of the following subsection.

### 2.1.5. *Certain Aspects of the Court's Reliance on Factual Determinations Made by Other International Courts*

A further potentially problematic aspect of the Court's approach to fact-finding is its reliance on factual determinations made by other international courts, in particular those established under the auspices of the United Nations. The most prominent example of this to date can be found in the *Bosnian Genocide* case in which reliance on factual determinations made in cases before the ICTY is evident throughout the judgment, and to a large extent the Court is deferential to findings-of-fact made by the ICTY.<sup>554</sup> Whilst this practice has not been widespread in the jurisprudence of the Court to date, it is clear that there is scope for this issue to recur in the future and as such the Court's problematic handling of facts in this regard it is worthy of our attention.

In the course of the *Bosnian Genocide* case the Court went to some lengths to highlight the specific weight it would accord to factual determinations made at different stages of cases before the ICTY, for instance stating that it would accord less weight to findings-of-fact made in pre-trial decisions since the standard of proof applied in such cases was lower than that the Court was applying in the present case.<sup>555</sup> For example, factual determinations made by the ICTY in the *Krstić* case were central to the determination that the *dolus specialis* required for genocide was not present in any situation apart from Srebrenica.<sup>556</sup> Crucially, the Trial and Appeals Chambers in *Krstić* did however find that the *dolus specialis* was present at the massacre in Srebrenica and that as such genocide had been perpetrated and this factual determination seemed to be deferentially accepted by the Court, pausing only to say that it 'sees no reason to disagree with the concordant findings of the Trial Chamber and the Appeals Chamber'.<sup>557</sup> The Court even made reference to a case pending before the ICTY at the time, the *Stanišić and Simatović* case which it said could shed crucial light on the relationship between Serbia and the Bosnian Serb forces.<sup>558</sup>

In addition, it would appear that findings-of-fact made by the ICTY will be similarly influential in the *Croatian Genocide* case with substantial reliance being placed on a number

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<sup>554</sup> *Bosnian Genocide Case*, see, by way of illustration, paras 248, 254, 261, 264, 266, 268, 272-274, 278-281, 283-318; Goldstone and Hamilton 104

<sup>555</sup> *Bosnian Genocide Case*, see para 219

<sup>556</sup> See *ibid*, see paras 277, 319, 334, 354

<sup>557</sup> *Ibid*, see para 296

<sup>558</sup> *Prosecutor v Stanišić and Simatović*, IT-03-69

of recent ICTY cases in the oral proceedings by the parties. As Sir Keir Starmer, counsel for Croatia, stated ‘ICTY judgements [sic] are rich in... factual findings that are highly relevant to the present proceedings. The Applicant will refer in particular to the judgements in *Mrkšić* and *Martić*; and the sentencing remarks in *Babić*.<sup>559</sup>

It has been suggested that the Court’s reliance on fact-finding carried out by other bodies in the *Bosnian Genocide* case is not inherently problematic practice since ‘most of the allegations made before the Court had already been the subject of lengthy trials before the ICTY...’<sup>560</sup> Undoubtedly there is some merit to this argument due to the fact that the ICTY is an independent and impartial judicial organ. In actual fact, if the Court had disputed any of the factual determinations made by the ICTY it would have to go to great lengths to do so.<sup>561</sup>

Certainly the Court ought to pay the ‘greatest respect’ to any judgments made by international judicial bodies such as the ICTY.<sup>562</sup> It is argued that in general a distinction ought to be drawn between facts which had been arrived at after a ‘painstaking adversarial process’ and those which have been gathered as part of a UN fact-finding mission (which as we have seen, operate under much less strict evidentiary working methods). Furthermore, it is of course the case that ‘it would have been unnecessarily duplicative for the ICJ itself to determine those facts which had already been authoritatively established by the ICTY, and especially when there is general acceptance regarding the rigour of the ICTY’s own fact-finding process.’<sup>563</sup>

However, the most that can be said is that factual determinations made in cases before other international courts is that they are persuasive, but not that they are determinative. This is so due to the fact that unquestioning reliance on factual findings made before another court, one with the goal of trying individual crimes, is potentially problematic;

‘The problem with the Court’s reasoning is that the question before it at that stage was whether genocide had occurred in Bosnia and Herzegovina, not whether genocide was committed by the relative handful of individuals who have to date been prosecuted by the ICTY...Furthermore, the ICTY was never judging whether genocide occurred at a given location or time, but rather whether an individual before

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<sup>559</sup> Case No. IT-95-13/1-T, Judgement, 27 Sep. 2007; Case No. IT-95-11-T, Judgement, 12 June 2007; Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004 respectively; *Croatian Genocide Case* 4 March 2014, Oral Proceedings, Verbatim Record, page 32-33, para 12

<sup>560</sup> Gattini

<sup>561</sup> *ibid*

<sup>562</sup> *ibid*

<sup>563</sup> Goldstone and Hamilton 106



it was responsible for a particular act of genocide or not.’<sup>564</sup>

Furthermore, relying on factual determinations made in cases before the ICTY is potentially problematic due to the possibility that the Prosecutor may have taken the decision not to prosecute a certain crime (the Prosecutor’s decision to ‘not include or to exclude’ a genocide charge being specifically cited as significant by the Court in the *Bosnian Genocide Case*<sup>565</sup>) as part of a plea bargain and as such ‘may have nothing at all to do with the absence of evidence that genocide was committed in any particular situation.’<sup>566</sup>

Sir Keir Starmer in the *Croatian Genocide* case also argued that ‘a prosecutorial decision not to prosecute should be given little or no probative value in respect of the establishment of facts...’<sup>567</sup> highlighting a number of additional factors including the inherent link between investigative decisions and prosecutorial decisions as well as problems in locating key witnesses and also time constraints.<sup>568</sup> By the same token, Starmer correctly argued that decisions *to include* a charge of genocide:

‘can be regarded merely as different – negative and positive – outcomes of the decision-making process; that is, the decision *whether* to include a particular charge. Neither outcome involves a finding of fact; therefore, no evidential inferences should be drawn either way’.<sup>569</sup>

In sum, it is argued that whilst of course the Court ought to draw upon fact-finding carried out by others, it should not do so in a wholesale manner, as the Court was criticised for in the present case.<sup>570</sup> As one commentator has stated, more is demanded of the Court than this.<sup>571</sup> The Court ought to ‘actively engage’ with such findings-of-fact, to attempt to carefully assess the value and weight of the evidence that it seeks to rely upon and clearly spell out to what extent the Court has relied upon it in making its legal determinations.<sup>572</sup>

Moving now to the second group of criticisms of the Court’s current reactive approach to fact-finding we turn our attention to those cases in which the Court has encountered difficulties

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<sup>564</sup> Ibid; see also *Croatian Genocide Case* 4 March 2014, Oral Proceedings, Verbatim Record, page 40, para 39

<sup>565</sup> *Bosnian Genocide Case*, see para 217

<sup>566</sup> Goldstone and Hamilton 106

<sup>567</sup> *Croatian Genocide Case* 4 March 2014, Oral Proceedings, Verbatim Record, page 33, para 17

<sup>568</sup> Ibid 4 March 2014, Oral Proceedings, Verbatim Record, page 32-33, paras 26, 29, 30

<sup>569</sup> Ibid 4 March 2014, Oral Proceedings, Verbatim Record, page 39-40, para 38

<sup>570</sup> The Court has been criticised for demonstrating a ‘timid readiness to accept these accounts and go no further – even when these sources do not purport to resolve the actual points at issue in this case’, see; Alvarez.

<sup>571</sup> *ibid* FN 2 referencing the Declaration of Judge Burgenthal in *The Wall Advisory Opinion*

<sup>572</sup> Alvarez, ‘Burdens of Proof’

due to insufficient evidence.

## 2.2. Group 2 - Problems Arising from Insufficient Evidence, Specifically Non-Appearance

As stated above, the second group of cases which expose the Court's current approach to fact-finding as not fit for purpose are those in which there is insufficient evidence before the Court for it to base a decision upon. A prominent example of a situation that leads to a paucity of evidence is non-appearance of one kind or another, be it complete or partial.<sup>573</sup> Non-appearance can be defined as the situation in which one party to a case fails to appear before the Court, to submit a counter-memorial or withdraws from proceedings at any stage before the final judgment is rendered. Non-appearance is explicitly addressed in Article 53 of the Court's Statute, which states:

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other Party may call upon the Court to decide in favour of its claim.
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 53 of the Court's Statute is a near word-for-word reproduction of the corresponding provision of the Statute of the PCIJ.<sup>574</sup> It would appear that the drafters of the PCIJ Statute deliberately went further than most domestic legal systems in providing a specific duty for the Court to satisfy itself not only that it had jurisdiction but also that the claim was well founded in fact and law before handing down a judgment.<sup>575</sup> Applying this underlying rationale to the corresponding provision in the statute of the ICJ, Article 53 of the Statute accordingly seeks to protect the due process rights of the non-appearing party,<sup>576</sup> and at the same time heavily implies that there is no duty to appear before the Court beyond the obligation to adhere to the Court's decisions under Articles 59 and 60 of the Statute and Article 94(1) of the Charter.<sup>577</sup>

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<sup>573</sup> For more detailed statistics on non-appearance see; Jonathan I Charney, 'Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance' *The International Court of Justice at a Crossroads*, ed Lori F Damrosch 288

<sup>574</sup> See Article 53 Statute of the Permanent Court of International Justice

<sup>575</sup> Hugh WA Thirlway, *Non-appearance before the International Court of Justice* (Cambridge University Press 1985) 123

<sup>576</sup> *Nicaragua Case*, 28 and para 24; Mosk 86; Jerome B. Elkind, *Non-appearance before the International Court of Justice : functional and comparative analysis* (M. Nijhoff 1984) 100

<sup>577</sup> On this debate see Thirlway; Elkind; HWA Thirlway, 'Normative Surrender and the Duty to Appear before the International Court of Justice: A Reply' 11 *Mich J Int'l L* 912; see also fourth paragraph of resolution of Institut de Droit International on non-appearing States – 1991, Basle

Nevertheless, Article 53 permits the Court, once it has established that it has jurisdiction, to decide the case in the absence of the non-appearing party, the rationale being that non-appearance by one party should not obstruct the proper administration of justice.

In relation to the Article 53 duty to ensure that the case is well founded in law, the operation of the principle *jura novit curia* provides that the Court is presumed to know the law. The operation of this principle, coupled with the fact that the Court is not confined to only consider the arguments made by the parties,<sup>578</sup> make the duty to ensure the case is well founded in law less onerous than the duty to ensure it is well founded in fact.<sup>579</sup>

The situation is not as straightforward in relation to the facts since Article 53 obliges the Court to perform a delicate balancing act. On the one hand, in seeking to ensure the case is decided on a solid factual basis, the Court may in certain cases feel obliged to undertake steps to obtain information or adapt its approach to the fact-finding process. On the other hand, however, it is clear that the Court must not step in to take the place of the non-appearing state by conducting fact-finding and making legal arguments on its behalf. To do so would place a considerable burden on the Court and provide an incentive for non-appearance to states.<sup>580</sup>

On the face of it, it would appear that Article 53 obliges the Court to take some proactive steps with regards to fact-finding in cases of non-appearance to ensure that it is satisfied that the claim is well founded in fact and law. It is important to emphasise at the outset that the following sections do not consider Article 53 problematic in itself – it is not the provision but rather the way the Court has applied the provision in practice which is problematic. What is troublesome is the effect produced by the combination of non-appearance and the Court's reactive approach in such cases. As we shall see in the following sections, faced with a lopsided evidentiary record and traditionally taking a reactive approach to the facts, the Court has made conflicting statements on the standard that must be achieved in order to fulfil its

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<sup>578</sup> *Nuclear Tests Case*, at 31-32, at 263-64; *Nicaragua Case*, 30 at 25

<sup>579</sup> As the Court stated in the *Nicaragua* case, '...the absence of one party has less impact'. The Court's duty to know the law was addressed by the Court in the *Fisheries Jurisdiction* case in which the Court stated that it must 'consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute...the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court'. *Fisheries Jurisdiction Case Fisheries Jurisdiction (United Kingdom v Iceland), Merits, Judgment, ICJ Reports 1974*, p3, 13, 17 at 9; see Stanimir A Alexandrov, 'Non-appearance before the International Court of Justice' 33 *Colum J Transnat'l L* 41, 59; see also; *Nicaragua Case*, para 29

<sup>580</sup> H. Von Mangoldt and A. Zimmermann, 'Article 53' in B. Simma and others (eds), *The Statute of the International Court of Justice* (1 edn, OUP 2006) 1346

Article 53 duty. Ultimately, doubt is expressed as to whether the Court can in fact ever fulfil Article 53 in cases of non-appearance whilst maintaining its current reactive approach to fact-finding.

To elaborate, uncertainty surrounds Article 53 with regard to the exact standard to which the Court should satisfy itself.<sup>581</sup> In cases of non-appearance, does Article 53 require the Court to make its own independent verification of the facts or ‘...may the Court, in the absence of challenge by the absent State, take the facts to be as they have been presented, and concentrate its attention on the legal deductions made therefrom by the active State?’<sup>582</sup> This is a question that the Court has struggled to answer in the past. At different times the Court seems to have deviated between two main positions: (i) that non-appearance places a greater fact-finding burden on the Court to establish a sound factual foundation, and the contrary position (ii) that non-appearance does not affect the Court’s approach to fact-finding and the Court need not necessarily take additional fact-finding action to fulfil its Article 53 duty. However, as will be shown in the following sections, in cases of non-appearance the Court has in fact struggled to provide the most basic guarantees that the case is well founded in fact.

### 2.2.1. Cases of Non-Appearance

Non-appearance is a not-uncommon occurrence in the history of the case law of the Court.<sup>583</sup> In particular in the thirty or so years between the establishment of the ICJ and the *Nicaragua* case there were nine cases of non-appearance.<sup>584</sup> A brief survey of these cases highlights that

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<sup>581</sup> Thirlway 123; In 1981 Sir Gerald Fitzmaurice argued that a *prima facie* case is enough to fulfil the Court’s Article 53(2) obligations, Gerald Fitzmaurice, ‘The Problem of the ‘Non-Appearing’ Defendant Government’ 51 British Yearbook of International Law 89, 113; Fitzmaurice argues in favour of taking a tougher line against non-appearing states, presuming validity of certain instruments as long as they were not contradicted, for example, arguing that in doing so ‘the whole non-appearance technique would be stopped dead in its tracks – or at least it would no longer pay, would no longer serve any real purpose’. See also ‘suffisamment fondée’ or ‘fondée’ - see *Procès-verbaux* of the Proceedings of the Advisory Committee of Jurists (1920)

<sup>582</sup> Thirlway suggests that judges used to the adversarial system would be more readily prepared to accept that an ostensibly plausible argument not contested by the other party is a reliable basis upon which to make a judgment, whilst judges from inquisitorial backgrounds would be ‘more haunted by the fear that the truth may lie elsewhere’; Thirlway 123

<sup>583</sup> The problem of non-appearance was seen as so persistent so as to warrant a resolution by the Institut de Droit International which stated that non-appearance before the Court tends to ‘hinder the conduct of the proceedings, and may affect the good administration of justice’ and creates difficulties for the other parties and for the Court in particular in relation to ‘the acquisition by the Court of knowledge of facts which may be relevant for the Court’s pronouncements on interim measures, preliminary objections or the merits’; *Institut de Droit International, 1991, Basel*, Rapporteur: Arrangio-Ruiz, preamble

<sup>584</sup> In two, *Anglo-Iranian Oil Company (Anglo-Iranian Oil Co. Case)* and *Aegean Sea Continental Shelf, (Aegean Sea Continental Shelf Case)* the Court dismissed the case for lack of jurisdiction. Similarly *Nottebohm (Nottebohm Case)* was dismissed for lack of standing. In the *Nuclear Tests Cases* the Court relied on

the Court's traditionally reactive approach to fact-finding has caused it considerable difficulty in cases of non-appearance.

The Court's statements in the final phase of the *Corfu Channel* case after the withdrawal of Albania have had a profound influence on how it has approached the issue of non-appearance in cases before it over the years. In *Corfu Channel* the Court stated that Article 53 only obliges the Court to:

‘...consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice.’<sup>585</sup>

As such, the Court seemed to suggest that in cases of non-appearance it was unproblematic for the Court to satisfy itself the submissions are well founded on the basis of the facts put before it by the appearing party.

In *Nuclear Tests*, however, the Court appeared to suggest that in cases of non-appearance there is an additional burden on the Court to fulfil its Article 53 duty, stating that in such cases it is ‘especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts’.<sup>586</sup> Despite stating that it was especially incumbent on the Court to satisfy itself of the facts in such cases, the Court stuck to its reactive approach and did not undertake any of its own fact-finding. Instead, the Court went to ‘curious lengths’ to include statements of French officials in the press and elsewhere that had not been put before the Court.<sup>587</sup> This illustrates that the approach of the Court at this time in attempting to ensure that it could fulfil its Article 53 duty was to, as far as it could, incorporate irregular procedural communications such as the statements of French officials in this case, rather than conducting its own fact-finding.

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statements made by French officials who had stated that they would be moving the tests underground, and held that this was sufficient to end the dispute (*Nuclear Tests Case 1974; Nuclear Tests Case*, *The Trial of the Pakistani Prisoners of War* case was discontinued by mutual agreement (*Trial of Pakistani Prisoners of War; Order of 15 December 1973, ICJ Reports 1973*, p 347). Of the nine cases only four reached the merits stage: *Corfu Channel*, (*Corfu Channel Case, Fisheries Jurisdiction Case, Tehran Hostages Case* and *Nicaragua Case*

<sup>585</sup> *Corfu Channel Case*, 248; *Corfu Channel Case, Judgment of December 15th, [Compensation] 1949: ICJ Reports 1949*, p 244

<sup>586</sup> *Nuclear Tests Case*, p. 253, 263 (para 31); p. 457, 468 (para 32)

<sup>587</sup> Ian Sinclair, ‘Some procedural aspects of recent international litigation’ 30 *Int'l & Comp LQ* 338, 349; Foreword by Judge Jessup in Sandifer, at x

Similarly, in light of the non-appearance of Turkey in the *Aegean Sea Continental Shelf* case the Court relied on a number of informal submissions to substantiate its arguments instead of conducting its own fact-finding.<sup>588</sup> Again, the Court's reluctance to move away from its reactive approach and conduct its own fact-finding meant that its only option was to cast its net wider to incorporate informal submissions or public sources of evidence in an attempt to fulfil its Article 53 duty,<sup>589</sup> insisting that such practice was necessitated by Article 53(2).<sup>590</sup>

In the *Tehran Hostages* case the issue of Article 53 arose once more.<sup>591</sup> Again the Court stuck to its traditional approach and avoided conducting its own investigations into the facts.<sup>592</sup> However, the Court's interpretation of its Article 53 duty in this way saw it run into trouble as the US complained that due to events inside Iran it had been unable to access the information upon which it sought to rely.<sup>593</sup> In response, in seeking to prevent the objections of the US that the Court did not have sufficient factual information regarding the treatment of hostages from derailing the case, the Court argued that the 'essential facts' of the case were public knowledge and that '...the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case'.<sup>594</sup>

This position is open to criticism. Not only did the Court's reactive approach and reluctance to undertake its own fact-finding force it to rely on public information, the Court's approach raises the question of whether it is '...legally permissible to rely on the silence of the absent party, in view of the clear intention of the draftsmen of the Statute that non-appearance should not be taken as an admission of the other party's case...'.<sup>595</sup> As such, placing reliance on the absence of contradiction by a non-appearing party would 'constitute exactly what Article 53 was intended to forbid: the treatment of non-participation in the proceedings as in itself an

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<sup>588</sup> As Fry has stated '[n]ot only did this put Greece in the awkward, if not unfair, position of having to respond on short notice, but it also put Greece in the position of having to respond to a party's arguments where it did not have the benefit of receiving a complete picture of its adversary's arguments in a formal Counter-Memorial, as required by Article 45 of the ICJ Rules of Court'; James D Fry, 'Non-Participation in the International Court of Justice Revisited: Change or Plus Ça Change' 49 Colum J Transnat'l L 35, 64

<sup>589</sup> On this see the famous comments of O'Connell in oral pleadings in *Aegean Sea*: '...while Article 53, by implication, requires that the Court be adequately informed, this can *ex hypothesi* never formally be achieved in the case of a default, although a default is precisely what the Article is supposed to provide for'; Fitzmaurice 114

<sup>590</sup> *Aegean Sea Continental Shelf Case*, p. 3, 20 (para 47); *Tehran Hostages Case*, p. 3, 18 (para 33)

<sup>591</sup> Sinclair 351

<sup>592</sup> *Corfu Channel Case*, p. 248; Thirlway 127

<sup>593</sup> *Tehran Hostages Case*, p. 9, para 11

<sup>594</sup> *Ibid*, p. 10, para 13, *ibid*

<sup>595</sup> Von Mangoldt and Zimmermann 1348; Thirlway 128

implied admission<sup>596</sup> and would threaten the equality of the parties before the Court.<sup>597</sup>

The *Nicaragua* case was also significant in terms of non-appearance. Whilst Judge Sir Robert Jennings noted in his dissenting opinion that the withdrawal of the US was inevitably prejudicial to the US itself,<sup>598</sup> it is clear that the withdrawal also damaged the Court in preventing it from adopting its usual reactive approach to the facts. The non-appearance of the US posed a number of considerable difficulties for the Court's reactive approach to fact-finding. Most significantly, the Court was deprived of the oral and documentary evidence of the US, meaning that it had a necessarily lopsided evidentiary record upon which to draw upon<sup>599</sup> and consequently found itself 'required to deal with this extraordinarily complex evidence entirely on its own...'<sup>600</sup> The withdrawal of the US meant that witnesses put forward by Nicaragua were only examined by its own counsel and were not tested by cross-examination by counsel for the US. In this respect, the role of Judge Schwebel was particularly significant as he took it upon himself to conduct an at times painstaking examination of counsel and witnesses himself.<sup>601</sup>

As one commentator stated, it is interesting to note that the Court was 'ill-served by its natural proclivity to say that the outcome would be the same regardless of whose versions of the facts were true',<sup>602</sup> being obliged to theorise more than it normally would have done in order to justify its factual determinations.<sup>603</sup> As such, and as we have seen in relation to earlier cases, the non-appearance of one party, in this case the US, can have a significant impact on the Court due to its traditionally reactive approach to fact-finding. Despite the non-appearance of the US, however, the Court was adamant that it '...must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing

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<sup>596</sup> Thirlway

<sup>597</sup> As the Court stated in *Nicaragua Case*, para 31, each party must be granted 'a fair and equal opportunity...to comment on its opponent's contentions' including in relation to the facts; see also; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, (*Nigeria v. Cameroon*), Judgment, I.C.J. Reports 1999, p. 31, p. 39, para 15

<sup>598</sup> *Nicaragua Case*, Dissenting Opinion of Judge Sir Robert Jennings, at 544

<sup>599</sup> Ibid, para 67 *ibid*, Dissenting Opinion of Judge Sir Robert Jennings, at 528

<sup>600</sup> Highet, 'Evidence, the Court, and the Nicaragua Case'

<sup>601</sup> See *Nicaragua Case*, see *Dissenting Opinion of Judge Schwebel*; see also; Highet, 'Evidence, the Court, and the Nicaragua Case' 28

<sup>602</sup> Alvarez; Franck 29

<sup>603</sup> Highet, 'Evidence, the Court, and the Nicaragua Case' 4

evidence'.<sup>604</sup> Highet described the Court as being caught in a vicious circle;

‘the Court’s job under Article 53 was made almost impossible by the complexity of the facts, just as the ability of the Court to deal with those complex facts was rendered almost impossible by the need for the Court to proceed under its Statute.’<sup>605</sup>

Consequently, the Court’s factual findings in *Nicaragua* and the interpretation of its Article 53 duty came in for considerable criticism.<sup>606</sup> For instance, Reisman argued that the Court did not in fact satisfy its Article 53 duty but rather lowered ‘the burden of Article 53 by selectively quoting *Corfu Channel*, citing only one-half of the relevant sentences in the *Corfu Channel* case and, in so doing, created the impression that *Corfu* was holding something it did not hold’.<sup>607</sup> Reisman argued that by leaving out the sentence that ‘[i]t is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded’<sup>608</sup> – the Court misconstrued *Corfu Channel* to avoid the necessity of resorting to ‘such methods’ to which the Court in *Corfu Channel* referred.

More generally, such cases raise doubts as to whether the Court can ever fulfil its Article 53 duty under its current reactive approach to fact-finding. These doubts resurfaced again after the *Nicaragua* case as instances of non-appearance continued to occur.<sup>609</sup> The most significant case of non-appearance in recent times is *The Wall* advisory opinion.<sup>610</sup> In the course of proceedings, Israel’s failure to participate again placed considerable strain on the Court’s approach to fact-finding.<sup>611</sup>

Whilst the deft phrasing of the question asked of the Court by the General Assembly meant that Palestine did not have to ‘substantiate its claim nor meet a burden of proof, whether positive or negative, thus removing all burdens that ought to have been on the supposed

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<sup>604</sup> *Nicaragua Case*, para 29

<sup>605</sup> Highet, ‘Evidence, the Court, and the Nicaragua Case’ 5

<sup>606</sup> See Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, Jan. 18, 1985, 24 I.L.M. 246 (1985)

<sup>607</sup> W. Michael Reisman, ‘Respecting One’s Own Jurisprudence: A Plea to the International Court of Justice’ [American Society of International Law] 83 *The American Journal of International Law* 312, 313

<sup>608</sup> *Corfu Channel Case* 248

<sup>609</sup> See for example *Qatar v Bahrain* in which Qatar was put in a difficult position given that Bahrain did not submit a Counter-Memorial; *Qatar v. Bahrain, Judgment*

<sup>610</sup> *The Wall Advisory Opinion*

<sup>611</sup> *Ibid*



applicant’,<sup>612</sup> the refusal of Israel to participate in the proceedings meant that the Court nonetheless was faced with familiar difficulties of a lopsided factual record. The Court sought to fill the evidentiary gap left by Israel by relying on the Fact-Finding Report of the UN Secretary-General referred to in the request for the advisory opinion.<sup>613</sup> However, the Court was nonetheless faced with the same difficulties as in any other case of non-appearance, namely ‘...a serious problem with regard to its factual record’.<sup>614</sup> And indeed the facts were crucial in the case, despite the legal nature of the advisory opinion sought, in determining whether Israel’s construction of the wall in occupied Palestinian territory was contrary to international law.

Judge Burgenthal in his dissenting opinion went so far as to argue that the Court did not have sufficient facts upon which to base its decision, and that the Court ought to have made this explicit,<sup>615</sup> going on to say that ‘Israel’s non-participation, coupled with the ill-suited format of advisory proceedings, meant that the court would be hard pressed to develop a factual record sufficient to enable the court to properly answer the question’.<sup>616</sup> In addition, the Court’s opinion was criticised for not taking into account legal justifications that could have been advanced by Israel<sup>617</sup> and for overreliance on abstract legal principles rather than the facts<sup>618</sup> – both arguably a consequence of the Court’s lopsided factual record. Similarly, Judge Owada in his separate opinion expressed concern about whether the Court’s fact-finding approach could enable it to properly assess whether the wall in question was necessary to obtain Israel’s security objectives.<sup>619</sup> Judge Owada lamented that the Court simply expressed a ‘lack of conviction’ that the wall was necessary based on ‘the material before it’ rather than making an ‘in-depth effort...*proprio motu*, to ascertain the validity of this argument...’<sup>620</sup> Such expressions of concern from judges in cases of non-appearance

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<sup>612</sup> See General Assembly Resolution A/RES/ES-10/14 (A/ES-10/L.6) 8 December 2004; Fry 65

<sup>613</sup> See Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, A/E-10/248, 24 November 2003

<sup>614</sup> Fry 65

<sup>615</sup> Ibid; see *WHO Advisory Opinion, para 95, see Dissenting Opinion of Judge Burgenthal at para 10 The Wall Advisory Opinion*, where the Court stated that ‘The Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance’

<sup>616</sup> Fry 65

<sup>617</sup> See the Submissions of the United States of America and United Kingdom of Great Britain and Northern Ireland, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=1>

<sup>618</sup> I. Scobbie, ‘Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice’s Wall Advisory Opinion’ 5 *Chinese Journal of International Law* 269 at FN 111

<sup>619</sup> *The Wall Advisory Opinion, dissenting opinion of Judge Owada at para 23*

<sup>620</sup> Ibid, dissenting opinion of Judge Owada at para 30

bring into sharp focus the problems facing the Court as a result of its current reactive approach to fact-finding.

### *2.2.2. The Court's Role in Cases of Non-Appearance and Resulting Difficulties*

As such, it is argued that the Court's reactive approach to fact-finding significantly impedes the Court in its attempts to fulfil its Article 53 duty. Of course the negative impact on the workings of the Court due to non-appearance are hard to quantify in exact terms but the practice of the Court shows that in cases of non-appearance, where the Court has a lopsided evidentiary record, the Court has historically sought to rely to a greater extent on public information and more often resorted to drawing inferences,<sup>621</sup> rather than conducting its own fact-finding.<sup>622</sup> However, this approach has only aided the Court to a limited extent and in practice it has continued to experience difficulties. The limitations of a more proactive approach are examined in greater detail in Chapter 5 at 5.5., but for now it can be said that cases of non-appearance are particularly problematic for the Court which is likely to always encounter significant difficulties faced with the non-cooperation of parties to cases that come before it.

It would appear that a potentially high profile instance of non-appearance looms on the horizon.<sup>623</sup> On 22 January 2013 the Republic of the Philippines instituted arbitral proceedings against the People's Republic of China under Annex VII of UNCLOS.<sup>624</sup> The Philippines

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<sup>621</sup> *Tehran Hostages Case, para 12-13; Nuclear Tests Case 1974, para 40-41*

<sup>622</sup> Fry 64

<sup>623</sup> For detailed historical background to the dispute and thorough assessment of the law of the sea issues involved see Zhiguo Gao and Bing Bing Jia, 'The Nine-Dash Line in the South China Sea: History, Status, and Implications' [American Society of International Law] 107 *The American Journal of International Law* 98 and Florian Dupuy and Pierre-Marie Dupuy, 'A Legal Analysis of China's Historic Rights Claim in the South China Sea' [American Society of International Law] 107 *The American Journal of International Law* 124; and Robert Beckman, 'The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea' [American Society of International Law] 107 *The American Journal of International Law* 142

<sup>624</sup> Under Article 3(b) of Annex VII the Notification and Statement of Claim included the appointment of an arbitrator by the Philippines, namely Rüdger Wolfrum; Article 3(c) provides that the other party will appoint one member of the arbitral tribunal no later than thirty days after the receipt of the Notification and Statement of Claim – and that if notification is not made within that period of time the party instituting the claim may request that the appointment be made by the President of the Tribunal. The Philippines subsequently did so on 22 February 2013.; See ITLOS/Press 191, 25 April 2013, Arbitrators Appointed in the Arbitral Proceedings Instituted by the Republic of the Philippines against the People's Republic of China; On 25 April 2013 the International Tribunal for the Law of the Sea announced that the President of ITLOS had appointed three arbitrators to serve as members of the arbitral tribunal; Pierre Cot (France), Chris Pinto (Sri Lanka), Alfred Soons (the Netherlands); and appointed Chris Pinto as President of the arbitral tribunal. Note that on 24 June 2013 Chris Pinto stepped down as from the arbitral panel and was replaced by Thomas Mensah as

specifically limited its claim to matters ‘other than those on territorial sovereignty, boundary delimitation or historic title’,<sup>625</sup> taking into account China’s 1996 Declaration under Article 298 of UNCLOS which excluded these issues from compulsory dispute settlement under the Convention.<sup>626</sup> Nevertheless, on 19 February 2013 China rejected the Philippines’ Notification and indicated it would take no part in the proceedings.<sup>627</sup>

Some commentators have argued that it is in China’s best interest to either enter into negotiations with the Philippines or participate in the arbitral proceedings or risk being the subject of an unfavourable award.<sup>628</sup> Whether or not this is the case it would appear unlikely that China will participate, and that proceedings will continue in its absence.<sup>629</sup> All this is to say that the issue of non-appearance is not merely historical and that given its problematic handling of the facts in such cases, the fact that the Court may at any time find itself face with an instance of non-appearance should be of great concern.

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both member and president of the tribunal – see ITLOS/Press 197, 24 June 2013, New Arbitrator and President Appointed in Arbitral Proceedings Instituted by the Republic of the Philippines against the People’s Republic of China

<sup>625</sup> See Robert Beckman, ‘The Philippines v. China Case and the South China Sea Disputes’ Asia Society, LKY SPP Conference, South China Sea: Central to Asia-Pacific Peace and Security, New York, 13-15 Mar 2013: Central for International Law accessed 10 September 2013

<sup>626</sup> Article 298(1) UNCLOS

<sup>627</sup> Jawad Ahmad, ‘The *Indus Waters Kishenganga Arbitration* and State-to-State Disputes’ (2013) 29 *Arbitration International* 507, 534

<sup>628</sup> *Ibid*

<sup>629</sup> Beckman, ‘The Philippines v. China Case and the South China Sea Disputes’; Similarly, at the time of writing there is some suggestion that Japan may bring its long-running dispute with China over the Senkaku-Diaoyu islands in the East China Sea before an Annex VII UNCLOS arbitral tribunal; Ahmad 535

### 2.3. Chapter 2 Summary – Criticisms of the Court Warranted

This chapter has attempted to set out in a systematic manner the main criticisms of the Court's current reactive approach to fact-finding. These criticisms were divided into two main groups: (i) those relating to abundant, particularly complex or technical facts and (ii) those relating to a lack of evidence before the Court. In relation to the first group of criticisms, it was argued that the Court's reactive approach to fact-finding in cases which involve 'highly complex, factually intensive inquiries requiring the application of particular forms of expertise outside the ken of respective adjudicators' can be a recipe for an unsure factual foundation upon which to make legal judgments.<sup>630</sup> The Court's approach to expert evidence and use of *experts fantômes*, cross-examination, and over-reliance on UN Commissions of Inquiry all have problematic aspects which undermine the Court's fact-finding process.

In relation to the second group of criticisms, it was argued that in cases where a party fails to appear before the Court, its reactive approach to fact-finding is found wanting due to the fact it only has the evidence of one party upon which to make its findings of fact. Without conducting its own investigations into the factual background of the case at hand the Court's reactive approach, which makes the court dependent on states to submit the facts to it, is a handicap for the Court. These criticisms having been set out, the next chapter seeks to look to other inter-state courts and tribunals in order to assess how they approach the problems the ICJ currently faces and asks whether the ICJ can learn anything from these other courts and tribunals in order to remedy some of the weaknesses set out in this Chapter.

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<sup>630</sup> Alvarez 87

*Chapter 3. The Practice of Other International Courts and Tribunals*  
*Or: How Other Tribunals Learned to Stop Reacting and Love Fact-Finding*

*Introduction*

The preceding chapter set out a number of recent criticisms of the ICJ's current reactive approach to fact-finding. It was argued that the Court's current reactive approach to fact-finding is not fit for purpose both (i) where there are abundant, particularly complex or technical facts, since the Court's reluctance to appoint experts or conduct cross-examination impede the Court in its attempts to effectively assess the evidence presented and (ii) where there is a paucity of facts, since the Court struggles to fulfil its Article 53 ICJ Statute obligation to satisfy itself the case is sound in fact and in law.

It might be said that this much is uncontroversial. As such, the thesis seeks to take the next step and explore whether we can envisage an approach that would allow the Court to more effectively conduct fact-finding. In doing so, Chapter 3 takes advantage of the much-discussed proliferation of international courts and tribunals and draws upon the substantial body of practice in this area.<sup>631</sup> The ICJ itself has 'shown increased openness to drawing insights from other international courts and tribunals' in recent judgments and it is argued that the practice of other courts and tribunals suggests a number of procedural mechanisms that the Court could adopt in order to, in the words of Judge Donoghue in the recent *Maritime Dispute (Peru v. Chile)* case, '...further enrich its practice and jurisprudence'.<sup>632</sup>

By way of clarification, it should be stated that due to the fact that the ICJ deals exclusively with inter-state cases, the focus of Chapter 3 is likewise limited to inter-state adjudicatory bodies. Of course, various other (less exclusively state-centric) areas of international law such as investment arbitration and human rights law regularly deal with interesting and important issues relating to fact-finding. However, the decision was taken to focus exclusively on inter-state cases in order to ensure the most meaningful comparisons possible. For example, it was felt that drawing conclusions from a dispute between an individual and a state, such as a case before the European Court of Human Rights, would be of dubious utility as a comparison, owing to the fact that the courts seek to achieve such different goals, deal with parties of a diverse nature and apply significantly different law and procedure.

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<sup>631</sup> For a thorough overview of the proliferation of international courts and tribunals see; Cesare P.R. Romano, 'A Taxonomy of International Rule of Law Institutions' 2 *Journal of International Dispute Settlement* 241

<sup>632</sup> *Maritime Dispute (Peru v Chile)*, 27 January 2014, *Judgement, Dissenting Opinion of Judge Donoghue*

Consequently, Chapter 3 is limited to a survey of the World Trade Organization (WTO) adjudicative bodies and recent inter-state arbitrations. As we will see in the following sections, this survey reveals that these adjudicatory bodies generally take a more proactive approach to fact-finding. Chapter 3 sets out the main noteworthy aspects of these more proactive tribunals, notably the most popular international tribunals in terms of case load at the moment. Doing so is a necessary first step before Chapter 4 will ask whether the adoption of similarly proactive approach by the ICJ could potentially help to remedy some of the fact-finding deficiencies the Court has been criticised for in recent times.

*(i) Fact-Finding and Fact-Assessment before the Adjudicative Bodies of the WTO*

This section sets out to examine the handling of issues of fact-finding and fact-assessment in cases before the Panels and Appellate Body (AB) of the WTO, often referred to as representing ‘best practice’ in terms of international judicial fact-finding.<sup>633</sup> A survey of the practice of the Panels indicates that they take a broadly reactive approach to evidence. Panels have not fully utilised the relatively broad statutory fact-finding powers given to them by the DSU. Instead, Panels have demonstrated a preference to rely on the facts as presented to them by the parties. However, on the whole it can be said that Panels and the AB take play a more active fact-finding role than the ICJ. This is so due to a number of interesting aspects of the Panels and AB’s approach to evidence that are examined *infra* in detail. These include the use of expert evidence, a distinctive burden of proof and the drawing of adverse inferences amongst others. In examining these issues this section will first examine the situation before the Panels in Part 1 before moving on to consider issues of fact and law that have arisen before the AB in Part 2. Part 3 examines a number of crosscutting evidentiary issues that apply to both Panels and the AB.

*(ii) Introduction*

The WTO Dispute Settlement Body (DSB) was created during the Uruguay Round to deal with disputes that arose out of the operation of the Agreements in practice. The DSB is made up of representatives of every WTO Member and governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The DSB is endowed with the competence to make rulings and recommendations, establish Panels, oversee the Appellate Body, adopt Panel and AB reports and even impose sanctions for non-compliance.<sup>634</sup> Reports of Panels and the AB are adopted by the DSB automatically unless there is consensus to the contrary.<sup>635</sup>

Under Article 3.2 DSU Panels and the AB are given the (relatively narrow) mandate of preserving the rights and obligations of WTO Members and of clarifying the provisions of the

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<sup>633</sup> *Pulp Mills Case, Dissenting Opinion of Judges Al-Khasawneh and Simma, para 16*; Foster 28

<sup>634</sup> See Articles 21 and 22 of the DSU regarding surveillance of implementation of recommendations and rulings and compensation and the suspension of concessions respectively

<sup>635</sup> In accordance with the so-called ‘negative consensus’ principle, see; P.C. Mavroidis, George A. Bermann and Mark Wu (eds), *The law of the World Trade Organization (WTO) : documents, cases & analysis* (Series: American casebook series, Thomson/West 2010)

Agreements.<sup>636</sup> This can be contrasted with the broader mandate of the ICJ which also contains the task of progressive development of international law.<sup>637</sup> Any Member can request the establishment of a Panel to adjudicate on a dispute with another WTO Member under the Agreements. The following section seeks to examine how the Panels of the WTO deal with issues of fact-finding in cases that have come before them. In turning to consider how the Panels have dealt with issues of fact-finding and fact-assessment in cases that have come before them, it is necessary to first examine the relevant evidentiary practice and statutory provisions as set out in the Dispute Settlement Understanding (DSU). The relevant AB statutory provisions will be examined in detail below in section 3.1.3.

### *3.1. Part 1 - Evidence at the WTO - The Panels*

#### *General Provisions*

As with the ICJ's statutory fact-finding powers (examined in detail in Chapter 1), before the specific fact-finding provisions of the DSU can be examined, it is first of all necessary to consider a number of general provisions which apply in all cases before the WTO adjudicative bodies.

#### *(i) Article 12.7 DSU*

Article 12.7 DSU provides that 'the report of a Panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes'. In doing so, a duty to respect due process and provide logical and transparent reasoning behind both the establishment of the facts and the law is imposed upon Panels. No Panel has yet been censured for failing to meet the Article 12.7 duty although the AB has criticised Panels in the past for a lack of transparency such as in in *US- Upland Cotton* in which the Appellate Body stated that the Panel could have provided a more detailed explanation of its analysis of the complex facts.<sup>638</sup> However it should be noted

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<sup>636</sup> D. Steger, 'Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience' *The WTO and NAFTA Experience* (October 26, 2011) European Integration and International Coordination: Studies in Honour of Claus-Dieter Ehlermann 419, 423

<sup>637</sup> R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 202; see C. J. Tams and J. Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2013)

<sup>638</sup> Appellate Body Report, *US – Subsidies on Upland Cotton*, WT/DS267/AB/RW, 20 June 2008 para 448



that there are limits to transparency such as considerations of confidentiality.<sup>639</sup>

(ii) *Article 11 DSU*

Article 11 DSU states that a Panel must ‘make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements...’ As such, guided by the procedural provisions set out in Article 12 and Appendix 3<sup>640</sup> each and every Panel is required to assess issues of both fact and law in cases that come before it in order to establish a solid factual basis upon which to make legal determinations.<sup>641</sup>

What exactly does the Article 11 DSU duty to provide an objective assessment of the facts entail? Although the wording of Article 11 could potentially be interpreted in such a way as to provide the Panels with a broad mandate to carry out fact-finding activities in order to make an objective assessment of the facts, in reality the AB has taken a limited view of the duty imposed on the Panels by Article 11.<sup>642</sup> Rather than justifying a broad fact-finding mandate Article 11 has been interpreted to mean simply that the Panels are required to observe due process considerations of conclusion.<sup>643</sup>

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<sup>639</sup> The DSU makes all dispute settlement proceedings confidential including written and oral submissions and although it does not comprehensively set out procedural rules for the treatment of confidential information in the course of proceedings. In relation to information that a party claims is confidential, the Panel in *Indonesia- Autos* stated that parties may not ‘invoke confidentiality as a basis for their failure to submit the positive evidence required, see; *Indonesia- Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, 2 July 1998 at paras. 14.235; see also *Turkey- Measures Affecting the Importation of Rice*, Panel Report, WT/DS334/R, 21 September 2007; Information not in the public domain by virtue of business confidentiality or government privilege frequently comes before panels and the AB; and this is recognised by the WTO Agreements; See; Article 12.4 SCM Agreement, Article 6.5 Anti-Dumping Agreement, Article 3.2 Agreement on Safeguards

<sup>640</sup> The power of the panel to intervene in the adjudicative process before it is provided for by Article 12.1 which gives the panel a broad power to adopt Special Working Procedures for cases that come before it after consultation with the parties. Articles 12.4 and 12.5 allow the panel control over the timeframe and deadlines of the proceedings.

<sup>641</sup> James Cameron and Stephen J. Orava, ‘GATT/WTO Panels Between Recording and Finding Facts: Issues of Due Process, Evidence, Burden of Proof, and Standard of Review in GATT/WTO Dispute Settlement’ in F. Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 226

<sup>642</sup> M. Bronckers and N. McNelis, ‘Fact and Law in Pleadings Before the WTO Appellate Body’ in F. Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 321; see *Australia – Measures Affecting Importation of Salmon – Appellate Body Report – WT/DS18/AB/R*, 20 October 1998, para 261 in which the AB had limited itself to more of a fact-assessment role rather than fact-finding – considering the ‘credibility’ and ‘weight’ of evidence submitted to the panels by the parties – and that it was not for the AB to intervene and second-guess the panels

<sup>643</sup> As Gabrielle Z. Marceau and Jennifer K. Hawkins, ‘Experts in WTO Dispute Settlement’ 3 *Journal of International Dispute Settlement* 493, 494 state; Article 11 ‘...requires that panels objectively assess the

In other words, it would appear that the objective assessment of facts simply requires that the Panel treat the evidence placed before it by the parties objectively and reach a conclusion that logically follows from the evidence produced.<sup>644</sup> Whilst the Panel has complete discretion to decide what evidence to focus on in particular in its analysis,<sup>645</sup> it must always ensure that its ultimate decision is reasoned and grounded in the basis of the evidence submitted by the parties.<sup>646</sup> The principle that decisions follow reasonably and logically from the evidence submitted by the parties is an important limit on the judicial function adjudicators and prevents complete unfettered judicial discretion.<sup>647</sup> Nevertheless, whilst Article 11 has not been interpreted in such a manner as to justify a broad fact-finding duty placed on the Panels, there is little doubt that the Panels possess such powers, as set out in Article 13 DSU and there is an intimate relationship between these two provisions to which we shall return momentarily.<sup>648</sup>

### 3.1.1 Evidentiary Practice Before Panels

#### 3.1.1.1. Evidence Put Before Panels by the Parties

Panels rely to a great extent on the evidence provided by the parties themselves.<sup>649</sup> In this regard, Panels take a reactive approach similar to that of the ICJ, as examined in Chapter 1. Whilst in the case of technical or scientific disputes, as we shall see *infra*, Panels have made regular use of individual experts in relation to technical issues, on the whole they establish the facts upon which their legal determinations are made on the basis of the evidence put before them by the parties without utilising the fact-finding powers the Panels possess.<sup>650</sup> In this regard, by leaving fact-finding to the parties the Panel's assessment of the facts becomes even

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matter so that there are rational bases for their decisions'

<sup>644</sup> M. Matsushita, T.J. Schoenbaum and P.C. Mavroidis, *The World Trade Organization*, vol 127 (Oxford University Press 2006) 128; As the Appellate Body stated in *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Report of the Appellate Body (AB/2002-3), 23 September 2002, WT/DS207/AB/R

<sup>645</sup> See *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at para 156

<sup>646</sup> Articles 12.7, 14.2 DSU; *Grando* 56

<sup>647</sup> *Ibid*, at FN 230; See Mirjan R Damaska, *Evidence Law Adrift*(New Haven: Yale University Press, 1997) at 22

<sup>648</sup> Marceau and Hawkins 494

<sup>649</sup> T. Christoforou, 'WTO Panels in Face of Scientific Uncertainty' in F. Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May 2000) 258

<sup>650</sup> *Ibid*

more important. As such, the general practice is to establish the facts by weighing the submissions of the parties to the dispute before the Panel on the basis of the evidential support for the legal positions defended by one party or the other.<sup>651</sup>

### 3.1.1.2. *Experts Appearing on Behalf of the Parties*

WTO Members appearing before Panels have the right to appoint their own experts to provide evidence in support of their case and they do so in practice. No rules of procedure govern the appointment of individual experts or regulate who can be appointed in terms of expertise.<sup>652</sup> It is perhaps obvious to state that the reports of Panel-appointed individual experts or expert review groups, an issue that we shall return to *infra*, will generally be accorded greater weight as a result of a perception of greater impartiality.<sup>653</sup> Rightly or wrongly, experts appearing on behalf of the parties are often perceived as being ‘hired guns’ – willing to express their expert opinion on a matter in such a way that it most closely accords with the interests of the party by whom he or she has been appointed.<sup>654</sup> It is for this reason that some have advocated that parties ought to endeavour to have the expert in question appointed by the Panel, rather than appointing the expert themselves.<sup>655</sup>

However, whilst Panels may most often establish the facts on the basis of the information put before them by the parties, this evidence put before the Panels ‘should not be understood as the frontiers of truth’.<sup>656</sup> Article 13 DSU is an acknowledgement that there may be information that will not be revealed to the Panels through the adversarial process, for one reason or another,<sup>657</sup> and accordingly provides Panels with the authority to seek information on its own initiative.

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<sup>651</sup> *Ibid*

<sup>652</sup> It is likely that through cross-examination of the expert, any doubts regarding competence would be exposed, see Section 4.3.1. below Pauwelyn 334; further, Marceau & Hawkins have argued that a general practice can be described in this regard; see Marceau and Hawkins 502

<sup>653</sup> Pauwelyn 334

<sup>654</sup> *Ibid*; see also Marceau and Hawkins 505

<sup>655</sup> Pauwelyn 334

<sup>656</sup> Steger 421

<sup>657</sup> Note that Article 13 DSU is contingent on panel informing authorities of Member within which the individual or body is situated

### 3.1.2. WTO Fact-Finding Powers – Traversing the Frontiers of Truth

#### 3.1.2.1. Information that can be gathered by the Panel – Article 13 DSU

Article 13(1) and (2) DSU provide Panels with the power to ‘seek information and technical advice from any individual or body which it deems appropriate’ and ‘seek information from any relevant source and...consult experts to obtain their opinion on certain aspects of the matter’ respectively. Articles 12 and 13 DSU together represent an extremely broad fact-finding power.<sup>658</sup> This ‘significant investigative authority’<sup>659</sup> is comprised of a number of constituent powers such as the power to ask questions, the power to request information and the power to mandate both individual experts and expert review groups.<sup>660</sup> Each falls to be considered in turn.

#### 3.1.2.2. Power to ask questions

Firstly, Article 13 DSU broadly provides for what could be called the ‘central prerogative’ of any international court or tribunal to participate in hearings before it.<sup>661</sup> In practical terms, like Article 49 of the Statute of the ICJ, Article 13 DSU confers on the Panel the ability to become actively involved in proceedings before it by conferring two distinct powers. Firstly, Article 13 gives Panels the right to put questions to the parties in the course of proceedings in order to clarify any aspect of their factual or legal contentions. As such, under Article 13, Panels have the power to ask questions of the parties appearing before them in the course of proceedings –and they regularly do so in practice. Appendix 3, §8 of the DSU confirms that Article 13 DSU is a general judicial power to gather information that has not been put before

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<sup>658</sup> As the AB stated in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998 at para 106, panels have ‘ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts’

<sup>659</sup> Appellate Body Report, *Japan – Measures Affecting Agricultural Products* (Japan – Agricultural Products II) WT/DS76/AB/R, 19 November 1999, para 129

<sup>660</sup> A.W. Shoyer and E.M. Solovy, ‘Process and Procedure of Litigating at the World Trade Organization: A Review of the Work of the Appellate Body, The’ 31 *Law & Pol’y Int’l Bus* 677, 683

<sup>661</sup> The AB described the power to ask questions as ‘part and parcel of the investigative function and duty of panels’ – *US – Continued Existence and Application of Zeroing Methodology*, Appellate Body Report, WT/DS350/AB/R, 19 February 2009, para 260; See also Article 49 ICJ Statute, Article 62, Rules of the International Court of Justice, 1978, ICJ Acts & Docs. 4 (as amended April 14, 2005) Rule 77 ITLOS Rules of Procedure, ICSID Convention Article 43(a); ICSID Arbitration Rules, Rule 34(2); Article 24(3) Rules of Procedure of the Iran-US Claims Tribunal

the Panel by the parties themselves, through asking questions, relevant to the case before it.<sup>662</sup>

Further, Article 13 DSU regulates the obtaining of evidence by the Court itself as opposed to the evidence submitted by the parties as part of their pleadings. In other words, Article 13 sets out a general power of the Court to request further information.

### 3.1.2.3. Power to Request Information Under 13 DSU

Article 13 DSU formally grants Panels a broad power to request information from parties appearing before them. Article 13 provides the Panels with an investigative power that is not limited to scientific or technical evidence or even to expert evidence.<sup>663</sup> In fact, the Appellate Body has held that Panels can seek information from any relevant source it so chooses<sup>664</sup> and that in principle there are no limits to this discretionary authority.<sup>665</sup> In the words of the Appellate Body in *Canada Aircraft*, Panels are ‘vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs’.<sup>666</sup> In practice Panels have made use of this broad fact-finding power contained in Article (1) and (2) although at times reference has merely been made to ‘Article 13’ generally.

On the face of it, it would appear that the use of the term ‘should’ rather than ‘shall’ in Article 13.1 gives requests an exhortatory character rather as opposed to binding legal effect.<sup>667</sup> Consequently, requests for information made of parties under Article would not compel WTO Members to place information before the Panel, and similarly individuals would be under no binding obligation to provide information (nor would Members themselves be obliged to require individuals provide the requested information).<sup>668</sup>

However, despite the fact a straightforward reading of Article 13 does not appear to impose a binding legal obligation on the parties to comply with requests for information there has been

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<sup>662</sup> Mavroidis, Bermann and Wu; Pauwelyn

<sup>663</sup> Pauwelyn

<sup>664</sup> *Argentina, Measures Affecting Imports of Footwear, Apparel and Other Items*, Appellate Body Report, 27 March 1998, WT/DS56/AB/R at para 84

<sup>665</sup> See *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 185

<sup>666</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 192; In this same case the Appellate Body held that a *prima facie* case did not need to be established before a panel had the right to seek information about the allegations; see para 185

<sup>667</sup> P. Lichtenbaum, ‘Procedural Issues in WTO Dispute Resolution’ 19 Mich J Int’l L 1195, 1252

<sup>668</sup> Ibid

some suggestion in recent times that Article 13 nevertheless places a binding duty on parties. For instance, in *Canada-Civilian Aircraft* the AB stated that although the term ‘should’ has an exhortatory character, it could also ‘express a duty or obligation’.<sup>669</sup> This is a significant innovation in terms of fact-finding and one that will be considered in greater detail in Chapter 4 at 4.1.

#### *3.1.2.4. Power of Panels to Mandate Individual Experts and Expert Review Groups Under Article 13 DSU*

Panels have the power to seek expert assistance under Article 13 DSU whenever any issue of fact is raised that requires more extensive expertise than the Panel possesses.<sup>670</sup> The procedure in general (which has been fairly consistent despite some criticism<sup>671</sup>) has been comprised of a three-stage process comprising; the selection of experts; written questions to experts, and meetings with experts.<sup>672</sup> During the written submissions a list of questions is typically submitted to the experts who are asked to submit a written reply. Whilst the parties are closely consulted at every stage of the process their consent is not required for the consultation of experts by the Panels.<sup>673</sup>

The use of expert evidence is an important difference between the practice of the International Court of Justice and the Panels and AB of the WTO. Whilst the practice of the ICJ until very recently has been that experts have appeared as counsel for one of the parties before the Court, in the context of the WTO, (individual) experts are mandated to provide evidence on a regular basis. Expert evidence is information of such a specialised nature that, by virtue of its nature, cannot be effectively gathered or fully appreciated by the Panels themselves. In other

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<sup>669</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 187; see R. Behboodi, ‘Should’ means ‘shall’: A critical analysis of the obligation to submit information under article 13.1 of the DSU in the Canada-Aircraft case’ 3 *Journal of International Economic Law* 563

<sup>670</sup> See also the affirmation of this power in Article 11.2 SPS Agreement and Article 14.2 TBT Agreement, Article 19.4 Agreement on Customs Valuations and Article 4.5 of the Agreement on Subsidies and Countervailing Measures; see Marc Iynedjian, ‘The Case for Incorporating Scientists and Technicians into WTO Panels’ 42 *Journal of World Trade* 279, 285

<sup>671</sup> See *GMO*, fn 226, *Asbestos*, paras 5.17 ff, *Hormones* Appellate Body Report, para 147

<sup>672</sup> See *GMO*, paras 7.20 ff, *Japan-Apples II*, paras 6.3. ff, *Japan-Apples*, paras 6.2; *Asbestos*, paras 5.8, 5.20, ff, *Hormones*, paras VI. 6 ff

<sup>673</sup> *Foster* 114; The *EC-Hormones* case provides a good example of the procedure for consulting experts before the WTO adjudicative bodies. In this case there was both tribunal-appointed and party-appointed experts, who were actively engaged throughout the case; see *ibid*; Annex, Transcript of the Joint Meeting with Experts, attached to the panel reports in both the complaint by Canada and the complaint by the US – see also *Japan-Agricultural Products* – paras 10.87, 10. 257 and *EC-Asbestos*, 359

words, it comes from a source that is more knowledgeable than the Panel.<sup>674</sup>

It should be made clear at the outset that under Article 13 (1) and (2) DSU Panels have the option of consulting both individual experts and expert review groups. The perception of both individual experts and expert review groups as a tool for the Panel to utilise in order to establish a sound factual basis upon which it can make legal determinations<sup>675</sup> is supported by the Panel's broad fact-assessment responsibility, the power to 'appreciate the weight and persuasiveness of the evidence before it'.<sup>676</sup> Panels are endowed with the power to establish and consult expert review groups to provide information on certain aspects of the case before it in the form of a written report submitted to the Panel.<sup>677</sup> Importantly, these reports are of an advisory nature and do not bind the Panels but of course their findings necessarily carry great weight and could not be easily overlooked by any Panel.

Notwithstanding the numerous reasons that go some way to explaining the preference of Panels to appoint individual experts, there are advantages to be gained from utilising the statutory power to establish expert review groups. For instance, Panels, being made up of lawyers, jurists and other non-scientific professions are arguably not the best placed forum to effectively assess and weigh technical and scientific opinions of experts.<sup>678</sup> For example, what may appear to be two contradictory positions taken by experts causing Panels to choose between one side or another, may not conflict in the eyes of the experts who could ultimately find a common position.<sup>679</sup> For this reason, commentators have argued that that use of expert review groups would be preferable to ensure the most accurate possible outcome for WTO fact-finding.<sup>680</sup> However, to date Panels have not established any such expert review groups.

Instead, the clear preference of Panels has been to appoint individual experts under Article

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<sup>674</sup> Pauwelyn 330

<sup>675</sup> Appellate Body Report, *EC—Selected Customs Matters*, Appellate Body Report, DT/315/AB/R, 13 November 2006 at para 258; *Japan—Measures Affecting the Importation of Apples*, Appellate Body Report, WT/DS245/AB/R, 26 November 2003 at para; *Australia — Salmon*, Appellate Body Report, WT/DS18/AB/R, 20 October 1998 at para 267

<sup>676</sup> Appellate Body Report, *EC—Selected Customs Matters*, Appellate Body Report, DT/315/AB/R, 13 November 2006 at para 258; *Japan—Measures Affecting the Importation of Apples*, Appellate Body Report, WT/DS245/AB/R, 26 November 2003 at para; *Australia — Salmon*, Appellate Body Report, WT/DS18/AB/R, 20 October 1998 at para 267

<sup>677</sup> See under Appendix 4 to the DSU and Annex 2 to the TBT Agreement

<sup>678</sup> Pauwelyn 329

<sup>679</sup> Ibid

<sup>680</sup> Ibid, T. Christoforou, 'Settlement of science-based trade disputes in the WTO: a critical review of the developing case law in the face of scientific uncertainty' 8 NYU Envtl LJ 622

13(1) DSU.<sup>681</sup> The procedure regarding individual expert advice is not regulated by the Agreements or DSU but parties are normally given fair opportunity to comment upon the findings of the expert both orally at the time of the investigation and formally during the proceedings.<sup>682</sup>

### 3.1.2.5. Preference for Individual Experts as Opposed to Expert Review Groups

It is suggested that a contributing factor to the preference for individual as opposed to expert review groups is the DSU App 4 paragraph 6 requirement that expert review groups produce a report of their findings. It has been argued that this requirement could be perceived as ‘transforming the expert group into a form of a “tribunal within a tribunal”’.<sup>683</sup> In other words, Panels may be afraid to tie their hands, both in terms of the flexibility of the process and limiting their discretion as to the ultimate factual determination. Although formally non-binding under paragraph 6 of the DSU Appendix 4, expert review groups would be more difficult to distinguish or make light of when compared with the opinion of one expert alone.<sup>684</sup> In contrast, the appointment of individual experts in the eyes of the Panel offer greater freedom to retain more control over the fact-finding process as well as making it easier for the Panel to ask specific questions of the expert in a way that would not be so easy in relation to an expert group.<sup>685</sup> Considerations of cost and time also play a role and it has been suggested that it may be easily to simply call upon one expert rather than establishing an expert review group given the time constraints imposed by the DSU.<sup>686</sup> These are important considerations that would be faced by the International Court of Justice were it to heed calls to make greater use of court-appointed experts.

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<sup>681</sup> Marceau and Hawkins 497; In accordance with DSU Annex 4 -; Appellate Body Report, *EC—Selected Customs Matters*, above n 183at para 258; Appellate Body Report, *Japan—Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391 at para 22; Appellate Body Report, *Australia —Salmon*, at para 267

<sup>682</sup> Appellate Body Report, *EC—Selected Customs Matters*, above n 183at para 258; Appellate Body Report, *Japan Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391 at para 22; Appellate Body Report, *Australia —Salmon*, above n 100at para 267; There is the possibility of cross-examination, however, it should be noted that this process before the WTO DSB is somewhat under-developed. Pauwelyn 348, See Christoforou, ‘Settlement of science-based trade disputes in the WTO: a critical review of the developing case law in the face of scientific uncertainty’ 632 who advocates this strongly. However, as with other international courts and tribunals, there has been some doubt expressed as to whether the conditions for cross-examination are right, as system is not purely adversarial; Pauwelyn 348; See; Sheila Jasanoff, ‘What Judges Should Know About the Sociology of Science’, 32 *Jurimetrics Journal* 345 (1995), at 353-4

<sup>683</sup> Pauwelyn 328

<sup>684</sup> Ibid

<sup>685</sup> Ibid

<sup>686</sup> See DSU Article 12.9 - ibid



### 3.1.2.6. Neglect of Expert Review Groups & the Discretionary Nature of the Article 13 Fact-Finding Power

In relation to the practice of exclusively consulting individual experts as opposed to expert review groups there has been some suggestion that the neglect of the Article 13(1) expert review group could be in contravention of the general rules of interpretation set out in the 1969 Vienna Convention on the Law of Treaties that interpretation must give meaning and effect to all terms of a treaty.<sup>687</sup> For instance in the *Reformulated Gasoline* case the Appellate Body stated that '[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility'.<sup>688</sup> As such, the failure to explain the preference for individual experts, it has been suggested, could mean that the WTO Agreements provisions on expert review groups will fall into desuetude, if they have not already done so.<sup>689</sup>

However, it is argued that any suggestion to this effect is unlikely to succeed due to the broad nature of the discretion Panels enjoy regarding this investigatory power. Panels generally enjoy broad discretion with regard to whether to carry out its own fact-finding and the means it chooses to apply when doing so.<sup>690</sup> Panels and the AB have on a number of occasions referred to the broad discretion of Panels to decide on its own volition whether to seek information under Article 13(1) or (2) and that it is under no obligation to do so even if requested to do so by one or both of the parties.<sup>691</sup> Ultimately, it is for the Panels to decide

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<sup>687</sup> Christoforou, 'WTO Panels in Face of Scientific Uncertainty' 259

<sup>688</sup> *United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, 26 April 1996 at p. 23; citing *Corfu Channel Case*, at p. 23

<sup>689</sup> Christoforou, 'WTO Panels in Face of Scientific Uncertainty' 260

<sup>690</sup> With the exception in cases under the SPS Agreement involving scientific or technical issues where Article 11.2 of the SPS Agreement provides that 'a panel should seek advice from experts'; D. Palmeter and P.C. Mavroidis, *Dispute settlement in the World Trade Organization: practice and procedure* (Cambridge University Press 2004) 116; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, paras 6.39; *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at paras 147, 149 referring to Article 11 and the function of panels

<sup>691</sup> D.P. Steger and P. Van den Bossche, 'WTO Dispute Settlement: Emerging Practice and Procedure' 92 *Am Soc'y Int'l L Proc* 79, 83, *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items (Argentina-Import Measures)*, WT/DS56/AB/R, at para. 84. With respect to seeking the opinion of a specialized agency, such as the International Monetary Fund, the Appellate Body has said that this is within a Panel's discretion under Article 13 of the DSU, except where there are specific provisions in the WTO Agreement requiring such consultation (e.g., Article XV:2 of the GATT 1994). As well as the Article 13 powers the panels possess to ensure this due process, Article 17.6(i) of the Antidumping Agreement sets out a special standard of review for such antidumping proceedings. See Matsushita, Schoenbaum and Mavroidis 128 for much more detail on this.

whether or not to appoint experts, even if the parties so request. Not only are Panels under no obligation to appoint experts if so requested, they may appoint experts of their own accord, without the request of either party.<sup>692</sup> In any case, the decision to appoint experts, whether requested by the parties or not, ‘...sends out a signal that the Panel takes the issue seriously and wants to obtain as much information as possible (not just the facts pre-selected by the parties).’<sup>693</sup>

### 3.1.2.7. *Special Permanent Expert Bodies*

In addition to the Panel’s fact-finding powers, a number of expert bodies exist under the WTO dispute settlement system that operate in relation to specific WTO agreements. Such bodies have not been widely used thus far but nevertheless form part of the WTO’s fact-finding apparatus.

Perhaps the most important example is Article 11.2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) which *obliges* Panels to seek expert advice although discretion remains as to what form this advice can take. As such experts have been appointed in every SPS case except one to date.<sup>694</sup> One option is resort to the Permanent Group of Experts established by the Committee on Subsidies under Article 24 of the SPS Agreement. The Permanent Group, composed of five impartial experts, can provide a non-binding advisory opinion at the request of the Committee and, interestingly, submit a report to the Panel with the question of whether a measure is a prohibited study which must be accepted by the Panel – the Panel has no discretion in this respect.<sup>695</sup> However, no Panel to date has ever requested the Permanent Group of Experts to submit a report, perhaps due to a desire to retain control of the proceedings.<sup>696</sup>

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<sup>692</sup> Although it would be unusual for a panel to refuse a party’s request to appoint an expert in order to avoid bringing its legitimacy into question and to retain the support of the parties; Pauwelyn 339 In ‘US - Shrimp/Turtle none of the parties requested the panel to appoint experts. Still, the panel sought expert advice. As noted before, it may do so to increase its credibility, even if it knows up-front that the expert advice may, in the end, not be used in its legal considerations.’

<sup>693</sup> Ibid

<sup>694</sup> Marceau and Hawkins 501, see FN 4, with the exception of *US-Certain Measures Affecting Imports of Poultry from China (US- Poultry (China)) WT/DS392/R*, adopted 25 October 2010

<sup>695</sup> Pauwelyn 336; the Group can also ‘be asked for a confidential advisory opinion (that cannot be used in any dispute settlement proceedings) by any WTO-member ‘on the nature of any subsidy proposed to be introduced or currently maintained by that member’

<sup>696</sup> Ibid

Further, the WTO SCM Committee under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) can establish a Permanent Group of Experts. The SCM Agreement provides that the Permanent Group of Experts must review the evidence and report its conclusions to the Panel. However, no Panel has ever made use of this provision to establish a permanent expert group, perhaps due to the obligation to accept its conclusions ‘without modification’.<sup>697</sup>

Similarly, Article 18.2 (see Annex 2) of the Agreement on Customs Valuation provides for the establishment of the Technical Committee on Customs Valuation under the Customs Co-operation Council. Article 19.4 permits Panels to ‘request the Technical Committee to carry out an examination of any question requiring technical consideration’. Again, the Committee must submit a report to the Panel but unlike the Subsidies Permanent Group of Experts the report is not binding on the Panel. Despite this, no use has been made of the advisory procedure to date.<sup>698</sup>

Such expert bodies have been said to represent an important symbol of the WTO’s commitment to factual accuracy and expert advice.<sup>699</sup> The significance of permanent bodies as opposed to *ad hoc* made up of experts as opposed to jurists or politicians is important and means that they are neither judicial nor political and ‘epitomise the “expert group” called in to assist both the political and the judicial decision-maker.’<sup>700</sup> Nevertheless, it can be said that their practical significance is limited.

### *3.1.2.8. Annex V SCM Agreement Procedures for Developing Information Concerning Serious Prejudice*

One final fact-finding mechanism that is deserving of mention due to its potential utility is Annex V of the SCM Agreement. Under this Annex, entitled ‘Procedures for Developing Information Concerning Serious Prejudice’ there exists an information-gathering procedure for disputes in which it is claimed that a Member has, through subsidization, caused adverse

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<sup>697</sup> See SCM Agreement Article 4.5, Marceau and Hawkins 499

<sup>698</sup> Pauwelyn 337; see also Article 8 of the Textiles Agreement providing establishment of the Textiles Monitoring Body which, whilst unable to provide expert advice to panels, Article 8 provides that before parties can come before a panel, they must argue their case before the Textiles Monitoring Body. Whilst the panels are not bound by the findings of the Textiles Monitoring Body, they are naturally influential

<sup>699</sup> Ibid

<sup>700</sup> Ibid

effects in the form of serious prejudice to the interests of another Member.<sup>701</sup> This process is initiated by the DSB and carried out by a member of the DSB known as a ‘facilitator’ within sixty days of the dispute being established and is intended to help the Panel elucidate the facts.

Paragraphs 5 to 9 of Annex 5 set out the modalities of the process such as the time for completion of the process and how the Panel is to use such information. The AB has described the rationale of the process: in imposing on parties a duty to cooperate in the gathering of information, along with sanctions for non-cooperation, Annex V ‘seeks to ensure that a complaining party is afforded access to information critical to its claims, and that such Member is not hampered, in the subsequent panel proceedings, in the event of a responding party’s non-cooperation in an Annex V procedure.’<sup>702</sup>

These sanctions for non-cooperation are set out in paragraph 7 of Annex 5 which specifically states that adverse inferences can be drawn from non-compliance whilst Paragraph 8 sets out that the facilitator will advise the Panel as to when a party is being uncooperative, although the final decision on this remains with the Panel. Paragraph 9 sets out that the fact an Annex V procedure is being conducted does not prevent the panel seeking additional information under, for instance, Article 13 of the DSU. The Annex 5 procedure also has in-built safeguards which prevent the procedure from being abused or turned into ‘an open-ended and unduly burdensome fishing expedition’.<sup>703</sup> These safeguards include a time limit for the conduct of the procedure, the kind of information being sought being limited to ‘such information... as *necessary* to establish the existence and amount of subsidization...’ and a ‘reasonableness’ requirement that would exclude any spurious requests.

In the recent *US-Large Civil Aircraft – 2<sup>nd</sup> Complaint* case the European Communities (EC) repeatedly requested that the DSB initiate such a procedure under Annex V.<sup>704</sup> The US objected to the establishment of such procedures, arguing that the establishment required consensus of the DSB (whilst the EC contended that a negative consensus was needed to stop

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<sup>701</sup> *US-Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, WT/DS353/AB/R, 12 March 2012, at para 480

<sup>702</sup> *US-Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, WT/DS353/AB/R, 12 March 2012, at para 518

<sup>703</sup> *US-Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, WT/DS353/AB/R, 12 March 2012, at para 519

<sup>704</sup> Panel Report para 1.7.

the establishment of this process). The Panel in this case found against the EC.<sup>705</sup> However, the AB found that the Panel had erred in this respect and concluded that the first sentence of paragraph 2 of Annex V requires the DSB to take action, and that such action must be taken automatically as soon as there is a request for the initiation of the procedure under Annex V.<sup>706</sup> Despite the AB taking this position, agreement remains elusive with the US maintaining that the processes must be initiated by the DSB and refusing to cooperate with the Annex 5 process. As such, this remains a contested procedure in one particular area of WTO law and one that has not to date been put to use. However, at the very least it has the potential to act as a form of centralised evidence-gathering mechanism.

### 3.1.2.9. Part 1 Summary – The Fact-Finding Approach of WTO Panels

Panels possess broad statutory fact-finding powers but in practice have not made full use of them. Instead, as a result of broad rules of admissibility, almost any piece of evidence is allowed to come before the Panels that the parties so choose. As we have seen, the general tendency of the Panels has been to ‘ask the parties to produce the evidence and operate with rules concerning burden of proof, rather than to have investigations into facts led by the Court itself’.<sup>707</sup> As such it can be said that the maxim *da mihi factum, dabo tibi jus* (give me the facts, I will give you the law) accurately governs the practice of the Panels, which it is suggested can be described as relatively reactive in terms of fact-finding.<sup>708</sup> Nevertheless, there are a number of factors that mark the WTO adjudicative bodies out as more proactive in terms of fact-finding than the majority of other international courts and tribunals. First, however, it is necessary to examine the treatment of facts by the Appellate Body.

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<sup>705</sup> Panel Report para 7.22

<sup>706</sup> *US-Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, WT/DS353/AB/R, 12 March 2012, at para 524

<sup>707</sup> Walter 1041

<sup>708</sup> Or as Huber once stated; ‘The parties may present any proof that they judge useful and the Court is entirely free to take evidence into account to the extent that it deems pertinent’. Acts and Documents Concerning the Organization of the Court, Judgment [1926] PCIJ Series D, Addendum to No 2 *Revision of the Rules of the Court* 250; closely related to the principle of *jura novit curia*

### 3.1.3. Part 2 –Evidence before the Appellate Body – Article 17 DSU

The Appellate Body is remarkable in international law as one of the few standing appellate bodies. Article 17.6 of the DSU states that the Appellate Body ‘shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel’, formally restricting the AB to the evidence put before the Panels and precluding it from seeking additional evidence at the appeal stage.<sup>709</sup> In so providing, the DSU established a system of appeal on points of law only, at least theoretically, that is in line with the majority of courts of appeal in domestic legal systems.<sup>710</sup> Whilst the AB may receive expert evidence in some limited circumstances, it can only hear such evidence relating to purely legal issues, such as ‘*amici curiae strictly limited to legal arguments* in support of the applicant’s legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief’.<sup>711</sup> Despite these formal restrictions, however, issues of fact-finding and fact-assessment frequently arise in cases before the AB, but how can this be?

First of all, it is clear that the separation of fact from law is and has always been a fiendishly difficult endeavour.<sup>712</sup> The AB itself has openly grappled with this distinction<sup>713</sup> and a number of commentators have remarked upon the apparent futility of attempting to do so in the context of the AB.<sup>714</sup> Instead, it will be shown that aside from this fundamental conceptual difficulty, issues of fact-finding and fact-assessment most often come into play before the AB as a result of two separate but related factors; (i) allegations that the Panel has failed in its Article 11 DSU duty to make an ‘objective assessment of the facts’ and (ii) the consequences of a finding of a failure in this regard and the practice of ‘completing the legal analysis’.

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<sup>709</sup> Pauwelyn 334 - The terms of DSU Article 13 do not apply to the Appellate Body

<sup>710</sup> See P.J. Kuyper, ‘The Appellate Body and the Facts’ in M. Bronckers and Reinhard Quick (eds), *New Directions in International Economic Law, Essays in Honour of John H Jackson* (Kluwer Law International, The Hague 2000) 312 discussing in particular the Court of Justice of the European Union, which does not remand cases back to the Court of First Instance if the issue is capable of being decided by the Court itself (‘en état d’être jugé’); see Opinion of Advocate General Van Gerven in Case C-404/92 P, X v Commission [1994] ECR, p – 4737, point 4

<sup>711</sup> *EC- Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, *amicus curiae* procedures, para 7(c); See Section 3.1.5. above

<sup>712</sup> G. Yang, B. Mercurio and Y. Li, *WTO Dispute Settlement Understanding: A Detailed Interpretation*, vol 7 (Kluwer Law International 2005) 206; see *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at 132

<sup>713</sup> *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at 132

<sup>714</sup> Grando 58; Lichtenbaum 1267

### 3.1.3.1. 'Objective Assessment of the Facts'

Whether a Panel has failed to make an objective assessment of the facts under Article 11 DSU necessarily raises the question of whether the Article 11 duty to make an 'objective assessment of the facts' should be considered an 'issue of law' under Article 17.6 DSU. The AB has taken two broadly different approaches to this issue. In the *Canada- Periodicals* case,<sup>715</sup> the Appellate Body stated that it must consider that firstly there has been a failure of the Panel to carry out the required objective analysis of the facts or to base its judgment in these facts or secondly incorrect reasoning by a Panel including illogical conclusions, or unreasonableness.<sup>716</sup> In contrast, in the *EC Hormones* case<sup>717</sup> the AB applied a more stringent standard,<sup>718</sup> the Appellate Body highlighted 'the deliberate disregard of, or refusal to consider, the evidence submitted to a Panel' and 'wilful distortion or misrepresentation of the evidence put before a Panel' as incompatible with the Panel's Article 11 duty to objectively assess the facts.<sup>719</sup>

However, on the whole, the AB has generally given Panels extremely broad discretion when dealing with fact-assessment.<sup>720</sup> As one commentator has put it, '[i]n its actual application of its task "as a trier of facts" the Panel must go very far astray before the Appellate Body will do anything about it'.<sup>721</sup> Consequently, commentators have argued that the criteria as set out by the Appellate Body in *EC Hormones* is too strict in that it 'requires an insight into the minds of the Panellists' and as such the distinction between a Panel which has made a mistake

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<sup>715</sup> *Canada – Certain measures concerning periodicals* – WTO/DS31/AB/R, adopted on 30 July 1997

<sup>716</sup> M. Lugard, 'Scope of appellate review: objective assessment of the facts and issues of law' 1 J Int'l Econ L 323, 324

<sup>717</sup> *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998

<sup>718</sup> Lugard 325

<sup>719</sup> *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at para 132 onwards; The AB in *EC-Poultry* confirmed this position, stating that a Panel must have made 'an egregious error that calls into question the good faith of the panel'; see *European Communities – Measures Affecting the Importation of Certain Poultry Products*, Appellate Body Report, WT/DS69/AB/R, 13 July 1998, paras 132-136

<sup>720</sup> See *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at 132-135; *European Communities – Measures Affecting the Importation of Certain Poultry Products*, Appellate Body Report, WT/DS69/AB/R, 13 July 1998, paras 133-135; to mention just two.

<sup>721</sup> Kuyper 317; see *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities*, Appellate Body Report, WT/DS166/AB/R at para 151; see also *Australia – Measures Affecting Importation of Salmon* – Appellate Body Report – WT/DS18/AB/R, 20 October 1998, para 267

in assessing the facts and one which has made a *deliberate* mistake is too difficult to prove.<sup>722</sup> However, a finding of an error of law by the AB is not the end of the story in that the question of what consequences should flow from such a finding remain.

### 3.1.3.2. 'Completing the Legal Analysis'

Article 17.3 sets out that the AB has the power to '...uphold, modify or reverse the legal findings and conclusions of the Panel' however the application of this provision, which happens at the end of the appeal procedure, has been problematic in practice. Generally, in the case that the AB finds that an error of law has been made, the practice to date has been to proceed to 'complete the legal analysis' by applying a correct legal interpretation to the factual record.<sup>723</sup> This practice is most likely the result of the AB not possessing any power to remand the case back to the Panel. In doing so, the AB has in practice proceeded to apply the revised legal determination to the facts as they were established before the Panel, as if it were the first instance court.<sup>724</sup> However, the judicially created practice of completing the analysis, in effect substituting the AB's reasoning into the decision has not been uniformly applied in practice and as such has created somewhat disjointed case law.<sup>725</sup>

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<sup>722</sup> Lugard 327; Christoforou, 'WTO Panels in Face of Scientific Uncertainty' 261

<sup>723</sup> R. Howse, 'The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power' in T. Cottier, P.C. Mavroidis and P. Blatter (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO*, vol 4 (University of Michigan Press 2009) 17

<sup>724</sup> See *Canada – Certain Measures Concerning Periodicals*, Appellate Body Report, WT/DS31/AB/R, 30 June 1997 at p.24; The AB argued 'As the legal obligations in the first and second sentences are two closely-linked steps in determining the consistency of an internal tax measure with the national treatment obligations of Article III:2, the Appellate Body would be remiss in not completing the analysis of Article III:2' (p. 24) where the AB reversed the Panel's finding of a violation of the first sentence of Art III:2 GATT 'based on mixed considerations of law and fact', finding that were so serious as to bring the nature of the legal analysis into dispute; see *ibid*; However, unable to remand the case back to the Panel for consideration of the facts, and despite the arguably inadequate factual record it possessed, the AB applied the second sentence of Art III:2 that the Panel had not applied, despite the fact it had not been the subject of appeal or cross-appeal.; Pauwelyn 334

<sup>725</sup> Yang, Mercurio and Li 212; Jan Kuyper has suggested that the drafters of the DSB acknowledged that giving the AB a power of remand was desirable or even necessary but believed it to be 'a bridge too far' for the Members; see Kuyper 310; Such remand authority exists in other international tribunals such as the EU Legal Order – Article 177 – Cameron and Orava argue that having such a power might benefit the WTO as they could send the case back for more fact-finding or ask the panel to try the case again. Cameron and Orava 231



### 3.1.4. Part 3 Notable Crosscutting Evidentiary Issues Affecting both Panels and the AB

Finally, part 3 will focus on a number of crosscutting evidentiary issues that affect both the Panels and the AB. These include the burden of proof, the *prima facie case* requirement and the practice of drawing adverse inferences and the use of *amicus curiae* briefs.

#### 3.1.4.1. Burden of Proof

A significant crosscutting evidentiary aspect of the practice of the Panels and AB of the WTO that is of potential significance is the treatment of the burden of proof. In contrast to the vague position on the burden of proof taken by the International Court of Justice, Panels and the AB have consciously attempted to address this issue in cases that have come before them. However, this increased attention has not brought about increased clarity, as we will be shown.

Neither the GATT nor the DSU specifically address the issue of the burden of proof in cases before the dispute settlement apparatus of the WTO. As such, this fundamentally important issue has been left to the Panels and AB themselves to clarify and develop in piecemeal fashion in cases that they are asked to deal with. It is customary to separate the burden of proof into the two constituent functions it plays; the burden of production (determining which party must provide evidence in support of their legal claim) and the burden of persuasion (determining which party must satisfy the standard of proof).<sup>726</sup> However, the extent to which the separation of the two constituent elements of the burden of proof is helpful is also debatable given the approach taken by the Panels and AB to which we now turn.

#### 3.1.4.2. The Burden of Production

In international adjudication generally the approach to the burden of production would appear to be governed by the principle *actori incumbit probatio* (that the party making the legal claim bears the burden of proving it), whilst the party invoking an exception to a general rule bears the burden of justifying it (*quicumque exceptio invokat ejusdem probare debet*).<sup>727</sup> However,

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<sup>726</sup> G. M. Grossman, H. Horn and P.C. Mavroidis, 'Legal and Economic Principles of World Trade Law: National Treatment' IFN Working Paper No 917, 2012 accessed 10/11/12; Michelle T. Grando, 'Allocating the Burden of Proof in WTO Disputes: A Critical Analysis' 9 *Journal of International Economic Law* 615, 615

<sup>727</sup> P.C. Mavroidis, *Trade in Goods* (2nd edn, OUP 2012) 291 Grossman, Horn and Mavroidis 85; see invocation of Art XX GATT – *US-Gasoline*, pp 22-23, *US-Wool, Shirts and Blouses*, pp15-16, *US-FSC (Article 21.5-EC)*

whilst the notional burden may lie with the complaining party in cases in the context of the WTO, in reality both parties generally put forward evidence in support of their position simultaneously at the start of each case.<sup>728</sup> As a result of the practice of simultaneous submission of evidence and the insistence by Panels and the AB that the requirement of making a *prima facie* case governs the operation of the burden of proof, it is not helpful to separate the burden of production from the burden of persuasion in this context. Instead, an evaluation of the *prima facie* case requirement is needed in order to appreciate the operation of the burden of proof.

### 3.1.4.3. *The prima facie case requirement*

Consistent case law reveals that in cases that come before the dispute settlement apparatus of the WTO the complaining party is required to make a *prima facie* case that its claim is meritorious, after which it will fall to the defendant party to effectively refute this claim.<sup>729</sup> Failure to refute the claim made by the other party will result in the complaining party prevailing.<sup>730</sup> Whilst this requirement may appear straightforward in theory, in practice the ambiguity surrounding what exactly constitutes a *prima facie* case has created much uncertainty.<sup>731</sup> The case law reveals that there are a number of plausible ways that the *prima facie* case requirement could be construed.

#### (i) *Possibility 1: Prima Facie Case as a Threshold Requirement*

A number of Panel reports have suggested that the *prima facie* case requirement operates as a

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§ 133 – see Section 4.2.2. The Evidentiary Burden Falls Heavier on the Complainant with Interpretation in *ibid*; These principles are applied in tandem with the *dubio mitius* principle that WTO Members' actions should be presumed legitimate unless proven otherwise. Of course all of this assumes that discerning between a general rule and an exception is a feasible task. However, it has been shown that due to a number of factors, in WTO law this distinction is in fact extremely difficult to make; see Grando, at 151 onwards

<sup>728</sup> Mavroidis 294

<sup>729</sup> Grossman, Horn and Mavroidis 86

<sup>730</sup> This requirement, nowhere mentioned in the DSU, apparently a creation of the WTO dispute settlement bodies themselves, is not unique to WTO dispute settlement, but nevertheless 'most other international tribunals do not expressly employ this concept in determining whether the burden of proof has been discharged' Brown 96. The AB in *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Reports, WT/DS98/AB/R, 14 December 1999 at para 145 stated that the Panel is under no obligation under the DSU to rule on whether a *prima facie* case has been made

<sup>731</sup> Grossman, Horn and Mavroidis 86 suggest that it is difficult to say anything more than that some sort of reasonableness standard will attach itself to the determination of when a *prima facie* case has been made

threshold for evidence that must be met before the case can proceed or before the Panel can examine the evidence placed before it.<sup>732</sup> However, the main problem with conceiving the *prima facie* case requirement as a form of threshold that must be met after the submission of some preliminary evidence before the Panel will proceed with its determinations is that in practice Panels do not issue intermediate rulings stating whether party has met *prima facie* case or not. As stated above, the WTO adjudicative bodies do not wait for the production of evidence from the claimant party before requesting evidence from the defendant party but instead asks for all the relevant evidence both parties wish to place before it. From this point onwards, ‘the WTO judge is an umpire who will evaluate the evidence submitted to it by both parties’<sup>733</sup> and will pronounce on whether a *prima facie* case has been sufficiently established only in the report and not before.<sup>734</sup> The Panel is in no way required to make an explicit ruling on whether or not a *prima facie* case has been established before considering the evidence as a whole.<sup>735</sup> In addition, the AB has in a number of cases held that Panels are entitled to consider not just information submitted by the complaining party but any information submitted at all and even information sought by the Panel itself in determining whether a *prima facie* case has been made.<sup>736</sup> As such, parties are unable to amend their submissions in response to an intermediate pronouncement that a *prima facie* case has been made or not. Instead, the exact level of evidence to be provided in order to make a *prima facie* case will be determined by the discretion of the Panel in the particular case, and the application of the *prima facie* standard beyond individual cases will be extremely limited.<sup>737</sup>

As such, the conception of the *prima facie* case requirement as a form of evidentiary threshold does not square with the practice of not issuing an intermediate ruling on whether this case

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<sup>732</sup> See for example; *United States- Section 211 Omnibus Appropriations Act of 1998*, Panel Report, 6 August 2001, WT/DS176/R, at paras 8.17, 8.18, 8.19; and *Korea – Taxes on Alcoholic Beverages*, Panel Report, WT/DS57/R, WT/DS84/R, 17 September 1998 at para 10.57; and *United States- Subsidies on Upland Cotton*, Panel Report, WT/DS26/R, 8 September 2004, at paras 7.959, 7.974; Grando 108

<sup>733</sup> Mavroidis 294

<sup>734</sup> Although panels can end the case if they believe that the complainant did not make a *prima facie* case, see *India- Measures Affecting the Automotive Sector*, Panel Report, WT/DS146/R, 21 December 2001 at para 7.231-3, or in the case of equipoise, where the evidence submitted by both parties does not convince one way or another, the advantage has been given to the defendant party – see Panel in *US- Anti-Dumping Act of 1916*, Panel Report, WT/DS162/R, at para 6.57

<sup>735</sup> *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Reports, WT/DS98/AB/R, 14 December 1999 at para 144, 145; *India- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Appellate Body Report, WT/DS90/AB/R (22 September 1999) para 142; *Thailand, Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Appellate Body Report, WT/DS122/AB/R (12 March 2001) para 134

<sup>736</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 192

<sup>737</sup> Mavroidis 291

has been made or not,<sup>738</sup> but would rather suggest that it is a standard of proof, which leads us on to the second conception of the *prima facie* case requirement.

*(ii) Possibility 2: Prima Facie Case as Initial Standard of Proof (presumption that if met shifts burden)*

The second conception of the *prima facie* case requirement that is plausible from a reading of the case law is that it represents a presumption which if raised by the claimant party shifts the burden of proof to the defendant party. In this sense the requirement would represent the initial standard of proof.<sup>739</sup> Such conceptions of a real shift in the burden of proof once a *prima facie* case has been made in effect means that ‘a *prima facie* case is in fact the standard of proof that the claimant must meet in order to discharge the burden of proof’, having the same effect as a rebuttable presumption of law.<sup>740</sup> Such a conception finds support in the literature<sup>741</sup> however it is suggested that it is also distinctly problematic.

To elaborate, equating the burden of proof with the concept of raising a presumption does not shed any further light on the issue: presumptions are at least equally conceptually unclear and give no guidance as to the degree of persuasion needed in order to find that a presumption has been rebutted.<sup>742</sup> Furthermore, conceiving of the *prima facie* case as the initial standard of proof sets the bar very low in terms of the quantum of proof required of the claimant party. This is so since, after a mere *prima facie* case is established by the claimant party, its evidence is taken as a given whilst the burden of proof shifts to the defendant party to conclusively rebut. Failure to do so will result in the loss of the case for the defendant ‘even though the circumstances may be such that if a holistic examination of all the evidence on the record were to be conducted, the adjudicator would find that there was not enough evidence to

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<sup>738</sup> As Åhman has pondered; ‘[w]hy would the Appellate Body talk about a party’s obligation to establish a *prima facie* case if a panel will never determine whether such a case has been established...It is difficult to find a satisfactory answer to this question’; see J. Åhman, *Trade, Health, and The Burden of Proof in WTO law* (Kluwer Law International 2012) 89; see also; Grando 114 who has argued in support of an interim pronouncement of this kind

<sup>739</sup> See for example; *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, 25 April 1997 – at p. 14 and *EC—Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998, at para109

<sup>740</sup> Grando 123

<sup>741</sup> J. Pauwelyn, ‘Evidence, Proof and Persuasion in WTO Dispute Settlement-Who Bears the Burden’ 1 *J Int'l Econ L* 227, 254

<sup>742</sup> Mavroidis 293

support...’ the submission of the claimant.<sup>743</sup> Such a conception, accepting the claim of a party based on a *prima facie* case rather than the preponderance of evidence or some other higher standard would clearly be weighted in favour of the claiming party.<sup>744</sup>

*(iii) Possibility 3: Prima Facie Case as the Final Standard of Proof (no shift in burden)*

The third possible conception is that the *prima facie* case requirement represents the final standard of proof that must be met by the claiming party. In a number of cases, when considering all the evidence submitted to it and sought by the Panel itself, there has been some suggestion that by either establishing or failing to establish a *prima facie* case is in some way or another the final determinative standard of proof.<sup>745</sup>

Such pronouncements that appear to treat the establishment of a *prima facie* case after considering all the evidence together as the standard of proof beg the question; ‘...why use the cryptic language of “establishing a prima facie case”, instead of just describing it as “reaching the required standard of proof” (which is the normal way of describing it in most legal systems)?’<sup>746</sup> Again, as with equating the *prima facie* case requirement with the initial standard of proof that shifts the burden to the defendant party, if one conceives the requirement as the final determinative standard of proof, the main issue is that it creates a bias in favour of the claimant party.<sup>747</sup> As such, conceiving of the *prima facie* case as the determinative standard of proof creates a situation whereby defendant parties have a much more onerous task than claimants which carries with it its own problems such as the possibility of encouraging spurious claims.

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<sup>743</sup> Grando 126

<sup>744</sup> Ibid

<sup>745</sup> *India- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Panel Report, WT/DS90/R, 6 April 1999 para 5.201 onwards; confirmed by the AB in *India- Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Appellate Body Report, WT/DS90/AB/R (22 September 1999) para 142; see also; *Canada – Measures Affecting the Export of Civilian Aircraft*, Panel Report, WT/DS70/R, 14 April 1999 and *Japan – Measures Affecting Agricultural Products*, Panel Report, WT/DS76/R, para 8.72

<sup>746</sup> Åhman 89

<sup>747</sup> Grando 131

(iv) *Most Likely Conception: Prima Facie as Merely Indicating a Tactical Burden*

A lack of conceptual clarity persists to this day and is evident in the most recent case law.<sup>748</sup> Having examined three possible conceptions of the *prima facie* case requirement, it is argued that, ultimately, none of them satisfactorily describes the operation of the burden of proof in the case law. As has been pointed out, in practice Panels do not actively shift the burden of proof from one party to the other as if the parties were opponents in a tennis match.<sup>749</sup> Indeed, the shifting of the burden of proof has no basis in the text of the DSU, and, in representing an exception to the approach taken to the burden of proof by the clear majority of other international courts and tribunals, such explicit provision in the DSU might have been warranted. The traditional approach in international adjudication of *actori incumbit probatio*, that the party alleging the claim bears the burden of providing adequate evidence to back up its claim, is a general position that provides a degree of clarity to parties considering international litigation.

It is difficult to provide any further clarity on this issue, other than to say that it is a concept that introduces an element of needless complexity into WTO adjudication, that it is a form of legal MacGuffin.<sup>750</sup> Whilst it may represent to some extent the very least that is required from the claimant party in terms of evidence, it is most likely to refer to the when the tactical burden shifts in procedural terms. Although the requirement may take on greater relevance in cases where one party refuses to submit evidence, in general the requirement ‘will most likely never be of any practical importance for as long as the WTO proceedings continue to have the same form as today’.<sup>751</sup> This use of this conception of the *prima facie* case requirement has

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<sup>748</sup> For instance, In *China- Electronic Payment Services* the panel stated that ‘...in WTO dispute settlement, once a party has made a *prima facie* case, the burden of proof moves to the responding party, which in turn must counter or refute the claimed inconsistency.’ *China- Certain Measures Affecting Electronic Payment Services*, Panel Report, WT/DS413/R, 16 July 2012 at para 7.6S. The same approach was taken by the panel in *US-Shrimps and Sawblades*; *US- Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, Panel Report, WT/DS422/R, 8 June 2012 at para 7.7, whereas a contrasting position was taken by the AB in *US-Tuna II*. The AB set out that ‘[w]here the complaining party has met the burden of making its *prima facie* case, it is then for the responding party to rebut that showing’. See *US- Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Report, WT/DS381/AB/R, 16 May 2012 para 216 (which, ultimately, the AB found was not even handed, see para 298) See also the discussion by the AB in *US-Clove Cigarettes* regarding the *prima facie* case at para 289-292 specifically relating to the TBT Agreement

<sup>749</sup> Grossman, Horn and Mavroidis 86

<sup>750</sup> A MacGuffin is a (most often) cinematic plot device by which an object forms part of a narrative, usually being sought after by the protagonist, often for a reason unrelated to the ultimate resolution of the narrative, made popular most notably in the work of Alfred Hitchcock

<sup>751</sup> Åhman 90

been confirmed in recent case law.<sup>752</sup>

#### 3.1.4.4. Summary – An Unclear Burden of Proof

To date the International Court of Justice has somewhat shied away from making explicit statements on the burden and standard of proof in cases that have come before it. Whilst increasingly complex cases come before the Court may call for a clearer articulation of the burden of proof and related issues, it is suggested that the practice of the adjudicative bodies of the WTO should be a somewhat cautionary tale for the Court. The handling of the *prima facie* case requirement has brought an element of uncertainty to proceedings that are otherwise more fact-focussed and forward-looking than those in operation before the Court. As such, any developments in this direction ought to be resisted.

#### 3.2. Adverse Inferences

A further notable aspect of the practice of the WTO Panels and AB is the practice of drawing adverse inferences from the refusal of a party to provide information requested of it by the other parties or that is generally relevant to the legal issues in consideration before the Panel – something that the ICJ has to date refrained from doing.<sup>753</sup> For example, in *Argentina-Footwear* the Panel drew an adverse inference from Argentina's refusal to provide information requested by the United States, stating this refusal taken together with the evidence presented by the US favoured their position.<sup>754</sup> The sole reference to adverse inferences in the WTO Agreements is Article 7 of the SCM Agreement, paragraph 7, Annex 5 '[i]n making its determination, the Panel should draw adverse inferences from instances of non-cooperation by any person involved in the information gathering process'.

The power to draw adverse inferences more generally flows from the duty of collaboration found in international adjudication generally which requires that states cooperate in good faith

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<sup>752</sup> *US- Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, Panel Report, WT/DS422/R, 8 June 2012 at para 7.9, 7.31-32

<sup>753</sup> See for example *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/RW (2 August 1999) para 203

<sup>754</sup> *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, para 6.40

in providing the Panel with the required evidence.<sup>755</sup> In relation to the duty of collaboration, although the parties are free to submit or not submit any piece of evidence they so choose, the Appellate Body has in the past urged that parties be ‘fully forthcoming from the very beginning both as to the claims involved in the dispute and as to the facts relating to those claims... Claims must be stated clearly. Facts must be disclosed freely.’<sup>756</sup> This is an issue considered in much greater detail in Chapter 4.

The practice of drawing adverse inferences is simply another way to aid the Panels in determining the facts through flushing out the facts it needs that have not been placed before them by the parties themselves,<sup>757</sup> or in the words of one commentator ‘...the real value of an adverse inference lies in its capacity to induce cooperation rather than the inference itself’.<sup>758</sup> The Panel in *US-Wheat Gluten* demonstrated that the power to draw adverse inferences is discretionary by refusing to do so despite being requested to do so, owing to the fact it felt the factual record it possessed was sufficient to fulfil its Article 11 DSU duty.<sup>759</sup>

There are drawbacks to the practice of drawing adverse inferences such as the fact that where neither the Panel nor the other party are aware of information that has been withheld from the Panel, the power is rendered useless.<sup>760</sup> Nonetheless, the tendency for governments to ignore requests for information in cases before Panels,<sup>761</sup> coupled with the uncertain nature of the power to compel the production of evidence suggest that the practice of drawing adverse inferences from a failure to comply with requests for information made by other parties can potentially play an important role in fact-finding before the Panels.<sup>762</sup>

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<sup>755</sup> P.C. Mavroidis, ‘Development of WTO Dispute Settlement Procedures’ in F. Ortino and E. Petersmann (eds), *Development of WTO Dispute Settlement Procedures*, vol 18 (Kluwer Law International 2004) 174; It has been argued that the practice of drawing adverse inferences more accurately squares with the good faith obligation to cooperate with the proceedings that is placed on all Members rather than imposing on them a binding duty to disclose information by construing ‘should’ and ‘shall’, see section 3.1.2.1. above; Kuyper 321

<sup>756</sup> *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, 19 December 1997, at para 94; see Steger and Van den Bossche 84

<sup>757</sup> D. Collins, ‘Institutionalized Fact-Finding at the WTO’ 27 U Pa J Int'l Econ L 367, 372; Cameron and Orava

<sup>758</sup> Grando 266; Kuyper 321

<sup>759</sup> *United States- Definitive Safeguard Measures on Imports of Wheat Gluten From The European Communities*, Panel Report, WT/DS166/R, 31 July 2000 at para 8.12

<sup>760</sup> Cameron and Orava

<sup>761</sup> Ibid; Palmetier notes that parties generally only place such information before the panels that is in their own interest. In relation to information that a party claims is confidential, the Panel in *Indonesia- Autos* states that parties may not ‘invoke confidentiality as a basis for their failure to submit the positive evidence required, see; *Indonesia- Certain Measures Affecting the Automobile Industry*, Panel Report, WT/DS54/R, 2 July 1998 at paras. 14.235

<sup>762</sup> *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Panel Report, WT/DS277/RW, 15 November 2005, at para 7.21



### 3.1.5. *Amicus Curiae* Briefs

The submission of *amicus curiae* briefs by individuals or bodies not party to the case, a fixture of adjudication both domestic and international to a greater or lesser extent,<sup>763</sup> are a further interesting case in the context of WTO dispute settlement. Whilst their use has been somewhat limited before the International Court of Justice, in the context of the WTO this has been a much debated and to this day reminds an unresolved issue.

*Amicus curiae* briefs are potentially a useful source of additional information.<sup>764</sup> Essentially, their value to fact-finding and evidence lies in their bringing fresh information before a Panel or the AB, or in the words of the AB itself, their ‘contribution to the resolution of [the] dispute that is not likely to be repetitive of what has been already submitted by a party or third party’.<sup>765</sup> The value of submitting briefs for the *amici* is varied but includes goals such as clarification of a particular aspect of the law or bringing to the court’s attention (and to the attention of the wider world, as the case may be) a particular issue for which the *amici* are champions.<sup>766</sup>

Numerous *amicus curiae* briefs have been, and continue to be, submitted to both the Panels and AB of the WTO despite the fact the Dispute Settlement Understanding makes no reference to such a possibility. The issue of *amicus curiae* briefs is one that has persisted in causing legal controversy and uncertainty. The practice of the Panels and AB shows that unsolicited briefs are no longer rejected outright as having no legal basis but are not often taken into account by Panels.<sup>767</sup> Although Panels and AB continue to receive *amicus curiae*

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<sup>763</sup> For a detailed review of their operation in international law see Shelton

<sup>764</sup> P.C. Mavroidis, ‘Amicus Curiae Briefs Before the WTO: Much Ado About Nothing’ in Armin von Bogdandy, P.C. Mavroidis and Yves Mény (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (Kluwer Law International 2002) 11 <ISSN 1087-2221>

<sup>765</sup> *EC- Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R at p. 20, para 3(f); see Pauwelyn, ‘The use of experts in WTO dispute settlement’ 354

<sup>766</sup> Mavroidis 10

<sup>767</sup> Unsolicited briefs have been accepted by panels on a number of occasions; *Australia – Measures Affecting Importation of Salmon* – Appellate Body Report – WT/DS18/AB/R, 20 October 1998, para 261, *US- Section 110(5) of the US Copyright Act*, Panel Report, WT/DS160/R, 150 June 2000, *EC- Anti-Dumping Duties on Imports of Cotton-type Bed Linen From India*, Appellate Body Report, WT/DS141/AB/R, 1 March 2001, and *EC- Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R. In addition they have been rejected in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Appellate Body Report, WTO Doc. WT/DS138/AB/R of 10 May 2000, and, *Thailand- Anti-Dumping Duties*

briefs,<sup>768</sup> and despite the fact that some Members have advocated the use of such briefs in relation to both factual and legal issues,<sup>769</sup> to this day the issue of unsolicited *amici curiae* briefs remains an unanswered question for the WTO dispute settlement system.<sup>770</sup> The situation has been described by Steger as a ‘stand-off’ between the adjudicative organ of the WTO and the Membership itself – with one side keen to gain every advantage they can to establish a full factual record and the other concerned about a loosening of their grip on the dispute settlement process. Consequently it has been argued that there is a clear need for procedural regulation of this issue as the current uncertainty suits neither the Members, the *amici* nor indeed the adjudicative body.<sup>771</sup> Ultimately it can be said that the practical influence of such briefs is limited.

### 3.1.6. Implications: the Autonomy of the Panel’s Fact-Finding Powers

Taken together, potential reliance on *amici curiae* briefs and the provision of evidence by Panel-appointed experts introduces the possibility of arguments being made to the Panels that are distinct from those put forward by the parties themselves. This possibility, one that has rarely arisen before the International Court of Justice, begs the question of whether Panels can rely upon or take into account arguments not made by the parties themselves.

This issue is especially pertinent with regard to *amicus curiae* briefs which, as we have seen, have no solid legal basis in the Agreements or DSU. As such, it has been argued that these briefs can be relied upon only to the extent that they speak to the arguments made by the parties themselves. Such consideration of the limitations that should be imposed on the use of such evidence goes to the heart of the issue of due process before Panels and the AB.<sup>772</sup> Due process considerations inform arguments that information put before the Panels and AB should not seek to make arguments on behalf of one of the parties and that there should be

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*on Angels, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Appellate Body Report, WT/DS122/AB/R – in which the AB received *amicus curiae* brief from Consuming Industries Trade Action Coalition (CITAC) but did not accept it as it ‘did not find the brief filed by CITAC relevant to its task’, para 78; Yang, Mercurio and Li 180

<sup>768</sup> Steger has described the panels as being inundated with submissions from NGOs - Steger 439

<sup>769</sup> In particular the US has been an outspoken supporter of the use of *amicus* briefs; see Yang, Mercurio and Li 180

<sup>770</sup> Mavroidis 15

<sup>771</sup> An argument echoed by Steger 439

<sup>772</sup> Mavroidis 14; By the same token, Mavroidis points out that the DSU does not mention due process but that ‘[f]ew would disagree that the Appellate Body has to ensure that due process is complied with. WTO Members, in their submissions, whenever they raise a procedural concern, almost always refer to due process’

sufficient opportunity for the parties to reply to any information contained within them.<sup>773</sup> It was such due process concerns that led the AB to find that the Panel had deprived Chile of a ‘fair right of response’ by relying on an argument not made by Argentina in the case.<sup>774</sup>

This issue has arisen in the case law, such as in *Japan-Varietals* where there was discussion of whether an expert invited to the Panel raising an issue that had not been raised by the complaining party could form part of the AB’s *ratio* in its decision.<sup>775</sup> The AB stated that:

‘A Panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties but not to make the case for a complaining party’.<sup>776</sup>

The Appellate Body in *Canada- Aircraft* clarified its earlier case law in *Japan- Varietals*<sup>777</sup> by stating that the Panel should not base its decision on an argument that the complaining party ‘had not even alleged or argued before the Panel, let alone something on which [it] had submitted any evidence’.<sup>778</sup> However, the Appellate Body in *EC – Hormones* again had to address this issue as it introduced itself an additional factual argument under the complainant’s claim of SPS Article 5.5.<sup>779</sup> This has introduced doubt into the DSB’s finding that it should not rely on an argument not made by the parties.

At this stage it is important to emphasise the distinction between issues of law and fact. Whilst Panels are entitled to conduct their own fact-finding and bring evidence that had not been submitted by the parties, they are not able to make legal determinations on claims not related to those made by the parties themselves. This issue is one of ‘drawing the line

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<sup>773</sup> Ibid; *ibid*; Pauwelyn, ‘The use of experts in WTO dispute settlement’ 351

<sup>774</sup> Appellate Body Report, *Chile – Price and System and Safeguard Measures Relating to Certain Agricultural Products*, WTO/DS207/AB/R, 23 September 2002 at para 149

<sup>775</sup> *Japan – Measures Affecting Agricultural Products*, Appellate Body Report, WT/DS76/AB/R, 22 February 1999 at para 129

<sup>776</sup> *Japan – Measures Affecting Agricultural Products*, Appellate Body Report, WT/DS76/AB/R, 22 February 1999 at para 129; (This is an interesting crossover issue: would encouraging the ICJ raise issues of experts making cases for the complaining party? Is this an argument to suggest that the practice of making experts part of the team is preferable?)

<sup>777</sup> *Japan – Measures Affecting Agricultural Products*, Appellate Body Report, WT/DS76/AB/R, 22 February 1999 at para 129

<sup>778</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 193

<sup>779</sup> *EC – Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R/ 16 January 1998

between the Panel's duty under DSU Article 11 and the obligation of parties to adduce evidence in support of their case, and is a line that may not be drawn easily'.<sup>780</sup>

To elaborate, it is clear that by virtue of the fact-finding power given to Panels in Article 13 DSU discussed above, they should not consider themselves bound to only consider the facts submitted by the parties themselves.<sup>781</sup> Indeed, the Panel's Article 11 DSU duty to make an objective assessment of the facts refers to 'the facts of the case' and not the facts as submitted by the parties.<sup>782</sup> Consequently, Pauwelyn argues that restricting the Panel's attention only to those facts submitted by the parties '...unduly restricts the inquisitorial role of WTO Panels as international tribunals and constitutes an unwarranted transplantation of common law principles into the WTO process.'<sup>783</sup>

However, the situation is different in terms of the legal arguments made. The discretion of the Panel in this respect is fettered by considerations of due process, the operation of the principle of *non ultra petita* and the terms of the reference itself.<sup>784</sup> For instance, in *Chile-Price Band System* the AB held that Panel had 'acted *ultra petita* and inconsistently' with Article 11 DSU duty when it determined a claim under second sentence of Article II:1 (b) of the GATT rather than the first sentence, as the parties had contested.<sup>785</sup> Grando argues that '*non ultra petita* rule is a function not only of the language of Articles 7.1, 6.2, and 11 of the DSU but also of the due process requirement of meaningful participation; a Panel must not rule on a claim which the parties did not have a meaningful opportunity to address.'<sup>786</sup> A similar argument has been made by Mavroidis who has state that, whilst Panels and the AB may adopt their own legal reasoning they cannot 'make the claim in the place of the party carrying the burden of proof' and argues that '...the independent legal reasoning of the WTO adjudicating bodies will have to be subordinated to the claims as presented by the parties: if they agree with what is pleaded, they will accept the claim; if they disagree, they will reject without however being in a position to move to legal standards not pleaded by the parties to a

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<sup>780</sup> Marceau and Hawkins 505

<sup>781</sup> Steger 431; see EC-Poultry – para 135, Australia- Salmon – para 267; Pauwelyn, 'The use of experts in WTO dispute settlement' 352

<sup>782</sup> Pauwelyn, 'The use of experts in WTO dispute settlement' 354

<sup>783</sup> Ibid

<sup>784</sup> Article 7.1 DSU states that the terms of reference are 'to examine...the matter referred to the DSB'

<sup>785</sup> *Chile – Price and System and Safeguard Measures Relating to Certain Agricultural Products*, Appellate Body Report, WTO/DS207/AB/R, 23 September 2002 at para 173

<sup>786</sup> Grando 344

particular dispute'.<sup>787</sup> In sum, then, Panels and the AB must be mindful of the fact that whilst of potentially crucial importance to the establishment of the factual record, there are a number of limitations on their power to consider evidence brought before them through the use of *amicus curiae* briefs or expert evidence.

### 3.1.7. WTO Concluding Remarks

This brief survey of the operation of the issues of fact-finding and fact-assessment reveals a number of aspects of WTO dispute settlement that are innovative and potentially influential outside the confines of the WTO. For instance, the WTO dispute settlement bodies have interpreted their Article 13 DSU power to request information in a manner that allows it to almost compel the production of evidence from parties (and the drawing of adverse inferences from any failure to do so). Furthermore, there is a much greater willingness to appoint experts from the Panels and a practice of considering *amicus curiae* briefs from third parties. Although there are a number of less-than-satisfactory elements of WTO fact-finding and fact-assessment such as an unclear burden of proof, on the whole it can be said that there is much that is innovative and could potentially influence older courts and tribunals. A selection of these innovative and proactive fact-finding practices will be examined in Chapter 4.

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<sup>787</sup> Mavroidis, 'Development of WTO Dispute Settlement Procedures' 167

### 3.2. Fact-Finding and Fact-Assessment in Recent Inter-State Arbitrations

This section sets out to examine the handling of issues of fact-finding and fact-assessment in a number of recent inter-state arbitrations conducted under the auspices of the Permanent Court of Arbitration (PCA).<sup>788</sup> Inter-state arbitration as means of dispute settlement has experienced somewhat of a renaissance in recent times.<sup>789</sup> In fact, there are now more pending inter-state arbitrations than cases in the docket of the ICJ.<sup>790</sup> Given the increasing use being made of inter-state arbitration, this section will attempt to discern whether any broad approach to fact-finding issues can be identified from the work of three prominent inter-state arbitrations conducted in the last few years; the *Guyana/Suriname*, *Abyei* and *Kishengana* arbitrations.<sup>791</sup> The selection of these arbitral disputes is based on the fact they are timely, high profile and,

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<sup>788</sup> In 1916 James Brown Scott famously remarked upon the misnomer that is the PCA, remarking that ‘...it is difficult to call a court “permanent”, which does not exist, and which only comes into being when it is created for the trial of a particular case, and goes out of existence as soon as the case is tried. It is difficult to consider as a court, a temporary tribunal, which is not composed of judges...The Conference did not call the creature of their hands a court of justice. It was to be one of arbitration...[T]he decision is to be on the basis of respect for law, which does not mean necessarily that the decision is to be reached by the impartial and passionless application of principles of law,...but the decision is to be reached “on the basis of respect for law”, which may be very a different matter’, James Brown Scott, *The Hague Court Reports* xvii-xviii (Oxford 1916)

<sup>789</sup> In the 1990s several commentators remarked upon what they saw as the decline of inter-State arbitration since the Second World War. For instance, Stuyt’s 1990 survey noted that despite the fact there were 178 inter-State arbitrations between 1900 and 1945, in the 45 years following the Second World War there were only 43; see A Alexander Marie Stuyt, *Survey of International Arbitrations: 1794-1989* (Martinus Nijhoff 1990); further Gray and Kingsbury noted that; “[t]he vast increase in the number of States [following the Second World War] and the corresponding increase in international transactions is accompanied by a decline in the number of arbitrations”; Christine Gray and Benedict Kingsbury, ‘Developments in dispute settlement: inter-State arbitration since 1945’ 1992 *British Yearbook of International Law* 97, 100; On this renaissance see Jacomijn J. van Haersolte-van Hof, ‘The Revitalization of the Permanent Court of Arbitration’ 54 *Netherlands international law review* 395; Bette E Shifman, ‘Revitalization of the Permanent Court of Arbitration’ 23 *Int’l J Legal Info* 284; see also C. Romano, ‘Trial and Error in International Judicialization’ in C. Romano, K. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013 (forthcoming)) 12; see also PCA Arbitral Tribunal: Iron Rhine (“IJzeren Rijn”) Railway (Belgium/Netherlands), Award 24 May 2005, para 235 where the arbitral tribunal ‘established a committee of independent experts to determine the costs of reactivating the railway route in question and adequate measures to achieve compliance with the required levels of environmental protection. In the award, the tribunal explicitly considered that “These issues are appropriately left to technical experts” - Francesca Romanin Jacur, ‘Remarks on the Role of *Ex Curia* Scientific Experts in International Environmental Disputes’ in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (1 edn, Springer, Asser Press 2013) 450

<sup>790</sup> The website of the PCA lists 14 pending inter-State or mixed arbitrations (see: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1029](http://www.pca-cpa.org/showpage.asp?pag_id=1029), last checked 5/4/13) whilst the website of the ICJ lists 10 pending cases (including a number of high profile arbitrations such as the Arbitration Between the Republic of Croatia and the Republic of Slovenia, having an extremely high-profile group of arbitrators), the status of at least two of which could perhaps more accurately be described as inactive (see: <http://www.icj-cij.org/docket/index.php?p1=3&p2=1>, last checked 5/4/13). Of particular interest is the case of *The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland* currently pending before the PCA, brought under Article 287 and Annex VII of UNCLOS on 20 December 2010, see; [http://www.pca-cpa.org/showpage.asp?pag\\_id=1429](http://www.pca-cpa.org/showpage.asp?pag_id=1429)

<sup>791</sup> Boyle and Harrison 275

unlike all arbitrations, completely available to the public. Furthermore, it is significant that these are inter-state arbitrations since disputes before the ICJ are similarly limited to states parties. So-called ‘mixed arbitrations’ (involving states and non-state actors) it is suggested are of more limited value in terms of providing guidance for procedural improvements that the purely state-centric ICJ could implement.

The recent revitalisation of inter-state arbitration can be attributed to two main factors.<sup>792</sup> The first is the dispute settlement procedure set out in Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS)<sup>793</sup> and the second is the adoption of the series of Optional Procedural Rules as part of the New Directions Initiative of the PCA.<sup>794</sup> Indeed, of the three arbitrations examined in this section, the *Abyei* arbitration utilises a particular set of Optional PCA Rules and the *Guyana/Suriname* arbitration is a result of a dispute arising under UNCLOS.<sup>795</sup> As such, they serve as clear examples of how the PCA is increasingly relevant in contemporary international dispute settlement.

To elaborate on the first rejuvenating factor, Article 287(1) UNCLOS provides that states may make a declaration stipulating their preferred means of settling any dispute that arises under the Convention, including *ad hoc* arbitration in accordance with Annex VII UNCLOS. In addition to the fact that arbitration is looked upon favourably by states as providing a degree of flexibility (in relation to the selection of arbitrators, for example),<sup>796</sup> Article 287(5) provides that arbitration is the default means of settling disputes where parties fail to agree to any alternative means. As such, it can be said that the UNCLOS system of dispute settlement

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<sup>792</sup> It should be noted that the revitalisation of inter-State arbitration should not be equated with the revitalisation of the Permanent Court of Arbitration *per se*. The significant number of investment disputes between States and private parties have also contributed to the full docket of the PCA in recent times – a point not addressed in this section.

<sup>793</sup> T. Van den Hout, ‘Resolution of International Disputes: The Role of the Permanent Court of Arbitration – Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes’ 21 *Leiden Journal of International Law* 643

<sup>794</sup> van Haersolte-van Hof 400; Shifman 286

<sup>795</sup> In total six UNCLOS cases have been, or are currently being, arbitrated under the auspices of the PCA: *MOX Plant Case* (Ireland v United Kingdom) instituted November 2006, terminated by Tribunal Order of June 6 2008, available at <http://www.pca-cpa.org>; *Malaysia/Singapore* (Award on Agreed Terms of 1 September 2005), available at <http://www.pca-cpa.org>; For other Annex VII Arbitrations see *Barbados/Trinidad and Tobago* (Award of 11 April 2006) 45 ILM 798, available at <http://www.pca-cpa.org>; *Bangladesh v India*, instituted October 2009, pending; *The Republic of Mauritius v United Kingdom*, instituted December 2010, pending

<sup>796</sup> See Article 3 Annex VII UNCLOS, Van den Hout; See Shabtai Rosenne and Louis B Sohn, *United Nations Convention on the Law of the Sea, 1982: A Commentary*, vol 5 (Martinus Nijhoff Publishers 1989), V, at 42 referring to statements in Plenary fourth session France, (1976), 59th meeting, paras. 8–10, V Off. Rec. 14; and Madagascar, 61st meeting, para. 44, V Off. Rec. 34; see also; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, vol 39 (Cambridge University Press 2005) 56

is somewhat predisposed to arbitration.

In relation to the second factor contributing to the revitalisation of the PCA, the Optional Procedural Rules have their roots in the United Nations Commission on International Trade Law Rules (UNCITRAL Rules).<sup>797</sup> Following the codification of the arbitration procedure in The Hague Conventions of 1899 and 1907 a number of high profile arbitrations had taken place before the procedure fell in to decades of desuetude.<sup>798</sup> In seeking to reverse the fortunes of the PCA, the UNCITRAL Rules were a major influence in the drafting of the Optional Rules in 1992 following the New Directions initiative.<sup>799</sup> The Working Group opted to give (a revised version of) the UNICTRAL Rules a central place in the PCA system due to their perceived flexibility and ability to apply to both states and non-state parties.<sup>800</sup> The success of the UNCITRAL Rules and resulting significant influence on the revitalisation of the PCA is also bound up with the operation of the Iran-US Claims Tribunal which significantly increased awareness of them.<sup>801</sup>

### *3.2.1. The Influence of the Iran-US Claims Tribunal*

Whilst the Iran-US Claims Tribunal is not an inter-state arbitral body, its operation to at least some extent influenced the adoption of the series of Optional Procedural PCA Rules and has in turn logically influenced the way that modern inter-state arbitrations operate. The Iran-US Claims Tribunal is a product of the diplomatic crisis between the US and Iran that encompassed the Hostages crisis, the imposition of economic sanctions on Iran and the subsequent judgment by the ICJ that Iran had breached its international obligations towards the diplomatic and consular staff taken hostage.<sup>802</sup> The Claims Settlement Declaration, part of the Algiers Accords designed to bring the diplomatic crisis to an end, provides for the establishment of the Iran-US Claims Tribunal, its competence, composition and rules of

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<sup>797</sup> The UNCITRAL rules must be seen in the context of other arbitral rules of practice such as International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration

<sup>798</sup> See for example *Island of Palmas (or Miangas)* (United States of America v The Netherlands), Award, 4 April 1928; *Norwegian Shipowners' Claims (Norway v United States of America)*, Award, 13 October 1922 and the notable arbitration between China and an American corporation; *Radio Corporation of America v The National Government of the Republic of China*, Award, 13 April 1935

<sup>799</sup> van Haersolte-van Hof 400; Shifman 286

<sup>800</sup> *The Permanent Court of Arbitration- New Directions, Working Group on Improving the Functioning of the Court*, 13 May 1991 – Peace Palace, The Hague, (The Hague, International Bureau of the Permanent Court of Arbitration in co-operation with the T.M.C. Asser Institut 1991), p. 8

<sup>801</sup> van Haersolte-van Hof 403

<sup>802</sup> *Tehran Hostages Case*



procedure.

The Algiers Accords stipulated that the Iran-US Claims Tribunal would follow the UNCITRAL Rules, approved by the General Assembly only a few years before in 1976, with necessary amendments since these Rules were designed for *ad hoc* commercial arbitration between only two private parties.<sup>803</sup> Crucially, in terms of fact-finding, the UNCITRAL Rules are significant for a number of reasons. For instance, particularly noteworthy is the fact that the Rules provide for a more proactive role for the tribunal, at least compared to the existing inter-state court, the ICJ.

### *3.2.1. (i) The Extent to Which the Iran-US Claims Tribunal Takes an Active Role in Investigating Facts*

From its early days the Tribunal has taken an active role in investigating the facts.<sup>804</sup> Generally in cases where the Tribunal feels the information put before it by the parties themselves is not adequate to establish the facts of the case it issues orders informing the parties of what information the Tribunal feels it lacks.<sup>805</sup> Such orders are often made after pre-hearing conferences with the parties. Such pre-hearing conferences are a notable aspect of the Tribunal's approach to fact-finding and have been described as an effective tool in alerting the Tribunal to what documents it requires to be produced.<sup>806</sup> As practice evolved, 'the Tribunal has continued to be quite activist and to issue detailed orders requiring parties to

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<sup>803</sup> See Claims Settlement Agreement, Algiers Accords, 81 Dep't St. Bull. § (1981), 20 ILM 223 (1981), Art III (2); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. III, para. 2, *reprinted* in IRAN-U.S. C.T.R. 9, 10 (1981-1982); Karl-Heinz Böckstiegel, 'The Relevance of National Arbitration Law for Arbitrations Under the UNCITRAL Rules' 1 J Int'l Arb 223, 227

<sup>804</sup> Order of December 20, 1982 in Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Case No. 36, Chamber One, *reprinted* in 1 Iran-U.S. C.T.R. 455 (1981-1982); Order of January 21, 1983 in General Motors Corporation, et al. and Government of the Islamic Republic of Iran, et al., Case No. 94, Chamber One, *reprinted* in 3 Iran-U.S. C.T.R. 1 (1983)

<sup>805</sup> See e.g. Order of February 2 1984 in Henry F. Teichmann, Inc., Carnegie Foundry and Machine Company and Hamadan Glass Company, Case No. 264, Chamber One; Order of January 15, 1986 in Hoshang Mostofizadeh and Government of the Islamic Republic of Iran, National Iranian Oil Company, Case No. 278, Chamber Two; Order of October 19, 1983 in Konstantine A. Gianoplus and Islamic Republic of Iran, Case No. 314, Chamber One; Order of July 12, 1982 in Leila Danesh Arfa Mahmoud and Islamic Republic of Iran, Case No. 237, Chamber Two; Order of November 18, 1982 in International Systems and Controls Corporation and Industrial Development and Renovation Organization of Iran et al., Case No. 439, Chamber Two; Howard M. Holtzmann, 'Fact-Finding by the Iran- United States Claims Tribunal' in R.B. Lillich (ed), *Fact-Finding Before International Tribunals* (Transnational 1991) 106

<sup>806</sup> *Ibid*

submit specifically described evidence’.<sup>807</sup>

### 3.2.1. (ii) *Production of documents – Article 24(3)*

The most significant fact-finding provision in the Rules of Procedure of the Iran-US Claims Tribunal is Article 24(3) (based on the corresponding UNCITRAL provision), which states that:

‘[a]t any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine’.<sup>808</sup>

Article 24 is significant in providing a binding power of discovery in an international arbitration involving a sovereign state.<sup>809</sup> A number of caveats must be added, however. Firstly, the standard of discovery at the Iran-US Claims Tribunal is much stricter compared to the traditional common law form of discovery and the Tribunal retains discretion as to whether or not it is granted.<sup>810</sup> Secondly, the Tribunal has developed a number of safeguards against so-called ‘fishing requests’ whereby one party would speculatively request a broad category of information from the other, without specifically identifying the evidence or how it will aid the resolution of the dispute, but merely seeks to use the procedure as a way to procure evidence to bolster its own case. In guarding against such requests, the practice emerged that the request made is firstly ‘necessary’,<sup>811</sup> ‘warranted’, or ‘appropriate’<sup>812</sup> and that secondly, the party had already taken ‘all reasonable steps’ to obtain the requested information.<sup>813</sup>

### 3.2.1. (iii) *Enforcement of Production Orders*

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<sup>807</sup> Ibid – Order of July 2, 1987 in Minister of National Defence of the Islamic Republic of Iran and Government of the United States of America, Case No. B1 (claims 2 & 3), Full Tribunal; Order of May 27, 1987 in Ministry of National Defence of the Islamic Republic of Iran and Government of the United States of America, Case No. B-61, Chamber One

<sup>808</sup> UNCITRAL Rules, art 24 (3)

<sup>809</sup> UNCITRAL Rules art 28 (3); Holtzmann 575

<sup>810</sup> Mosk 97; Holtzmann 574

<sup>811</sup> *Weatherford International Inc. and the Islamic Republic of Iran*, Case No. 305, Chamber Two, Order of 15 Feb 1985

<sup>812</sup> *Brown & Root Inc. and the Islamic Republic of Iran*, Case No. 432, Chamber One, Order of 4 Jan 1993

<sup>813</sup> See, for example, Order of March 14, 1983 in *William Stanley Shashoua and Government of the Islamic Republic of Iran, et al.*, Case No. 69, Chamber One

Once the Tribunal is satisfied that the request for disclosure is necessary, warranted or appropriate and that the requesting party has already taken ‘all reasonable steps’ to obtain the information, the Tribunal hands down a production order for disclosure. McCabe has estimated only half are complied with.<sup>814</sup> UNCITRAL Rules provide no sanctions for non-compliance stating only in Article 28(3) that, as noted above, ‘the arbitral tribunal may make the award on the evidence before it’ – however this may in some cases benefit the party withholding the information since it can keep damaging evidence from coming before the Tribunal. As such, the possibility of drawing adverse inferences from any failure to produce requested information has been described as ‘most effective response to a party’s failure to comply with a discovery order...’<sup>815</sup>

### 3.2.1. (iv) Adverse Inferences

Generally, in situations where a party has access to information relevant for the case, the Tribunal is authorised to draw adverse inferences from the failure of that party to disclose it.<sup>816</sup> And in practice the Tribunal has used its Article 24(3) power to draw adverse inferences from the failure of a party to comply with a request for evidence.<sup>817</sup> However generally the Tribunal has been reluctant to draw adverse inferences in practice often because one of the main prerequisites to drawing adverse inferences, ‘namely showing that the missing documents are in the possession of the opposing party’ has not been established.<sup>818</sup> Further even where the prerequisite is established, the Tribunal was remarkably reluctant to draw adverse inferences in cases where it arguably could have.<sup>819</sup>

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<sup>814</sup> Monica Petraglia McCabe, ‘Arbitral Discovery and the Iran-United States Claims Tribunal Experience’ 20 *The International Lawyer* 499, 518

<sup>815</sup> Holtzmann 121; McCabe has described the drawing of adverse inferences as ‘[p]robably the most powerful and most easily facilitated enforcement weapon in both domestic and international settings is the arbitrator’s assumption of negative inference from the refusal to produce requested evidence.’ McCabe 528 See page 570 UNCITRAL commentary; (although in international commercial arbitration there is always the possibility of enforcement through domestic courts); see *INA Corporation and the Islamic Republic of Iran*, Award No. 184-161-1 (12 August 1985) at 14, reprinted in 8 *Iran-US CTR* 373, 382 (1985-1) – *Brown & Root Inc. and the Islamic Republic of Iran*, Case No. 432, Chamber One, Order of 4 Jan 1993, para 3, *Frederica Lincoln Riahi*, Concurring and Dissenting Opinion of Judge Brower, para 20; see *ibid*

<sup>816</sup> Concurring Opinion of Richard M. Mosk in *Ultrasystems Incorporated and Islamic Republic of Iran et al.*, Award No. 27-84-3 (Mar 4 1983) reprinted in 2 *Iran-U.S. C.T.R.* 114, 115 (1983)

<sup>817</sup> Holtzmann 104

<sup>818</sup> Brower and Brueschke 194; For instance in the case of *H.A. Spalding, Inc. and Ministry of Roads and Transport of the Islamic Republic of Iran – Tribunal*, Award No. 212-437-3 (24 February 1986) reprinted in 10 *Iran-U.S. Cl. Trib. Rep.* 22, 26-33, at 31-32

<sup>819</sup> For instance in in *Arthur J. Fritz & Co. and Sherkate Tavonie Sherkathaye Saktemanie (Cooperative Society of Construction Companies)*, the Tribunal stated that the Tribunal’s task would have been greatly facilitated by the submission of directors reports, it stopped short of drawing adverse inferences; Award No. 426-276-3

### 3.2.1. (v) *The Use of Experts*

Experts have been appointed both by the parties and by the Tribunal itself. Brower has described the use of experts appointed by the parties as ‘invaluable’ to the Tribunal in relation to factually complex issues - not just scientific issues - but also in relation to property valuation and assessing accounting standards for example.<sup>820</sup> Whilst parties regularly appoint experts, the Tribunal’s power to appoint its own experts at the request of the parties or on its own initiative under Article 27 has been used sparingly.<sup>821</sup> Since parties regularly appoint experts it is sometimes not necessary for the Tribunal to appoint its own. And even in those rare cases where the Tribunal does so, it will most often only do so after the parties own witnesses have been heard. However, it is nonetheless significant that the Tribunal appointed experts itself at all – something the ICJ has only done in a small number of cases.<sup>822</sup>

### 3.2.1. (vi) *The Iran-US Claims Tribunal in the Round*

On the whole the Iran-US Claims Tribunal takes a generally proactive approach to fact-finding, ‘actively seeking to elucidate the facts, rather than simply evaluating what the parties put before it’.<sup>823</sup> But what is the significance of this brief summary of the practice of the Iran-US Claims Tribunal to our consideration of recent inter-state arbitrations? It is argued that the practice of the Iran-US Claims Tribunal, operating under a modified version of the UNCITRAL Rules that influenced the revitalisation of the PCA, highlights some of the most significant aspects of modern inter-state arbitration that we will see recur when considering the following arbitrations.

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(30 June 1989) *reprinted in* 22 Iran-U.S. Cl. Trib. Rep. 170, at 180; Brower has argued that it was obvious that the majority would have liked to have seen the respondents produce the evidence to clarify the legal issue, but nevertheless did not take the opportunity to draw adverse inferences; *ibid.* This reluctance has provoked some criticism not only from commentators but from judges themselves, lamenting the reluctance to draw adverse inferences from failure to cooperate fully with the Tribunal in the establishment of the factual record; See *William J. Levitt and Islamic Republic of Iran*, The Tribunal was openly critical, stating ‘Their often contradictory and evasive explanations suggest deliberate non-compliance rather than an inability to produce [the documents]’, but stopped short of explicitly drawing adverse inferences, stating it would assess the case in the light of the respondent’s behaviour in non-production; Award No. 520-210-3 (29 Aug 1991) *reprinted in* Iran-U.S. Cl. Trib. Rep. 145 at 165; See also; Dissenting Opinion of Richard. C. Allison. At 190; ‘When a party in possession of evidence that is clearly relevant and would be of assistance to the Tribunal opts to make a selective presentation apparently designed not to illuminate the facts but only to support its own arguments, that party assumes the risk that the Tribunal will reach its own conclusions as to the content of the material withheld’

<sup>820</sup> See *Chas. . Main International, Inc. and Kluzestan Water and Power Authority, Interlocutory Award No. ITL-, 23-120-2 (27 July 1983) reprinted in* 3 Iran-U.S. Cl. Trib. Rep 156, 164-67; See *ibid*

<sup>821</sup> *Ibid*, FN 949 for extensive case law examples

<sup>822</sup> *Ibid*

<sup>823</sup> Holtzmann 132

To reiterate, whilst the Iran-US Claims Tribunal is not an inter-state arbitral body, its operation to at least some extent influenced the adoption of the series of Optional Procedural PCA Rules and has in turn logically influenced the way that modern inter-state arbitrations operate. The noteworthy fact-finding aspects of the Iran-US Claims Tribunal such as its binding power of discovery, use of adverse inferences, its generally proactive approach regarding pre-hearing conferences, asking questions, requesting information and appointing experts are all innovative when compared to the approach of the ICJ at this time, and to a large extent this remains the case even today. A similarly more proactive approach to fact-finding is evident in the following inter-state arbitrations to which we now turn our attention.

### *Recent Inter-State Arbitrations – Fact-Finding Provisions*

First, a preliminary word on the statutory basis for the fact-finding powers that modern inter-state arbitrations possess. Whilst the arbitral Panel most commonly has the discretion to adopt its own rules of procedure (through consultation with the parties),<sup>824</sup> in the end the rules of procedure relating to fact-finding are often similar. Arbitrations constituted under Annex VII of UNCLOS such as *Guyana/Suriname* most often adopt Rules of Procedure based on the PCA Optional Rules<sup>825</sup> meaning that there is a degree of commonality between such arbitrations and those brought on an *ad hoc* basis that opt to base their Rules of Procedure on the PCA Optional Rules also, such as the *Abyei* Arbitration. To elaborate, the 2012 PCA Rules of Procedure, Optional Rules for Arbitrating Disputes Between Two States and Optional Rules for Arbitrating disputes between Two Parties of which Only One Is a State all contain broadly similar provisions, based on the corresponding UNCITRAL provisions, to the effect that the Arbitral Tribunal may at any time call on the parties to produce any information it requires and may draw adverse inferences for any failure to do so.<sup>826</sup> The vast majority of modern inter-state arbitrations adopt Rules of Procedure containing such provisions or slight variations thereof.

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<sup>824</sup> See Article 5 Annex VII UNCLOS

<sup>825</sup> Which, as we noted above, are themselves based on the UNCITRAL Rules

<sup>826</sup> See Article 27(3) PCA Arbitration Rules 2012, Article 24(3) PCA Optional Rules for Arbitrating a Dispute Between Two States, Article 24(3) PCA Optional Rules for Arbitrating a Dispute between Two Parties of Which Only One is a State, Article 11(2) Rules of Procedure Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea, in the Matter of Arbitration Between: Guyana and Suriname, Award, 17 September 2007, Article 12(2) Rules of Procedure *MOX Plant Arbitration*, Article 24(3) UNCITRAL Arbitration Rules, General Assembly Resolution 31/98 1976 or Article 27(3) UNCITRAL Arbitration Rules 2010

### 3.2.2. *Guyana/Suriname*

The recent Guyana/Suriname arbitration has a number of notable fact-finding elements including the appointment of experts and a Tribunal actively engaging with a dispute over disclosure of documents.

#### 3.2.2. (i) *Introduction*

On 24 February 2004 Guyana initiated arbitration proceedings with Suriname concerning the delimitation of their maritime boundary, and related alleged breaches of international law by Suriname in disputed maritime territory. Guyana brought proceedings under Articles 286 and 287 of UNCLOS and in accordance with Annex VII of the Convention.<sup>827</sup> Neither party had made a declaration regarding their preferred method of dispute settlement under Article 287(1). In its Notification of Claim, Guyana stated that both parties had accepted arbitration in accordance with Annex VII through Article 287(3) of UNCLOS. The Tribunal adopted its rules of procedure with the consent of the parties on 30 July 2004.

#### 3.2.2. (ii) *Hydrographic Expert*

By Order No. 6 of 27 November 2006, after consultation with the parties, the Tribunal appointed an expert, more specifically a hydrographer, to assist it in the course of proceedings ‘in the drawing and explanation of the maritime boundary line or lines in a technically precise manner’.<sup>828</sup> The hydrographer appointed by the Tribunal played a notably active part in the proceedings requesting information he felt necessary to effectively carry out his task.<sup>829</sup> In addition, through Order No. 8 the hydrographer undertook a site visit to inspect the position

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<sup>827</sup> Under the dispute settlement regime of UNCLOS, Art 279 provides that parties are to settle disputes peacefully in accordance with Art 2(3) UN Charter. Art 280 sets out that there is nothing to prevent states from settling disputes by their own means. Art 280(1) contains an obligation to proceed to exchange of views once dispute arises. Art 281 provides that where parties have chosen preferred means of dispute settlement then this applies. Only when no agreement that further procedure is needed. If no agreement is reached then Section 2 of Part XV ‘Compulsory Procedures Entailing Binding Decisions’ comes into play states can make declaration choosing ITLOS, ICJ, arbitral tribunal or special arbitral tribunal as preferred means under Art 287. Where no agreement is met then arbitration is initiated to find agreement

<sup>828</sup> 3.1. Order No. 6; *Guyana v Suriname Arbitration, para 108*, Order No. 6

<sup>829</sup> Namely: ‘the position of Marker “B”, and other points in this 1960 survey within the geographic area of the mouth of the Courantyne River, their geodetic datum, and the WGS-84 datum position of these points if they have been determined by re-computation of the 1960 survey’; *ibid*, para 110, confirmed by Order No. 7 12 March 2007 that the information had been received

of Marker “B” on 31 May 2007.<sup>830</sup> The appointment by the Tribunal of an expert to assist it clearly indicates that it wished to proactively engage with the evidence to establish a sound factual basis upon which to make a judgment rather than simply relying on the information submitted by the parties, or even on the expert evidence presented by the parties themselves. Furthermore, in contrast to the ICJ’s practice of consulting *experts fantômes* criticised in the previous chapter, the Tribunal was transparent in actively consulting with an independent expert in assisting it in the course of proceedings.<sup>831</sup>

### 3.2.2. (iii) Dispute Over Disclosure of Documents

On 4 November 2004 Guyana alleged that Suriname had objected to its requests for access to a number of files located in the archives of the Netherlands Ministry of Foreign Affairs,<sup>832</sup> and later requested the Tribunal to ‘require Suriname to take all steps necessary to enable the parties to have access to historical materials on an equal basis and immediately advise The Netherlands that it withdraws its objection to disclosure of 7 December [2004]’.<sup>833</sup> Suriname justified its objection, saying that this was not an issue of equal access to public records for the records were not public, owing to the fact they related to matters of national security and that it was the policy of the Netherlands to restrict material relating to ongoing boundary disputes.<sup>834</sup>

By letter to the President of 4 January 2005 Guyana again requested that the Tribunal ‘adopt an Order requiring both parties to cooperate and to refrain from interference with each other’s attempts to obtain documents or other information...and...to take all necessary steps to undo the effects’ of interference that had already taken place.<sup>835</sup> The Tribunal, in asking for Suriname’s views on Guyana’s letter, reminded the parties of the importance of the principles of equality of arms and cooperation in the course of international proceedings- citing Articles 5 and 6 of Annex VII of UNCLOS as well as Articles 7(1) and (2) of the Tribunal’s own Rules of Procedure in support of this position.<sup>836</sup> It is a significant and bold move for the Tribunal to explicitly remind the parties of their duty to collaborate with the Tribunal and is another

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<sup>830</sup> Order No. 7, 21 May 2007

<sup>831</sup> Van den Hout 652

<sup>832</sup> *Guyana v Suriname Arbitration*, para 16

<sup>833</sup> *Ibid*, para 17

<sup>834</sup> *Ibid*, para 18; letter to the President 27 December 2004

<sup>835</sup> *Ibid*, para 19

<sup>836</sup> *Ibid*



indicator of a tribunal actively engaged in the fact-finding process seeking to achieve as close an approximation of the objective truth as possible.

In order to resolve the impasse the President of the Tribunal asked Guyana to submit a ‘list of specific documents and information in the archives of The Netherlands Ministry of Foreign Affairs it is seeking to access, indicating in general terms the relevance of each item solely as it pertains to the maritime boundary before this tribunal’ and asked Suriname to communicate its position on ‘whether the specific items sought by Guyana in that list should be released to Guyana, and if not, on what basis they should be withheld’.<sup>837</sup>

Subsequently Suriname complained that Guyana had not specified the information it required as requested by the Tribunal, nor explained why the information it had requested was necessary and stated that it believed that ‘none of the items on Guyana’s list...is a file or document that Suriname has an obligation under international law to make available to Guyana’.<sup>838</sup> Predictably, Guyana argued that since it had been denied access to the information it could provide no further clarification or details about the evidence it sought.<sup>839</sup>

### 3.2.2. (iv) *The Tribunal’s Approach to Fact-Finding*

After extended disagreement over access to documents, the Tribunal issued Order No. 1 on 18 July 2005, entitled ‘Access to Documents’, which addressed a number of interesting fact-finding issues. First of all, the Order stated that the Tribunal would not consider any document from the archives of The Netherlands to which Guyana had been denied access.<sup>840</sup> This can be seen a proactive move by the Tribunal to counteract the difficulties and apparent reluctance of Suriname to cooperate with the Tribunal in relation to this evidence.

Secondly the Order made clear that each party had the right to ‘request the other Party, through the Tribunal, to disclose relevant files or documents, identified with reasonable specificity, that are in the possession or under the control of the other Party’.<sup>841</sup> In this statement the Tribunal reminds the parties of their duty to collaborate with the Tribunal and

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<sup>837</sup> 7 February 2005, *ibid*, para 26

<sup>838</sup> Letter to President, 21 February 2005, *ibid*, para 28

<sup>839</sup> 2 March 2005, letter to President, *ibid*, para 30

<sup>840</sup> Order No. 1 Operative Paragraph 1

<sup>841</sup> Order No. 1 Operative Paragraph 3

seeks to facilitate the disclosure of information between the parties – taking a more active role than the ICJ would do. However the Tribunal chose its words carefully, referring not to a general right of discovery but to a right to ‘documents, identified with reasonable specificity, that are in the possession or under the control of the other party’. As such the Tribunal places two important limitations that prevent a general discovery right – firstly referring only to information within the possession or under the control of the other party<sup>842</sup> and laying down the condition that the information must be ‘identified with reasonable specificity’, to prevent so-called fishing expeditions. It is suggested that in this the influence of the Iran-US Claims Tribunal can be discerned.

### 3.2.2. (v) *Independent Expert*

The Order was also notably innovative in establishing an independent expert, under article 11(3) of the Tribunal’s Rules of Procedure whose task was to, at the request of a party disclosing information, review any proposal by that party to ‘remove or redact parts of that file or document’<sup>843</sup> in light of the fact that that party may have a right to non-disclosure for valid reasons.<sup>844</sup> Importantly, any dispute as to the failure to produce a document, in whole or part, was to be resolved by the expert, with whom, under Article 11(4) of the Tribunal’s Rules of Procedure, the parties are under a duty to cooperate with.<sup>845</sup>

Through a letter to the President on 20 July 2005 Guyana requested a number of ‘relevant files’ in the possession or under the control of Suriname, pursuant to Order No. 1. On 25 July 2005 Suriname asked the Tribunal to reject Guyana’s request, but stated that it was willing to comply with its obligations under paragraph 2 of the order.<sup>846</sup> On 27 July Suriname wrote to the President setting out the way in which it intended to provide the information to Guyana, in implementation of Order No. 1, paragraph 2. After some equivocation, Suriname agreed to submit the documents to the independent expert.<sup>847</sup>

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<sup>842</sup> See *Corfu Channel* on this

<sup>843</sup> Order No. 1 Operative Paragraphs 4,5

<sup>844</sup> Such as that the information does not relate to the present dispute or national security considerations or ‘prejudice to governmental interest’ as recognised by Judge Jessup in his Separate Opinion in the *Barcelona Traction Preliminary Objections* case at para 97; see also *Corfu Channel Case 4* and *Bosnian Genocide Case*, at para 205

<sup>845</sup> Order No. 1 Operative Paragraph 7

<sup>846</sup> Letter to the President, 25 July, *Guyana v Suriname Arbitration*, para 50

<sup>847</sup> (Files 161 and 169A); Professor Hans van Houtte was appointed as independent expert – see Order No. 3, 12 October 2005, *ibid*, paras 59-60

The Tribunal's Order No. 3 provides that the Tribunal will retain ultimate control over the evaluation of the evidence.<sup>848</sup> The Order provides that if a party invokes paragraph 5 to remove or redact information requested to be produced, 'the Party proposing removal or redaction shall produce the entire un-redacted file or document for the Expert's inspection.'<sup>849</sup> The Expert is then to invite the party to justify why it ought to be redacted or removed.<sup>850</sup>

Subsequently the Tribunal issued Order No. 4 by which it ordered Suriname to cooperate with the independent tribunal in accordance with Order No. 3<sup>851</sup> and ordered the independent expert to review Suriname's proposals for removal or redaction<sup>852</sup> and to determine whether Guyana's request for information had made with 'reasonable specificity and appear relevant.'<sup>853</sup> This corresponding obligation is a clear attempt to prevent any 'fishing expeditions' from Guyana. Both parties interacted with the Tribunal and the independent expert extensively in attempting to reach common ground regarding the submission of a number of documents and attempts to withhold or redact them.<sup>854</sup> The independent expert, after reviewing the relevant files, submitted a report to the Tribunal which was made available to the parties.<sup>855</sup> Guyana completely agreed with the findings of the Report and pushed for disclosure of the documents mentioned. Suriname, on the other hand, concurred with everything apart from the disclosure of one specific document, File 161, which it protested ought not to be disclosed.

On 16 February 2006 the Tribunal issued Order No. 5 'adopting' the recommendations of the independent expert's report in sections 5 and 6 relating to Files 161 and 169A stated that Suriname was 'hereby requested to grant Guyana immediate access to the files in accordance with those recommendations'. In relation to other documents, the Tribunal ordered that Suriname either disclose them to Guyana or submit them to the expert for redaction, as it so chose – a course of action that Suriname pursued, providing a number of documents to the expert along with a memorandum containing its reasons why they ought to be redacted.<sup>856</sup>

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<sup>848</sup> Order No. 3, 2.0

<sup>849</sup> Order No. 3, 2.3

<sup>850</sup> Order No. 3, 2.3

<sup>851</sup> Order No. 4 1(a)

<sup>852</sup> Order No. 4 1(b)

<sup>853</sup> Order No. 4 2(a)

<sup>854</sup> See *Guyana v Suriname Arbitration*, see paras 64-70

<sup>855</sup> *Ibid*, para 76, 18 January 2006

<sup>856</sup> *Ibid*, para 80-86

The wording of the evidentiary Orders is significant and deserves closer attention. Although the Tribunal phrases the order in terms of ‘requesting’ information from the parties, it is unclear what the exact legal force of their orders is. The Tribunal’s authority to compel the production of evidence of course stems from its constitutive instruments, in this case UNCLOS and its Rules of Procedure adopted by the parties. Neither of these instruments clearly sets out that the Tribunal possesses a power to compel the disclosure of information and unlike the WTO adjudicative bodies, as we have seen, no clear attempt has been made to develop such a power in this context. As such the exact legal nature of the Tribunal’s requests remains unclear. However the possibility of developing a binding power drawing on the duty of collaboration that all states are under once they accept the jurisdiction of an international tribunal is one that remains open and is an issue that is examined in greater detail in relation to the ICJ in Chapter 4 at 4.1.

### *3.2.2. (vi) The Arbitral Tribunal’s Approach in the Round*

At the very least it can be said that this arbitral tribunal, as with a number of others in recent times, has taken a clearly proactive approach to fact-finding in engaging with the parties, mediating in their dispute regarding the disclosure of evidence, requesting information itself and even appointing an independent expert to review and redact information in order to reach a solution that would satisfy both parties and, most importantly, give the Tribunal the best chance of achieving as close an approximation of the truth as possible. The appointment of the independent expert to adjudicate on issues of disclosure of information is particularly innovative and appears to have worked well in the present case and to the satisfaction of both states – illustrating that more proactive tribunals are not immediately threatening to states and can in fact help to illicit further information required for the proper administration of justice. The Tribunal also relied heavily on independent experts’ advice and cited expert advice referred to in the submissions of the parties – a practice not often seen in the ICJ.<sup>857</sup> Admittedly some bargaining was necessary in order to ensure that both parties were happy with the solution reached but this is to be expected in the course of international litigation. The Tribunal’s proactive approach facilitated the evidentiary compromise and could serve as a model for other international courts and tribunals considering being more proactive in their

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<sup>857</sup> Riddell 255

approach to fact-finding.<sup>858</sup>

### 3.2.3. *Abyei Arbitration*

The Abyei Arbitration is similarly noteworthy for its approach to issues of fact-finding including requesting information, active involvement in the proceedings and the appointment of experts.

#### 3.2.3. (i) *Introduction*

The Abyei Arbitration took place at the Permanent Court of Arbitration in 2009 under the PCA's Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State. The arbitration was a politically significant one concerning a long-running dispute over territorial boundaries between the state of Sudan and the newly formed state of South Sudan. The dispute was brought before an arbitral tribunal due to the non-state nature of the Sudan People's Liberation Movement/Army (SPLM/A) at the time. Although the International Court of Justice has a long history with territorial disputes, it would have been unable to deal with this dispute since its Statute does not permit non-state parties to appear before it.<sup>859</sup>

Following decades of civil war the Protocol on the Resolution of the Abyei Conflict was signed in May 2004 however it did not contain any agreement in relation to the boundaries of the Abyei area. Instead, the Protocol provided for the establishment of the Abyei Boundaries Commission (ABC) to 'define and demarcate the Area of the nine Ngok Dinka Chiefdoms transferred to Kordofan in 1905'<sup>860</sup> consisting of members appointed by the parties and five independent experts appointed by the US, UK, and IGAD.<sup>861</sup> The ABC was to prepare a report that would be final and binding upon the parties.<sup>862</sup> However the award was immediately disputed by the parties and the 2008 Abyei Road Map contained an obligation on both parties to refer the dispute to arbitration.<sup>863</sup>

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<sup>858</sup> *Guyana v Suriname Arbitration*, para 90-107

<sup>859</sup> Brooks Daly, 'The Abyei Arbitration: Procedural Aspects of an Intra-state Border Arbitration' 23 *Leiden Journal of International Law* 801, 803; Article 34(1) states that 'only States may be parties in cases before the Court'.

<sup>860</sup> Abyei Protocol, Article 5(1); see Understanding on Abyei Boundaries Commission (Abyei Appendix) 2004.

<sup>861</sup> Abyei Protocol Article 5(2), Abyei Appendix Article 2

<sup>862</sup> Abyei Appendix Article 5

<sup>863</sup> The Road Map for Return of IDPs and Implementation of Abyei Protocol' signed in Khartoum, 8 June 2008; see para 134

The task of the resulting Arbitral Tribunal was twofold, (i) firstly to effectively conduct judicial review to determine whether or not the ABC had exceeded its powers,<sup>864</sup> and (ii) secondly, if it was found to have done so, to ‘proceed to delimit the boundaries of the area of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905, based on the submissions of the parties’<sup>865</sup> or to declare that the report of the ABC was valid.<sup>866</sup>

### 3.2.3. (ii) Evidence - Tribunal’s Request for Certain Documents

The SPLM/A alleged that it had been denied access to a number of documents and requested of the Tribunal ‘full and unhindered access to the SPLM/A and counsel to the relevant archival documents at the Survey Department...’<sup>867</sup> In turn the Tribunal requested that the documents in question be produced. Under Article 24(3) of the PCA Rules the Tribunal requested that the Government of Sudan supply the Tribunal and the SPLM/A with a detailed list of documents including a full record of maps and records as specified.<sup>868</sup> The Tribunal laid out a detailed procedure regarding what information it desired, and the options that the Government of Sudan had in producing it, including a procedure for objecting to disclosure.<sup>869</sup>

The Tribunal also invited the SPLM/A to request any other documents it needed,<sup>870</sup> which the SPLM/A did on a number of occasions.<sup>871</sup> Nevertheless, the SPLM/A continued to argue that it had been denied complete access to the Sudan Survey Department and Sudan National Records Office and urged the Tribunal to draw adverse inferences from Sudan’s failure to

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<sup>864</sup> Arbitration Agreement, Article 2(a); see Vaughan Lowe and Antonios Tzanakopoulos, ‘The Abyei Arbitration’ in Lise Bosman and Heather Clark (eds), *The Abyei Arbitration (Sudan/Sudan People’s Liberation Movement/Army)* (The Permanent Court of Arbitration Award Series, The Permanent Court of Arbitration 2012), at para 19

<sup>865</sup> Arbitration Agreement, Article 2(c)

<sup>866</sup> Arbitration Agreement, Article 2(b); Award, paragraph 6

<sup>867</sup> Letter to the Tribunal March 17, 2009

<sup>868</sup> In the Matter of an Arbitration Before a Tribunal Constituted in Accordance with Article 5 of the Arbitration Agreement Between the Government of Sudan and the Sudan People’s Liberation Movement / Army on Delimiting Abyei Area and the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One is a State between the Government of Sudan and the Sudan People’s Liberation Movement/Army, Final Award, July 22 2009, see Transcript of November 24 2008 Procedural Hearing p. 34-5

<sup>869</sup> Ibid, see Transcript of November 24 2008 Procedural Hearing p. 34-5

<sup>870</sup> Award, para 46

<sup>871</sup> Award, para 49, 53

provide unfettered access to this information.<sup>872</sup> Sudan refuted these allegations throughout, accusing the SPLM/A of ‘an unfettered fishing expedition’ and arguing that the SPLM/A’s ‘own failure to exercise due diligence is no justification for a late request to seek access to such a potentially wide array of documents’.<sup>873</sup>

On the other side, Sudan claimed that a number of its witnesses had been harassed and threatened,<sup>874</sup> (allegations which the SPLM/A promised it had investigated and found to have no basis in fact).<sup>875</sup> Furthermore the SPLM/A continued to protest that its legal representatives had been ‘wholly obstructed from viewing a single relevant document’ and “prohibited from carrying out any of their own research”.<sup>876</sup> After a long exchange of letters between the parties the Government of Sudan stated that it had already provided a number of the maps requested to the Tribunal and to the SPLM/A and that others could not be located.<sup>877</sup> Throughout this time the Tribunal played an active role, prompting the production of the requested evidence.<sup>878</sup>

In response to the possibility of drawing adverse inferences, the Tribunal made an astute distinction in order to avoid addressing the issue directly. The Tribunal stated that it believed that the SPLM/A was not asking the Tribunal to draw adverse inferences at this precise moment but rather the SPLM/A was putting the Government of Sudan ‘on notice’ that it may seek adverse inferences if its requests for information are not complied with.<sup>879</sup> In doing so the Tribunal stated that ‘[i]n light of the arguments presented at oral pleadings, the Tribunal will decide, in the fullness of these proceedings, whether any adverse inferences or other appropriate conclusions should be drawn’.<sup>880</sup>

Both parties presented arguments regarding admissibility and weight of evidence produced.<sup>881</sup> The Tribunal, however, ultimately accorded no weight to allegations of intimidation,

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<sup>872</sup> Award, para 57; *Abyei Arbitration Award*, para 61, see p 2-3 SPLM/A letter dated April 3, 2009; see also p. 2, SPLM/A letter dated April 8, 2009

<sup>873</sup> Award, para 49, 52, March 23 2009

<sup>874</sup> Award, para 63

<sup>875</sup> Award, para 64-5

<sup>876</sup> *Abyei Arbitration Award*; letter to the GoS and Tribunal, March 26 2009

<sup>877</sup> Ibid, para 55; letter of March 30 2009

<sup>878</sup> See for example the Presiding Arbitrator’s request to the Government of Sunday to respond to the points made on April 3 and provided

<sup>879</sup> *Abyei Arbitration Award*, para 61, April 11 2009 Communication from the Tribunal to the parties

<sup>880</sup> Ibid, para 61, April 11 2009 Communication from the Tribunal to the parties

<sup>881</sup> Award, para 306 onwards, for arguments on oral tradition see para 372

obstruction of access to documents and drew no adverse inferences,<sup>882</sup> a point lamented by Judge Al-Khasawneh in his dissent.<sup>883</sup> During the oral pleadings Judge Al-Khasawneh asked four witnesses of the Government of Sudan if they had been intimidated by agents of the SPLM/A, however in the end nothing came of these allegations with the Award describing the witnesses as giving ‘varying answers’.<sup>884</sup>

### 3.2.3. (iii) Experts Appointed by the Tribunal

On 16 April 2009 the Tribunal passed Procedural Order No.2 which provided for the appointment of Douglas Vincent Belgrave and Bill Robertson as experts to provide assistance to the Tribunal in the course of this arbitration.<sup>885</sup> The task of the experts was to be, should the Tribunal find that the ABC had exceeded its mandate, to assist the Tribunal in delimiting the boundaries of the nine Ngok Dinka chiefdoms transferred to Kordofan in 1905 in accordance with the Arbitration Agreement.

### 3.2.3. (iv) Experts & Witnesses Appointed by the Parties

Furthermore, the parties presented witnesses to the Tribunal. The Government of Sudan had criticised the use of witness evidence in this case, which the Tribunal agreed with in cases of oral evidence passed down through generations, however it went on to state that ‘depriving witness evidence *per se* of all probative value would be unjustifiable’<sup>886</sup> and that it would ‘...accordingly admit oral evidence and will assign it the weight proper to it in each instance. It will be duly taken into account, in particular, in so far as it corroborates other sources of evidence’.<sup>887</sup> Furthermore, throughout the course of proceedings, both the Government of Sudan<sup>888</sup> and the SPLM/A<sup>889</sup> produced experts to speak to their case. In appointing its own

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<sup>882</sup> Lowe and Tzanakopoulos 60

<sup>883</sup> Dissent of Judge Al-Khasawneh, para 31, 200

<sup>884</sup> *Abyei Arbitration Award*, para 66; see witness testimony of Mr Zakaria Atem Diyin Thibek Deng Kiir at GoS Oral Pleadings, April 21, 2009, Transcr. 43/04 – 44/05, Mr Majid Yak Kur at GoS Oral Pleadings, April 21, 2009, Transcr. 54/13 – 55/09, Mr Ayom Matit Ayom at GoS Oral Pleadings, April 21, 2009, Transcr. 51/04 – 51/19 and Mr. Majak Matet Ayom at GoS Oral Pleadings, April 21, 2009, Transcr. 51/25 – 52/12

<sup>885</sup> See Procedural Order No. 2 at

<sup>886</sup> *Abyei Arbitration Award*, para 717

<sup>887</sup> *Ibid*, para 718

<sup>888</sup> Pursuant to Procedural Order No. 1,10 the GoS presented the following witnesses to answer questions propounded by the Tribunal: Mr Ayom Matet Ayom, Mr Majak Matit Ayom, Mr Majid Yak Kur

<sup>889</sup> As notified on March 20, 2009 and March 30, 2009, the SPLM/A presented the following experts and witnesses for direct examination and for cross-examination by the GoS:11 Mr Deng Chier Agoth Professor J. A. Allan Dr Peter Poole Professor Martin Daly Mr Richard Schofield



experts and hearing both witnesses and expert opinion put forward by the parties it can be said that the approach of the Tribunal is reminiscent of the similarly more proactive approach to fact-finding taken in the *Abyei* and *Kishenganga* arbitrations as we will see in the following section.

### 3.2.3. (v) *Dissent*

As he has in previous cases,<sup>890</sup> Judge Al-Khasawneh was vehemently critical of the Tribunal's approach to both fact-finding and fact-assessment.<sup>891</sup> Judge Al-Khasawneh even went so far as to accuse the Tribunal of doing the very thing it had accused the ABC of, namely exceeding its mandate, by delimiting boundaries 'without the reasoning required of it by Experts'.<sup>892</sup> In particular, in relation to the reasoning for the eastern and western boundaries and their intersection with the northern boundary, Al-Khasawneh described the authority for the Tribunal's delimitation as one source, and that that source was 'the imprecise, non-contemporaneous remarks made by Howell in 1951 which the majority quoted out of context and misinterpreted'.<sup>893</sup>

### 3.2.3. (vi) *Abyei in the Round*

What can be said about the fact-finding approach of the arbitral tribunal in the *Abyei* arbitration? Mbengue and D'Aspremont interestingly characterise the approach of the tribunal in the *Abyei* arbitration as providing 'passive treatment of scientific fact-finding' since the tribunal interpreted its mandate so as to not require 'an analysis of the substantive correctness' of the science and stated that it would not 'engage at the outset in an omnibus re-operating of the... appreciation of evidence'.<sup>894</sup> However, whether or not the tribunal had the scientific expertise to be able to engage with such disputed scientific facts or whether an arbitral tribunal was the best place to do so is somewhat doubtful. Rather, the approach of the tribunal in establishing experts and engaging with the parties is anything but passive, especially compared to the practice of the International Court of Justice.

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<sup>890</sup> See Joint Dissenting Opinion in *Pulp Mills*

<sup>891</sup> Dissent of Judge Al-Khasawneh, para 10, 15, 22(e)

<sup>892</sup> Dissent of Judge Al-Khasawneh, para 5

<sup>893</sup> Dissent of Judge Al-Khasawneh, para 6; see P.P. Howell, "Notes on the Ngork Dinka of Western Kordofan", (1951) 32 *Sudan Notes and Records* 239, p. 242, cited in Award at paras. 701 *et seq*

<sup>894</sup> *Abyei Arbitration Award*, at 410, 411; D'Aspremont and Mbengue 17

There are a number of proactive aspects of its fact-finding process. For instance, in the dispute over access to documents between the parties, the Tribunal played a proactive role in handling the requests and bringing the dispute to a mutually agreeable compromise. In addition the Tribunal was proactive in requesting information, asking questions and appointing its own experts in addition to those appointed by the parties. Although the tribunal was diplomatic, or some might say hesitant, in its approach to drawing adverse inferences, and whilst Al-Khasawneh's vociferous dissent suggests that the fact-finding process is far from perfect, it can nevertheless be said that the Tribunal was readily willing to engage with the parties in the fact-finding process and to utilise some of its fact-finding powers to establish a solid factual basis for the resolution of the dispute. A similar willingness to engage with the facts can be seen in the third and final arbitration examined in this chapter, that of the recent *Kishenganga* arbitration.

### 3.2.4. *Kishenganga*

#### 3.2.4. (i) *Introduction*

The recent Partial Award of the Kishenganga Indus Waters Arbitration (*Kishenganga*) constituted in accordance with the Indus Waters Treaty 1960 between India and Pakistan contains a number of notably proactive fact-finding elements. Conducted under the auspices of the PCA, the dispute concerns the Kishenganga Hyrdo-Electric Project (KHEP) and centres around the two legal questions defined by Pakistan as; ‘The First Dispute’: whether India’s proposed diversion of the river Kishenganga (Neelum) into another Tributary i.e. the Bonar-Madmati Nallah, being one central element of the Kishenganga Project, breaches India’s legal obligations owed to Pakistan under the Treaty, as interpreted in accordance with international law, including India’s obligations under Article III(2) (let flow all the waters of the Western rivers and not permit any interference with those waters) and Article IV(6) (maintenance of natural channels) and the ‘Second Dispute’: whether under the Treaty, India may deplete or bring the reservoir level of a run-of-river plant below Dead Storage Level (DSL) in any circumstances except in the case of an unforeseen emergency.<sup>895</sup>

#### 3.2.4. (ii) *Adoption of Rules of Procedure*

Under Procedural Order No.1 of 21 January 2011, and in accordance with Paragraph 16 of Annexure G, the parties agreed the supplemental Rules of Procedure for the arbitration. The Court noted that the parties had expressed two viable options; firstly the PCA Optional Rules for Arbitrating Disputes Between Two States, or secondly the rules of procedure similar to those used by arbitral tribunals established under UNCLOS in proceedings administered by the PCA. After hearing the parties’ views at the first meeting the Court issued Procedural Order No. 2 on 16 March 2011 adopting the Supplemental Rules of Procedure.<sup>896</sup>

#### 3.2.4. (iii) *Site Visits*

Interestingly, at the First Meeting of the parties, before even the Rules of Procedure had been

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<sup>895</sup> See Pakistan’s Request for Arbitration, para 4; for a detailed account of the factual and historical background of the dispute see Ahmad

<sup>896</sup> See Procedural Order No. 2 para 1.1; please note: this Order has not been published in full as yet and as such there is only a limited amount that can be said about the rules of procedure.

adopted or the scope of the dispute set in stone, the parties agreed on the need for the Court to conduct a site visit in the course of proceedings.<sup>897</sup> The parties agreed that the Court should visit the site of the Pakistan Neelum-Jhelum Hydro-Electric Plant (NJHEP) as well as the KHEP.<sup>898</sup> The Parties agreed that the only presentations made to the Court during the Site Visit were to be those of experts limited to objective, technical issues, meaning that legal issues and argumentation were not permitted to be put forward during the visit.<sup>899</sup>

Furthermore the Court conducted a second site visit, on request of Pakistan on 6 December 2011. After circulating a draft of Procedural Order No. 7 to canvas the thoughts of the parties the Court issued it on 16 January 2012 stating that from 3 to 6 February 2012 three members of the Court, Sir Franklin Berman, Professor Wheeler and one member of the Secretariat would visit the site. The visit would be documented by video and pictures to be shown to the rest of the Court and experts not part of the delegations of the parties would make brief presentations to the members of the Court visiting.

The parties were reassured that the procedure adopted regarding the content of the presentations made to the visiting Court and warned the parties against participating in *ex parte* discussions with Members of the Court – a problematic issue faced by the ICJ in recent times.<sup>900</sup> The second site visit consisted of a visit to the Neelum valley and inspection of the gauge-discharge observation site at Dudhnial and a water-pumping station at Athmuqam – videos of the site visit and the presentations made to the visiting Court were presented to the parties in accordance with Procedural Order No. 7.

#### 3.2.4. (iv) Information Requested of the Parties

From the outset the Court played an active role in proceedings. For instance, on 27 August 2011, Professor Wheeler, the umpire appointed by the Rector of Imperial College London

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<sup>897</sup> In the Matter of the Indus Waters Kishenganga Arbitration before the Court of Arbitration Constituted in Accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan Signed on 19 September 1960, between the Islamic Republic of Pakistan and the Republic of India, Partial Award, 18 February 2013, para 8

<sup>898</sup> Procedural Order No. 3 was passed concerning the itinerary of the visit, the share of the costs to be apportioned and the size of the delegations amongst other matters.

<sup>899</sup> *Kishenganga Partial Award*, see para 5 onwards; Furthermore, as a result of the ordering of Interim Measures the Court passed Procedural order No. 6 the Court ordered two inspections to monitor the implementation of the Interim Measures; Procedural Order No. 6 Concerning the Joint Report dated 19 December 2011, submitted pursuant to paragraph 152(2) of the Order on Interim Measures

<sup>900</sup> See 27 January 2012 Registrar Message to the Parties Regarding Procedural Order No. 7, *ibid*, para 85

requested information from India regarding technical aspects of the KHEP dam including cross-sections of the dam, drawings of the dam elevation and India's Environmental Impact Assessment, amongst other things.<sup>901</sup> The Chairman asked India to furnish the information requested by Professor Wheeler by 2 September 2011 and Pakistan to comment on the information submitted by India by 7 September 2011.<sup>902</sup>

As we can see already, the Arbitral Tribunal is actively participating in the proceedings, requesting information and taking charge of the fact-finding process. Subsequently India informed the Court that the majority of the information requested of it had already been given to Pakistan and that any information that had not been given to Pakistan would be put before the Court with India's Counter-Memorial.<sup>903</sup> On 7 September Pakistan submitted its comments on India's letter to the Court and provided the Court with two additional documents that had not already been made available to the Court.<sup>904</sup> Furthermore, a substantive part of the Partial Award is dedicated to the Court's finding that it had insufficient data on record to determine a precise minimum downstream flow.<sup>905</sup> The parties did not dispute that such a minimum was to be set but could not agree on what this minimum should be and as such this task fell to the Court. However the Court felt it had insufficient data to make such a judgement. Accordingly, the Court took the decision to be proactive and to request further information from the parties.

This is significant in that, as opposed to the reactive approach of the ICJ where judgements are made on the basis of the information submitted by states the vast majority of the time, in this case the Court was willing to admit that it had a factual deficiency and what's more was willing to take steps to remedy it.<sup>906</sup> The Court requested further information from the parties and deferred its judgement on this matter in a detailed request, listing the specific information required of each of the parties.<sup>907</sup> The Court's request is wide-ranging, stipulating that the data 'should be accompanied by full information on the assumptions underlying these analyses, including these for power generation and environmental concerns, and the

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<sup>901</sup> See Interim Measures Hearing Tr., (Day 3), 27 August 2011, at 201: 6 to 202:25

<sup>902</sup> Interim Measures Hearing Tr., (Day 3), 27 August 2011, at 294: 10-16

<sup>903</sup> 2 September 2011, Letter to the Court

<sup>904</sup> *Kishenganga Partial Award, para 60*; In the words of the Court '[t]he evidence presented by the Parties does not provide an adequate basis for such a determination, lacking sufficient data... Accordingly, the Court finds itself unable, on the basis of the information presently at its disposal, to make an informed judgment...'

<sup>905</sup> *Ibid*, para 445

<sup>906</sup> *Ibid*

<sup>907</sup> *Ibid*, 458

associated uncertainty in the Parties' estimates' and other such specific requests.<sup>908</sup> The Court went on to state the strict time limits placed on the submission of the information to the tribunal.<sup>909</sup>

### 3.2.4. (v) *Information Requested by the Parties*

In the phase of the written submissions, after the submission of Pakistan's Memorial and India's Counter-Memorial<sup>910</sup> each party made a number of requests for documents and further information – an interesting procedural practice, especially considering how the arbitral tribunal dealt with these requests. Requests of this type are more akin to the common law procedure of discovery and are commonplace in international commercial arbitration, but are much less common in international inter-state adjudication. It is for this reason that the practice of the Court in this case is particularly interesting.

By email Pakistan requested that India produce a number of documents that had been referred to in India's Counter-Memorial: an unredacted version of a letter from 1960 from the Chairman of India's Central Water and Power Commission (CWPC Letter), a letter dated 13 January 1958 referred to in the CWPC letter, the preliminary hydro-electric survey of the Indus basin and letter of 13 January and revised environmental impact assessments conducted in 2006 (EIAs).<sup>911</sup> This request was later reiterated on 21 January.<sup>912</sup> Meanwhile India requested that Pakistan produce additional information on the purpose of the construction of Adit 1 and the range of uses it could be put to in relation to KHEP,<sup>913</sup> and later on 13 January requested Pakistan provide a copy of the EIA and other assessments for the NJHEP and technical details of the four upstream projects planned.<sup>914</sup> These queries were resolved satisfactorily at the merits stage of proceedings.<sup>915</sup>

In relation to the CWPC letter, Pakistan had requested that it be disclosed in full since it was central to India's case, and, importantly, that the Court was competent to do so under

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<sup>908</sup> Ibid, para 460 to para 463; see Decision D, page 201

<sup>909</sup> Ibid; 120 days from the issuance of the Partial Award

<sup>910</sup> On 27 May 2012 and 23 November 2011 respectively.

<sup>911</sup> *Kishenganga Partial Award*, para 91

<sup>912</sup> Ibid, para 95

<sup>913</sup> Email communication 5 January 2012, *ibid*, para 92

<sup>914</sup> Ibid, para 93

<sup>915</sup> Hearing Tr., (Day 5), 24 August 2012, at 145:15 to 146:8, *ibid*, para 102

Paragraph 20 of Annexure G of the Treaty.<sup>916</sup> On the other hand, India argued that the letter itself is not relevant to the case at hand, that secondly India does not rely on them ‘in terms of Rule 11(i)(a) of the Supplementary Procedural Rules and that lastly the full disclosure of the unredacted letter risks ‘prejudice to India’, also making reference to the Official Secrets Act 1923 in force in both India and Pakistan.<sup>917</sup> The requests between the parties for the disclosure of information prompted the Court itself to intervene and notify the parties of the procedure that would cover Pakistan’s application for production of the CWPC letter:

‘India is requested to provide to all Members of the Court (through the Registrar) a full copy of [the CWPC] letter at India’s earliest convenience, but *in no case later* than Tuesday, February 7, 2012. By no later than Tuesday, February 7, 2012, India is to provide its views on any applicable principle of state secrecy or privilege that the Court should take into account in deciding Pakistan’s disclosure application. Pakistan is invited to comment on India’s submission by no later than Friday, February 10, 2012’.<sup>918</sup>

In reply to Pakistan and the Court’s prompting, India provided a full, unredacted copy of the CWPC letter along with a copy of the Official Secrets Act 1923 (India) and a copy of the Official Secrets Acts 1923 (Pakistan) – each party restating their respective positions.<sup>919</sup>

In order to resolve this impasse the Court passed Procedural Order No. 8 on 14 February 2012. Significantly, the Court stated that it ‘believes that any Party offering a document in evidence should provide the full document and noted that indeed, under Paragraph 20 of Annexure G and Article 13(2) of the Supplemental Rules of Procedure, that it had the power to ‘require from the Parties the production of all papers and other evidence it considers necessary’<sup>920</sup> either *proprio motu* or at the request of one of the parties. In attempting to balance its views that a party should disclose information in full with India’s concerns regarding official secrets, the Tribunal proposed a compromise solution of seeking an examination of the material *in camera* before making a judgement as to whether it should be disclosed in full to the other party.<sup>921</sup> After reviewing the document the Court found that it was not directly relevant to the issues currently in dispute and that ‘the non-disclosure of the redacted passages will not hamper Pakistan’s ability to respond to the arguments made in India’s Counter-

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<sup>916</sup> See Procedural Order No. 8

<sup>917</sup> See Procedural Order No. 8

<sup>918</sup> *Kishengaga Partial Award, para 97*, 1 February 2012 (emphasis added)

<sup>919</sup> *Ibid*, on 7 and 9 February 2012.

<sup>920</sup> See Procedural Order No. 8, at 3.1

<sup>921</sup> See Procedural Order No. 8, at 3.4

Memorial...<sup>922</sup> This practice can be seen as similar as the approach of the Tribunal in the *Guyana/Suriname* arbitration without the formal appointment of an independent expert to review the evidence. Nevertheless we can see active engagement from the Tribunal in eliciting and procuring information from the parties through compromise.

#### 3.2.4. (vi) *Expert Witnesses*

Under paragraph 3.2 of Procedural Order No. 9 on 15 June 2012 the parties indicated the names of both the experts and the witnesses that they intended to cross-examine. Due to the fact the oral proceedings are not publicly available it is not possible to comment in any great detail on the value added to the tribunal's fact-finding process by the cross-examination of expert witnesses or the exact format that such examination followed. However, at the very least it can be said that in conducting cross-examination of both witnesses and experts, by all accounts a valuable element of the proceedings,<sup>923</sup> the procedural approach of the arbitral tribunal, and of the parties themselves, is notably more proactive than the ICJ.

#### 3.2.4. (vii) *The Kishenganga Arbitration in the Round*

The arbitral tribunal in *Kishenganga*, like the preceding two, has taken a proactive approach to fact-finding.<sup>924</sup> From the outset the tribunal showed a willingness to become actively involved in the fact-finding process through the agreement to undertake a site visit (and a later follow-up visit). Furthermore the Tribunal was forthright in requesting information from the parties that it felt it required in order to establish a solid factual foundation upon which to decide the case. In relation to the disputed documents, the Tribunal was also similarly proactive in mediating the dispute and although it stopped short of going as far as the tribunal in *Guyana/Suriname* in appointing an independent expert, it did take extra steps to examine the information *in camera* before making a judgement on its relevance to the case at hand. This approach appears to have been acceptable to both parties. And whilst the tribunal did not appoint any experts of its own in this case, this can more likely be attributed to the composition of the Panel itself which was deliberately made up of arbitrators with relevant expertise in the requires areas (and in addition experts were appointed by the parties

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<sup>922</sup> See Procedural Order No. 8, at 3.5

<sup>923</sup> Foster 3; *Kishenganga Partial Award*; see also *Guyana v Suriname Arbitration*; *Abyei Arbitration Award*

<sup>924</sup> Jacur 450



themselves). As such, there is much to consider in the approach of the tribunal when considering potential lessons for the ICJ.

### 3.4. Chapter 3 Summary – The Lost Art of Fact-Finding

What can be gleaned from this brief survey of the WTO adjudicative bodies and recent inter-state arbitrations? First of all, it can be said that the approach of the two most popular means of settling international disputes today take a generally more proactive approach to fact-finding than the ICJ. However this fact should not be surprising in itself. These tribunals have different constitutive instruments, operate as part of different institutional structures (as part of no strict institutional structure as the case may be) and certainly do not carry the same symbolic value nor bear the same burden in terms of progressive development of international law as the ICJ does. Indeed, in some instances the differences between the tribunals are more clearly apparent; in particular in relation to the fact that there is no standing bench of arbitrators (despite the PCA being nominally ‘permanent’) or in relation to the flexibility regarding the rules of procedure that arbitrating states enjoy. Nevertheless, the tribunals have more similarities than differences. All are tribunals dealing with states, applying international law and playing an important role in the peaceful settlement of international disputes.

As such, it is suggested that the differences between the approaches of the tribunals to the issue of fact-finding cannot simply be dismissed as inevitable given their genetic make up. Rather, it is argued that many of the differences identified are the result of a more or less proactive attitude to fact-finding. But what can be said are the main differences? There are a number of aspects of the fact-finding process that are particularly distinctive:

1. First of all, both the WTO adjudicative bodies and inter-state arbitration more actively engage with the case before them through asking questions and requesting information. In both cases the tribunals come close to asserting a power to compel the disclosure of evidence,
2. Secondly, the WTO adjudicative bodies have (with limited success) attempted to assert a clear burden of proof through the *prima facie* case requirement to take more control over the fact-finding process,
3. Thirdly, both the WTO adjudicative bodies and inter-state arbitration both regularly hear and examine witnesses put before them by the parties and more significantly, appoint their own experts in seeking to better evaluate the evidence put before them,
4. Fourthly, in addition to the (already remarkably proactive in comparison to the ICJ) step of requesting information from the parties, both tribunals have also drawn adverse

inferences from a party's failure to produce the requested information.

5. Fifthly, one arbitral tribunal undertook a site visit (and necessary follow-up visit). The site visit mechanism is one which has been seldom used before the ICJ but one which by all accounts was significant in the arbitration in question.

These aspects of the fact-finding processes of the tribunals examined in this chapter stand out as being significantly different from the approach taken by the ICJ. In fact, in these respects the tribunals examined mark themselves out as clearly more proactive in terms of fact-finding than the ICJ. It is this conclusion that begs the question of whether by adopting a similarly proactive approach to fact-finding, such as being more assertive in its requests for information, the ICJ could perhaps remedy some the current fact-finding deficiencies examined in the previous chapter. It is this question, the possibility of seeing a Court more proactively engaging in the process of fact-finding, and the potential obstacles facing the Court were it to choose to do so, that is the focus of the following chapters.



#### *Chapter 4. Winds of Change: The Possibility (Audacity) of Reform*

Richard B. Lillich famously argued that the Court often fails ‘to take advantage of existing procedures to help unearth the facts that may be the key to the resolution of disputes’.<sup>925</sup> This point was made and developed at length in Chapters 1 and 2. However, it is the conclusions that Lillich drew from this state of affairs that is the subject of this chapter, namely that the Court should ‘be far more aggressive in seeking the facts’ and utilising the fact-finding tools it already possesses.<sup>926</sup> This chapter seeks to draw on the practice of the other international courts identified and suggests that there are a number of avenues open to the Court that could potentially remedy some of its current fact-finding weaknesses, should it choose to do so:

1. The first relates to the possibility of making greater use of the fact-finding powers that the Court already possesses. Section 4.1. explores the possibility of the Court taking a teleological approach to its Statute and Rules and the so-called duty of collaboration in asking whether the Court could potentially construe its fact-finding powers to compel the production of evidence, as opposed to merely requesting it.
2. Secondly, the possibility of better utilising the Court’s power to order provisional measures under Article 41 of its Statute is examined.
3. Thirdly, relating to both the fact-finding and fact-assessment process, section 4.3. explores the possibility of increased use of experts, the refinement of the current procedure for the presentation of expert evidence and greater use of cross-examination as a way of aiding the Court effectively assessing the facts put before it by the parties.

Subsequently Chapter 5 examines the merits of taking a more proactive approach to fact-finding, as facilitated in the manner set out in the present chapter.

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<sup>925</sup> R.B. Lillich and University of Virginia. School of Law, *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium* (Transnational Publishers 1992) 76

<sup>926</sup> *Ibid*

#### 4.1. Developing a Power to Compel the Disclosure of Evidence

The first avenue that it is suggested the Court could explore in taking a more proactive approach to the facts relates to the Court's fact-finding process – namely the possibility of making greater use of the fact-finding powers the Court already possesses. This section explores the possibility of the Court taking a teleological approach to its Statute and Rules and relying on the so-called 'duty of collaboration' in asking whether the Court could potentially construe its fact-finding powers to compel the production of evidence, as opposed to merely requesting it.

##### 4.1.1. As Things Stand – Discovery & the Unclear Binding Nature of Article 49 ICJ Statute

As we saw in Chapter 1, the Court possesses considerable fact-finding powers including the ability to request information from the parties under Article 49 of its Statute. However in practice the Court has not made any significant use of this fact-finding power. Instead, the consistent practice of the Court has been to allow the parties to retain almost exclusive control over the fact-finding process whilst it has played a reactive role in this process.<sup>927</sup>

But what of the suggestion that the Court could interpret its Article 49 powers to seek information as being binding on the parties? Tams states that whilst this would undoubtedly increase the effectiveness of the Court in its dispute settlement role, *de lege lata*, 'the more convincing view is that the parties are under no legal obligation to comply with requests under Art. 49...'<sup>928</sup> since, where this duty is imposed on states, the relevant statutory instruments or rules of procedure will usually state this clearly or heavily imply such a duty.<sup>929</sup> Indeed, the wording of Article 49 merely states that the Court can 'call upon' parties to submit evidence and as such has been described as a 'rather meagre substitute for real powers for procuring evidence, which the ICJ does not possess'.<sup>930</sup>

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<sup>927</sup> In the absence of a prosecutor no explicit duty of disclosure exist in this regard as they do before international criminal tribunals such as the ICTY. Rule 66 of the ICTY's Rules of Evidence and procedure states that the Prosecution is under an obligation to provide the Defence with all material concerning the indictment in the accused's case within thirty days of the accused's first appearance. Further, paragraph B states that when the Defence requests, the Prosecution must allow access to 'books, documents, photographs and tangible objects in the Prosecutor's custody or control' which will be used as evidence in the trial, belonged to the accused or could assist the Defence in preparing for the trial. Rule 67(B) provides the corresponding right for the Prosecution in relation to information in the possession of the Defence. Rule 68 also provides an additional obligation on the Prosecutor to disclose exculpatory material.

<sup>928</sup> Tams, 'Article 49' 1107; citing *Canada-Aircraft (Complaint by Brazil)*, Appellate Body Report, reproduced in *Dispute Settlement Reports* (1999), vol. III, p. 1377, (para 188).

<sup>929</sup> *Ibid*

<sup>930</sup> *Ibid*

The argument could be made that states are under an obligation to comply with requests for information under Article 49 of the Statute as a result of the fact the UN Charter imposes an obligation on states to comply with ‘decisions’ of the Court. However, as Brown has demonstrated, it is unlikely that orders requesting information under Article 49 could be regarded as decisions in themselves, highlighting that the consequences for not complying with requests under Article 49 are set out expressly in that provision, namely the possibility of ‘formal note’ being taken of such a refusal, not a breach of the Charter.<sup>931</sup>

A legal obligation for parties to comply with requests for information is regularly imposed on parties before other international courts and tribunals. Some have a specific power set out in their constitutive instrument,<sup>932</sup> whilst others such as the ICYY and ICTR derive such a power from a special source. To elaborate, the Appeals Chamber of the ICTY stated in the *Blaškić* case that it possessed a power to compel the production of information in Article 29 of the Court’s Statute arising from ‘the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council Resolution adopted pursuant to these provisions’.<sup>933</sup> The ICTY at the time described this power as ‘novel and indeed unique’ – arising as it did from the Security Council’s Chapter VII powers.<sup>934</sup> Other international tribunals such as the adjudicative bodies of the WTO have established a binding power through judicial interpretation – an issue to which we shall return presently.

However international legal scholarship has traditionally regarded the ICJ’s powers to request information from the parties as lacking binding legal force. For instance, Highet stated that the Court’s most significant impediment to functioning decisively in evidentiary positions is its inability to compel the production of evidence or subpoena witnesses.<sup>935</sup> Similarly, Alford Jr. stated that whilst the Court may request information of the parties and international organizations, without a power to compel production ‘the Court tends to rely heavily upon the evidence submitted without positive efforts to police the truth of the facts’.<sup>936</sup>

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<sup>931</sup> Chester Brown, *A Common Law of International Adjudication* (Oxford University Press Oxford 2007) 106

<sup>932</sup> See for instance Article 86 Rome Statute, Article 24(3) Rules of Procedure of Iran-US Claims Tribunal and other arbitral tribunals such as Article 55 of the German-Polish Mixed Arbitral Tribunal and Article 90 of the German-French Mixed Arbitral Tribunal; see Tams, ‘Article 49’, FN 47

<sup>933</sup> *Prosecutor v Blaškić* 100 ILR 688, 699

<sup>934</sup> *Ibid*

<sup>935</sup> Highet, ‘Evidence, the Court, and the Nicaragua Case’ 10

<sup>936</sup> Alford Jr

As well as not making any significant use of its Article 49 ICJ Statute power to request information, the Court has not developed a practice of granting discovery requests (whereby one party may request that the court order the other party to produce documentation relevant to the case before it) as generally found in common law jurisdictions. One exception is the *ELSI* case in which counsel for Italy complained that the US had not put forward crucial evidence and requested that the United States make available to the Court a financial statement of the year 1967 of Raytheon/ELSI's auditors which the US had referred to in its oral argument but had not produced.<sup>937</sup> In mentioning but not producing the information, the US appeared to be in breach of Article 56(4) of the Court's Rules which prohibits any reference during the oral proceedings to information that has not been put before the Court under Article 43 of the Statute or that is not readily available to the public.<sup>938</sup>

Italian counsel asked the Chamber to request the financial statement be disclosed in accordance with Article 49 of the Statute and Article 62(1) of the Rules and the President requested the US to do so.<sup>939</sup> The US complied with the request for disclosure promptly – and the document proved to be significant for the outcome of the case.<sup>940</sup> Italy's request for information was described as 'unprecedented' in the history of the Court, a form of (indirect) discovery, saying that it provided 'an effective substitute for more forthright discovery powers.'<sup>941</sup> What the Court would have done had the US refused to comply with the Court's request is unclear and this remains the sole example of the Court agreeing to a request for information. For instance, as we saw in Chapter 2, in the *Bosnian Genocide* case the Court refused to order Serbia to produce the minutes of the Serbian Supreme Defence Council which were believed to be the evidence that would prove that the army of the *Republika Srpska* was under the control of Serbia, stating that the Court had sufficient evidence before it, including ICTY records.<sup>942</sup> Relatedly, in the recent preliminary objections phase of the *Croatian Genocide* case, the Court refused a similar request made by Croatia, stating that it was 'not satisfied that the production of the requested documents was necessary for the

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<sup>937</sup> In fact Italy made an issue of the fact that the US had not put forward the evidence of its own volition and had to be asked to disclose it, saying the evidence '...was not filed voluntarily with the Applicant's pleadings, although one might have expected that they would have been considered rather important, in the interests of justice and the amicable resolution of a matter of this kind; Verbatim Record C 3/CR 89/8 of 23 February 1989, at 19

<sup>938</sup> See Article 56(4) of the Court's Rules

<sup>939</sup> Verbatim Record C 3/CR 89/4 of 16 February 1989 at 45

<sup>940</sup> See *ELSI case*; at 26, para 19 and 53, para 79

<sup>941</sup> Hight, 'Evidence, The Chamber, and the ELSI Case' 60

<sup>942</sup> *Bosnian Genocide Case*, 129, para 206



purpose of ruling on preliminary objections'<sup>943</sup> going on to say that 'Croatia had failed to provide sufficient reason to justify the great lateness of its request and that to accede to this request made at this very late juncture would, in addition, raise many practical problems'.<sup>944</sup>

As such the practice of the Court shows that it has not routinely either been asked to make orders for discovery or consented to granting them.<sup>945</sup> Given the lack of practice in this area it is not surprising that the Court has not laid out any guidelines as to what conditions must be met to ensure the granting of a discovery order.<sup>946</sup>

Nevertheless it is suggested that these traditional conceptions of the Court's powers to request information, and its limited use of any form of discovery procedure, do not tell the whole story. In fact, in light of the practice of other international courts and tribunals, it is argued that the Court could feasibly interpret its powers to insist upon the disclosure of evidence. In this regard, the practice of the WTO adjudicative bodies merits attention.

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<sup>943</sup> *Croatian Genocide Preliminary Objections*, 416, p. 13-15

<sup>944</sup> *Ibid*, para 15

<sup>945</sup> *Benzing* 1249

<sup>946</sup> *Ibid*

#### 4.1.2. 'Should' Means 'Shall'? The Curious Case of Article 13 WTO DSU

As we saw in Chapter 3 at 3.1.2.1., Article 13 of the WTO Dispute Settlement Understanding formally grants Panels a broad power to request information from parties appearing before them. Article 13 provides the Panels with an investigative power that is not limited to scientific or technical evidence or even to expert evidence.<sup>947</sup> In fact, the Appellate Body has held that Panels can seek information from any relevant source it so chooses<sup>948</sup> and that in principle there are no limits to this discretionary authority.<sup>949</sup> In the words of the Appellate Body in *Canada Aircraft*, Panels are 'vested with ample and extensive discretionary authority to determine *when* it needs information to resolve a dispute and *what* information it needs'.<sup>950</sup> In practice Panels have made use of this broad fact-finding power contained in Article (1) and (2) although at times reference has merely been made to 'Article 13' generally.

On the face of it, it would appear that the use of the term 'should' rather than 'shall' in Article 13.1 gives requests an exhortatory character as opposed to binding legal effect.<sup>951</sup> Consequently, requests for information made of parties under Article 13 would not be compulsory, and similarly individuals would be under no binding obligation to provide information (nor would Members themselves be obliged to require individuals provide the requested information).<sup>952</sup>

However, despite the fact that a literal reading of Article 13 does not appear to impose a binding legal obligation on the parties to comply with requests for information there has been some suggestion in recent times that Article 13 nevertheless places a binding duty on parties. For instance, in *Canada-Civilian Aircraft* the AB stated that although the term 'should' has an exhortatory character, it could also 'express a duty or obligation'.<sup>953</sup> As such, some consideration of the facts of the *Canada-Civilian Aircraft* case is warranted.

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<sup>947</sup> Pauwelyn, 'The use of experts in WTO dispute settlement'

<sup>948</sup> *Argentina, Measures Affecting Imports of Footwear, Apparel and Other Items*, Appellate Body Report, 27 March 1998, WT/DS56/AB/R at para 84

<sup>949</sup> See *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 185

<sup>950</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 192; (emphasis in original) In this same case the Appellate Body held that a *prima facie* case did not need to be established before a panel had the right to seek information about the allegations; see para 185

<sup>951</sup> Lichtenbaum 1252

<sup>952</sup> Ibid

<sup>953</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 187; see Behboodi

Brazil raised a preliminary motion requesting documentary discovery at the very beginning of the case (even before any submissions had been made) asking the Panel to undertake extensive ‘additional fact-finding’.<sup>954</sup> In the course of the case Brazil argued that Canada was under a legal obligation to disclose the information requested of it, and averred that it was under a duty to fully cooperate with the tribunal.<sup>955</sup>

Canada meanwhile refused to comply with Brazil’s wide-ranging requests for information, accusing Brazil of having ‘embarked on a fishing expedition and cast a drift-net – and has asked the Panel to pilot the ship.’<sup>956</sup> Crucially, Canada did not deny that it had a duty of collaboration with the tribunal, but argued that this duty only came into effect with regard to countering the legal arguments and evidence produced against it.<sup>957</sup> In other words, Canada argued that the duty of collaboration only came into effect when the other party had made a *prima facie* case against it, and that in cases where the other party is arguably engaging in a ‘fishing expedition’ for information, this duty did not apply.<sup>958</sup> The duty of collaboration is one that we will return to examine in greater detail in section 4.1.4.

Canada also argued, relying on *Japan- Agricultural Products*, that Article 13 DSU does not permit the Panel to engage in fact-finding for the purpose of making the case of a claimant.<sup>959</sup> As such, Canada refused to co-operate with what it called a ‘shot-gun’ request for information and argued that there was nothing in GATT or WTO jurisprudence that substantiated the position that a responding party can be subject to a process of discovery.<sup>960</sup>

However, the Appellate Body upheld that Panel’s right to make binding requests, arguing that if Article 13 DSU were to be interpreted as representing merely a non-binding request for

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<sup>954</sup> Specifically, Brazil requested; ‘the complete details of all operations of the Export Development Corporation, the Canada Account, the Technology Partnerships Canada and its predecessor programs, the Canada-Québec Subsidiary Agreement on Industrial Development, and the Société de Développement Industriel du Québec with regard to the civil aircraft industry, including all grants, loans, equity infusions, and loan guarantees, or any other direct or indirect financial contribution of any kind’; see Letter from the Government of Brazil to Mr David de Pury, Chairman of the Panel (23 October 1998)

<sup>955</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 186 onwards

<sup>956</sup> Reply Submission of Canada, 30 October 1998, at para 3

<sup>957</sup> Brazil’s Appellant’s Submission, para 53

<sup>958</sup> Further, in the *Argentina-Footwear* panel report, the Panel discussed the duty to collaborate, citing the work of Kazazi in this regard, who had previously argued that the duty of collaboration did not arise until one party had presented a *prima facie* case; Kazazi 573

<sup>959</sup> See *Japan- Measures Affecting Agricultural Products*, WT/DS76/AB/R, 19 March 1999 at paras 129-30

<sup>960</sup> Reply Submission of Canada, 30 October 1998, at para 6

information, the Panel's 'right to seek information' would be rendered meaningless.<sup>961</sup> As such, the AB pointed to the wording of Article 13.1 that WTO Members were under a duty to 'respond promptly and in full' to requests for information made by the Panels,<sup>962</sup> suggesting that this stipulation added further weight to the argument that 'should' ought to be read as 'shall' in this provision.<sup>963</sup> The AB went on to state that:

'To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences'<sup>964</sup>

As such, relying on Arts 11 and 12, the AB 'transformed the right of a panel to *seek* information first into a right to *obtain* such information and then into a task of 'finding the facts constituting the dispute before it' or 'ascertaining the real or relevant facts of a dispute'.<sup>965</sup>

Perhaps unsurprisingly, the AB's interpretation of the fact-finding power contained in Article 13 DSU has come in for some criticism. For instance, Kuyper has pointed out that inferring a binding duty to provide evidence from the obligation to act in good faith is somewhat unsound since any refusal to do so, whilst providing a satisfactory basis upon which to draw adverse inferences, does not warrant taking the extra step of extrapolating a duty to provide information, a duty described as 'an unnecessary logical step and construed on the basis of rather flimsy contextual analysis'.<sup>966</sup> Furthermore, as one commentator has stated, 'where judicial or arbitral bodies can impose upon States a duty to disclose evidence, the statutory instruments or procedural rules will say so, or will at least clearly imply it'.<sup>967</sup> The question

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<sup>961</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 187– the AB also relied on Article 3.10 obligation to engage in proceedings in 'good faith'; See AB Reports in *EC-Hormones*, *US-Shrimp*, *Canada-Aircraft*, para 184

<sup>962</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, Appellate Body Report, 2 August 1999, at para 187

<sup>963</sup> Marceau and Hawkins 499

<sup>964</sup> AB Report, *Canada – Aircraft* at para 189

<sup>965</sup> Behboodi 585; In addition, the *Argentina-Footwear* case made a different argument regarding the duty of a party to disclose information that was in their sole possession; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, para 6.40

<sup>966</sup> Kuyper 321

<sup>967</sup> Tams, 'Article 49' 1107

in this case is whether Article 13 can be read as clearly implying a duty to disclose requested information or not – a question not definitively answered in the case law.

Further, another commentator has questioned the dangerous precedent created by such interpretation, asking ‘how are government lawyers and private sector counsel to advise their clients as to the nature and scope of their obligation? How are future negotiators to be counselled on drafting treaty language?’<sup>968</sup>

It would appear at the very least, however, that Panels and the AB conceive of Article 13 as granting a power to compel the production of evidence in a way that is notably more proactive than the ICJ, for instance.<sup>969</sup> Although the AB’s reasoning in this case may be far from satisfactory, the end result of asserting a power to compel the disclosure of information did not provoke outrage from WTO Members. It is suggested that the same result can be achieved for the ICJ but through less problematic legal reasoning, such as relying on the duty of collaboration, should the Court so choose.

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<sup>968</sup> Behboodi 578

<sup>969</sup> Lichtenbaum 1252, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, paras 6.52- 6.54

#### 4.1.3. Developing a Power to Compel the Disclosure of Evidence for the ICJ

Judge Owada in *Oil Platforms* argued that the Court has in the past been overly concerned with the sovereign nature of the parties before it and the desire to not appear to favour one party over another. In other words, the Court's preoccupation with appearing impartial has meant that it has under-utilised its Article 49 ICJ Statute power to request information from the parties. Judge Owada argued that the Court, as a court of justice, must act like one in the course of judicial proceedings and do all that it can to address the problems arguably caused by the Court's traditional reactive approach to fact-finding.<sup>970</sup> In order to do so, the judge argued that;

‘...the only way to achieve this would have been for the Court to take a more proactive stance on the issue of evidence and that of fact-finding in the present case’.<sup>971</sup>

Arguably the need for a more proactive approach extends beyond the facts of the *Oil Platforms* case to all cases where the Court's traditionally reactive approach to fact-finding is a hindrance to the proper administration of justice (see Chapter 2). Drawing on the practice of the WTO adjudicative bodies it could be argued that there is little preventing the Court from requesting information from the parties again in the future and insisting that its powers to do so are compulsory, in the right circumstances.<sup>972</sup> Such circumstances would include where the information requested is in the sole possession of one party, where the other party has made a *prima facie* case and where it can demonstrate that it has made reasonable efforts to obtain the information requested, conditions to which we shall return in section 4.1.4.(iv).

It is argued that the Court's extensive fact-finding powers and the broad wording of Article 49 of the Statute and Article 62 of the Rules permit an interpretation of the Court's powers that holds that it has the power to compel production and draw adverse inferences from any unexplained refusal to do so. Quite simply, it is argued that the open wording of Article 49 of the Court's Statute and the corresponding Article 62 of the Rules mean that the Court would not need to engage in the type of linguistic gymnastics that the WTO adjudicative bodies were forced into in order to construe its power to seek information as binding on the parties to the

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<sup>970</sup> *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, *ICJ Reports 2003*, p 161, 321 dissenting opinion of Judge Owada

<sup>971</sup> *Ibid*, 321 dissenting opinion of Judge Owada

<sup>972</sup> Hightet, ‘Evidence, The Chamber, and the ELSI Case’

case before it. Article 49 of the Statute states plainly that the Court ‘may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations’ whilst Article 62 of the Rules relatedly states that the Court ‘may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.’ Quite plainly, interpreting the Court’s power to ‘call upon’ agents or parties to produce evidence it ‘considers to be necessary for the elucidation of any aspect of the matters in issue’ is less of a stretch compared to interpreting that a party ‘should’ produce information to mean that it ‘shall’ do so.

Whilst, admittedly, international courts and tribunals that possess such compulsory powers of production usually have this power explicitly laid out in statutory form, it is argued that the trailblazing example of the WTO adjudicative bodies could act as a precedent for the Court, should it feel the need to insist upon its powers in order to secure evidence necessary to establish a solid factual foundation for the case at hand. Furthermore, it is argued that any purposive interpretation of its Article 49 powers to request information, in line with the principle of effectiveness, point to the conclusion that the argument that the Court can issue binding requests for information is not completely implausible.

A purposive interpretation of the provisions that contain the Court’s fact-finding powers is permitted as part of the customary rule for treaty interpretation as set out in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT). This ‘general rule of interpretation’ states that that ‘[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The WTO has given the most concise statement of the ‘general rule of interpretation’ set out in Article 31(1) of the VCLT in recent times in the *US-Shrimp* case, stating that;

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and the purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may be usefully sought’.<sup>973</sup>

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<sup>973</sup> *Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998 at para 114; see also; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2 edn,

Whilst the ICJ has also stated that the ordinary meaning is the starting point for treaty interpretation which the interpretation must be based ‘above all upon the text of the treaty’,<sup>974</sup> the reference in Article 31(1) to the ‘object and purpose’ introduces an element of purposive, teleological interpretation.<sup>975</sup> Accordingly, it is argued that, despite the fact doing so is far from an exact science,<sup>976</sup> purposively interpreting its existing powers to request information to insist upon the production of evidence is an option open to the Court.

This is especially so given the fact that purposive interpretation has ‘traditionally played a part in the interpretation of constitutions of international organisations (and their implied powers) and other multilateral, “legislative” conventions,<sup>977</sup> in international law purposive interpretation is closely linked to the principle of effectiveness.<sup>978</sup> Crucially, ICJ has in its case law consistently ‘harnessed’ the principle of effectiveness to the purposive interpretation of treaties. As such, any ambiguity or uncertainty may be interpreted in line with the object and purpose of the treaty as a whole in order to ‘enable the treaty to have appropriate effects’.<sup>979</sup> An example of this can be seen in the *Territorial Dispute* case where the Court applied the principle of effectiveness with regards to the object and purpose of the treaty in seeking to delimit a settled boundary.<sup>980</sup> The Court interpreted the treaty provision so as to best to give practical effect to the object and purpose of the treaty, and stated that doing otherwise ‘would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness’.<sup>981</sup>

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Manchester University Press 1984) 130

<sup>974</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p6, para 41

<sup>975</sup> Jan Klabbbers, ‘Treaties, Object and Purpose’ Max Planck Encyclopedia of Public International Law <<http://opil.ouplaw.com.ezproxy.eui.eu/home/EPIL>> accessed 10/10/2013; Practice shows that the object and purpose are interpreted together as one singular unit – there is no distinction made between the object of a treaty and the purpose of it; Richard Gardiner, *Treaty Interpretation* (OUP 2008) 194

<sup>976</sup> See the difficulties noted in; Jan Klabbbers, ‘Some Problems Regarding the Object and Purpose of Treaties’ 8 Finnish Yearbook of International Law 138; Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ 3 Austrian Review of International and European Law 1998; Ulf Linderfalk, ‘On the Meaning of the “Object and Purpose” Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19’ (2003) 72 Nordic Journal of International Law 429

<sup>977</sup> *WHO Advisory Opinion*, at 18

<sup>978</sup> ILC, Report on the Draft Articles on the Law of Treaties, Yearbook of the International Law Commission, 1966, vol. II, 219

<sup>979</sup> See ILC Report on the Draft Articles on the Law of Treaties, Yearbook of the International Law Committee, 1966, vol. II, 219

<sup>980</sup> *Territorial Dispute* 25

<sup>981</sup> *Ibid*; the Court citing *Lighthouses Case between France and Greece*, Judgment, 1934, PCIJ Series A/B, No 62, p. 27; *Namibia Advisory Opinion*, p. 35, para 66; *Aegean Sea Continental Shelf Case*, p. 22, para 52



Taking up such reasoning, the Court could conceivably purposively interpret its own fact-finding powers and assert that the way to best give effect to these powers is that they be binding on the parties. The Court's Statute (being without a preamble), Rules and the relevant provisions of the UN Charter provide little more than the fact that Court is both a principal organ and principal judicial organ of the United Nations.<sup>982</sup> Despite this, it is clear that the object and purpose of Article 49 of the Court's Statute, for example, is to ensure that the Court has all the facts it needs to make sound legal determinations, and if the Court felt that the most effective way to establish such facts was to compel the production of evidence it is difficult to imagine an argument that states parties could advance without somehow appealing to traditional privileges of state sovereignty and the control over the fact-production process that states have enjoyed in the past.<sup>983</sup>

In short, it is argued that through taking a teleological approach to this power the Court can begin to assert that parties must comply with its requests for information. Bolstering this interpretation is the related duty of collaboration, to which we now turn.

#### *4.1.4. The Duty of Collaboration & the Burden of Proof*

##### *(i) Definition*

In the recent *Argentina-Footwear* case a Panel of the WTO adjudicative bodies, considering whether it should allow a request from the US to order the production of documents from the Argentina, stated that the very idea of the peaceful settlement of international disputes by adjudication is founded on the notion of co-operation between the parties, and that to this end there existed a 'rule of collaboration' with regard to the production of evidence.<sup>984</sup> It is this rule or duty that is considered in the following section.

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<sup>982</sup> See Articles 7(1) and 92 of the UN Charter

<sup>983</sup> One possible exception is national security or 'prejudice to governmental interest' as recognised by Judge Jessup in his Separate Opinion in the *Barcelona Traction Preliminary Objections* case at para 97; the United Kingdom successfully argued that it was not bound to submit documents on the basis of 'naval secrecy' in the *Corfu Channel Case* 4; furthermore, in the *Bosnian Genocide Case*, at para 205 the Court noted that the requested documents had been redacted on grounds of national security in the course of refusing Bosnia's request for the Court to formally seek these documents

<sup>984</sup> *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, para 6.40; similarly in *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, 19 December 1997, the AB stated that parties should be 'fully forthcoming from the very beginning both as to the claims involved in the dispute and as to the facts relating to those claims...Claims must be stated clearly. Facts must be disclosed freely.' at para 94

However, before we can turn our attention to the duty of collaboration that is the topic of the following section, a preliminary word is needed about the burden of proof before the ICJ. Like the majority of international courts and tribunals,<sup>985</sup> the burden of proof before the Court has always generally been said to lie with the party alleging a fact in accordance with the principle of *actori incumbit probatio*.<sup>986</sup> In this regard the status of the party as applicant or defendant is not determinative. In reality the Court does not operate a strict burden of proof and it may be the case that in relation to different legal issues before the Court, different parties bear the burden at different times.<sup>987</sup> For instance, in the *Guinea v. Congo* case it was for one party to establish that local remedies were exhausted or that extenuating circumstances existed that avoided this requirement – whilst at the same time it was for the other side to prove that these local remedies had not been exhausted.<sup>988</sup> Similarly, in *Rights of US Citizens in Morocco*, the Court determined that the US bore the burden of proving that its citizens had certain rights in the French Zone of Morocco, despite the fact that France was formally the applicant party in this case.<sup>989</sup> The Court's operation in this way means that when cases are brought before it through mutual agreement it has no need to alter its approach to the burden of proof.<sup>990</sup>

Additionally, the Court recently held that the burden does not shift in relation to the precautionary principle stating that ‘while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it

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<sup>985</sup> *Bosnian Genocide Case, para 204*; (‘On the burden or onus of proof, it is well established in general that the applicant must establish its case and that a party asserting a fact must establish it . . .’) *Nicaragua Case, para 101* (‘it is the litigant seeking to establish a fact who bears the burden of proving it.’)

<sup>986</sup> *Pulp Mills Case, para 162*; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, Grotius Publications Limited 1986) 576; Wolfrum; This basic rule is complicated in cases where there is a special agreement to bring a case before the Court such as in the *Minquiers and Ecrehos* case where a Special Agreement between France and the UK asked the Court to determine who had sovereignty over the islets – the Agreement provided that the proceedings be ‘without prejudice to any question to the burden of proof’; see *The Minquiers and Ecrehos case, Judgment of November 17th, 1953: ICJ Reports 1953, p 47, at 52*

<sup>987</sup> See the argument made criticising the generally vague attitude to the burden of proof before the Court and supporting a variable burden depending on the facts of the case in *I.C.J. Pleadings, Pulp Mills*, CR 2009/15, 28/9/2009, page 10, para 15; see also *I.C.J. Pleadings, Pulp Mills*, CR 2009/15, 23/9/2009, page 10, para 15

<sup>988</sup> Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Judgment of 30 November 2010, <<http://www.icj-cij.org/docket/files/103/16244.pdf>>, at para 56; ‘In short, when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof.’ See also; Higgins, ‘Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly’

<sup>989</sup> *Case concerning rights of nations of the United States of America in Morocco, Judgment of August 27th, 1952: ICJ Reports 1952, p 176*; see Kolb 931

<sup>990</sup> See for instance; *The Minquiers and Ecrehos case, p. 52*

operates as a reversal of the burden of proof'.<sup>991</sup> Similarly, the Court has not in the past stressed a strict standard of proof.<sup>992</sup> But what is the significance of there not being a strict burden of proof before the Court?

It is argued that whilst the party alleging a fact generally bears the burden of proof in accordance with the principle of *actori incumbit probatio*, this party does not bear the burden of production of evidence alone. Once jurisdiction has been established in the case before the Court each party is under an obligation to collaborate with the Court in the establishment of a sound factual foundation upon which the Court can make legal determinations. And indeed, the Court most recently in the *Pulp Mills* case explicitly stated that both states were to co-operate in the production of evidence in order to assist the Court in order to resolve the dispute before it.<sup>993</sup>

The Court specifically mentioned that the parties ought to co-operate in the provision of evidence to the Court beyond that which supports their own case. It is this sort of statement and conception of the role of states in the fact-finding that the Court could seize on in order to take a more proactive approach to the facts. In doing so the ICJ could become more like other courts who have become more assertive in their own function and more assertive in emphasising the duty of collaboration whilst no longer seeing themselves as at the mercy of the whims of states or of their sovereignty.

It has long been argued by international legal scholars that in light of the absence of an explicit power which would enable the Court to compel the production of evidence like those that exist in domestic law, states 'have a more extensive obligation to produce all evidence within their control than that normally imposed upon litigants in municipal proceedings'.<sup>994</sup> For instance, in Georges Scelle's report to the International Law Commission in 1950 as Special Rapporteur on Arbitral Procedure stated that;

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<sup>991</sup> *Pulp Mills Case*, para 164; Boyle and Harrison

<sup>992</sup> See; Valencia-Ospina, 'Evidence before the International Court of Justice' 203; '[t]he international regime appears to reflect the civil law system, in which all that is needed is that the court be persuaded, without reference to a specific standard'. As Fitzmaurice stated, the view in international law has always been that important international litigation should not depend on 'accidents of a largely procedural or formal situation'; see Fitzmaurice 576; Kolb 944

<sup>993</sup> *Pulp Mills Case*, paras 162, 163, and 168

<sup>994</sup> Sandifer 112; see also Wolfrum; J.F. Lalive, *Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de justice* (ASDI7 1950) 85, C.F. Amerasinghe, *Evidence in international litigation* (Martinus Nijhoff Publishers/Brill Academic Publi 2005) 66

‘il est...un principe certain, c’est que les Etats en litige ont l’obligation de collaborer de bonne foi à l’administration de la preuve’.<sup>995</sup>

This obligation has often been termed the ‘duty of collaboration’ but what exactly is it? The duty of collaboration can be broadly defined as the obligation placed on states appearing as parties before international courts and tribunals to provide information necessary for the establishment of the facts of the case and the proper administration of justice more generally.<sup>996</sup> The duty of collaboration arises when states agree to submit their disputes to international adjudication.<sup>997</sup> As such, the rationale underpinning the duty of collaboration has much to do with the sovereign nature of the states appearing before the Court and the fundamentally important principle of consent in international law. As V.S. Mani famously stated;

‘Adjudication cannot take place in a vacuum; it can function properly only if the parties are willing to co-operate with the tribunal by furnishing it with all necessary and relevant facts by way of evidence.’<sup>998</sup>

Once consent has been given to international adjudication it is a widely held position that parties are obligated to act in good faith and to put evidence before the tribunal ‘so as to enable it to arrive at a viable and fair resolution of the conflicting claims’.<sup>999</sup> The duty of collaboration falls on both the claimant and defendant states, or any party appearing before the Court, and is meant to benefit all parties in this non-discriminatory manner.<sup>1000</sup> The duty has a positive aspect, this being the duty to cooperate with the other party and with the Court to achieve the settlement of the dispute through the judicial process,<sup>1001</sup> including the establishment of the factual foundation of the case. Similarly, there is a negative aspect to this duty, in that States are obligated not to destroy or deliberately obstruct access to information within their sole possession.<sup>1002</sup> Whilst the rule of collaboration is not specifically mentioned

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<sup>995</sup> Arbitral Procedure, Document A/CN.4/18 Rapport par Georges Scelle, *Yearbook of the International Law Commission* (1950), Vol. II, p. 134 [It is a certain principle, that litigating States have an obligation to collaborate in good faith in the administration of the evidence]

<sup>996</sup> Sandifer 117; Mosk 137

<sup>997</sup> V.S. Mani and V.S. Mani, *International adjudication: procedural aspects*, vol 4 (Kluwer Law International 1980) 198

<sup>998</sup> Ibid; see also Kolb 942

<sup>999</sup> Mani and Mani; see also Benzing 1247

<sup>1000</sup> Kazazi 121

<sup>1001</sup> Benzing 1247; citing A. Peters, ‘International dispute settlement: a network of cooperational duties’ 14 *European Journal of International Law* 1

<sup>1002</sup> Benzing 1247

in either the Court's Statute or Rules, the rule is contained in other international legal instruments.

*(ii) The Duty of Collaboration in International Instruments*

For instance, the 1907 Hague Convention contains a mention of the duty in relation to the Permanent Court of Arbitration. Article 75 lays down that states are under a duty 'to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case.' The Draft on Arbitral Procedure produced by the International Law Commission in 1958 stated in Article 21 that:

'The parties shall cooperate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph'<sup>1003</sup>

This was developed even further in Article 10 of the 1962 Permanent Court of Arbitration 'Rules of Arbitration and Conciliation for Settlement of International Disputes Between Two Parties of Which Only One is a State' which states that 'the parties undertake to facilitate the work of the Commission and particularly to furnish it to the greatest possible extent with all relevant documents and information'.<sup>1004</sup>

Similarly Rule 33(3) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of ICSID 1986 states that:

'The parties shall cooperate with the Tribunal in the production of evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure'.<sup>1005</sup>

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<sup>1003</sup> Draft on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, (1958), Article 21(2) in II *Yearbook of the International Law Commission*, A/CN.4/SER.A/1958/Add.1, p. 9, para 20; 20. Article 21 (formerly article 15) could be placed before article 20, for it is concerned with the general subject of the hearing of evidence before the closure of proceedings. It is based partly on theory, partly on the jurisprudence of arbitral tribunals, and partly on the jurisprudence of The Hague Court.<sup>20</sup> Its underlying principles can be traced back to the 1907 Convention (articles 74 and 75) and to Articles 4S and 49 of the Statute of the International Court of Justice.

<sup>1004</sup> Article 10, superseded by rules based on the UNICTRAL rules; [http://www.pca-cpa.org/showfile.asp?fil\\_id=194](http://www.pca-cpa.org/showfile.asp?fil_id=194)

<sup>1005</sup> Rule 33(3) of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules) of ICSID 1986

Further, Article 2 of the 1991 Resolution of the Institut de Droit International, on the subject of non-appearance, made reference to the duties of a state appearing before the Court. The Resolution states that ‘in considering whether to appear or to continue to appear in any phase of proceedings before the Court, a State should have regard to its duty to co-operate in the fulfilment of the Court’s judicial functions’.<sup>1006</sup>

In addition, Article 6 of Annex VII of UNCLOS relating to arbitral proceedings under the Convention provides explicitly for the duties of the parties to the dispute, stating that parties are under a duty to facilitate the work of the arbitral tribunal, or in other words a statement of the duty of collaboration. Subsection (a) provides that the parties are under a duty to provide the tribunal with ‘all relevant documents, facilities and information’ and subsection (b) provides that parties are under a duty to ‘enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates’.

However, these statutory documents reveal little about the content of the obligation. For more useful insight into the duty of collaboration it is to the case law of various international courts and tribunals that we must look.

### *(iii) The Duty of Collaboration in International Jurisprudence*

The development of this duty can be traced throughout the history of international dispute settlement. The classic example often referred to is the *Parker Case* before the Mexican Claims Commission, in which the Commission said:

‘It is the duty of the respective Agencies to cooperate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented. The Commission denies the ‘right’ of the respondent to merely wait in silence in cases where it is reasonable that it should speak’.<sup>1007</sup>

It is interesting to note the similarity of the wording of this famous formulation of the duty of collaboration to the most recent high-profile invocation in the *Pulp Mills* case before the Court, to which we shall return.<sup>1008</sup> The Commission also said that states were bound to make

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<sup>1006</sup> Institut de Droit International, Session of Basel, 1991, Non-Appearance Before the International Court of Justice, Rapporteur, Arangio-Ruiz, Preamble

<sup>1007</sup> RIAA, Vol IV, p. 39

<sup>1008</sup> Contrast: “It is...to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the

full disclosure of the facts reasonably within their knowledge or that can reasonably be ascertained by them, no matter whether they are exculpatory or otherwise.<sup>1009</sup> The Commission emphasised the relationship between the duty of collaboration and the principle relating to burden of proof, namely, *actori incumbit probatio*, stating that:

‘Whilst ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the commission all evidence within its possession to establish the truth, whatever it may be’.<sup>1010</sup>

As such, whilst it may be the case that the onus falls on the claimant state in cases before international tribunals, the burden in the production of evidence is not that state’s burden alone. The duty of collaboration complements the rule of *actori incumbit probatio* ‘and in cases where the full application of the latter may result in unreasonable consequences or impede the due process of the proceedings, the rule of collaboration plays a balancing role’.<sup>1011</sup> The respondent state, in some cases, may be under a duty to collaborate with the court or tribunal in the establishment of the factual record. And indeed it has been argued that the duty of collaboration is not a mere formality; it is not enough that the party deny the claims made against it, rather, the party must justify its denial and put before the Court documents that are in its sole possession.<sup>1012</sup>

Admittedly, the exact extent to which states must comply with requests for information is not entirely clear. As Feller stated with regard to the position taken by the Mexican Claims Commission ‘[t]o the cynical observer of the habits of lawyers all this may seem nothing more than a pious wish.’<sup>1013</sup> And indeed, the practice of international courts and tribunals since the *Parker* case does not indicate that a clear legal obligation on states to this full effect has been definitively established, with states being reluctant to put information damaging to their case before the tribunal in full knowledge of the fact that the Court plays an almost completely reactive role and that this information would be unlikely to come before the Court

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provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it...’; *Pulp Mills Case*, paras 162, 163, and 168

<sup>1009</sup> *American-Mexican General Claims Commission, William A Parker (USA) v United Mexican States*, Award of 31 March 1926, RIAA 4 (1951), pp 35, 39 (para 6)

<sup>1010</sup> *Ibid*, pp 35, 39 (para 6)

<sup>1011</sup> Kazazi 121

<sup>1012</sup> *Ibid*

<sup>1013</sup> *Ibid*

were they to withhold it.<sup>1014</sup>

There is some evidence in recent case law of international tribunals that the duty of collaboration is one which could potentially be utilised to bolster the obligation to provide requested evidence.<sup>1015</sup> Should the Court choose to do so, it could rely on the duty of collaboration in order to enforce a power to compel the production of evidence. Indeed a number of states have advocated a rule of collaboration in their submissions to the Court.<sup>1016</sup> Further, the ICJ itself recently made reference to the duty of collaboration in the *Pulp Mills* case stating that:

‘It is...to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it...’<sup>1017</sup>

As stated above, the sentiment expressed by the Court, namely that the party bearing the burden of proof does not bear the sole burden with regard to the production of evidence is expressed in not dissimilar terms to the famous statement of the US-Mexican Claims Commission in the *Parker* case. Robert Kolb has argued that the duty of collaboration is especially pertinent in relation to the ICJ owing to nature of disputes before the Court the facts of which ‘are often unique, often spread over a long period of time, and...frequently difficult and uncertain of access.’<sup>1018</sup> This being so, it is suggested that the duty of collaboration is one which could aid the Court in its fact-finding process and recent statements such as the one in *Pulp Mills* suggest that this is a course of action that the Court would not necessarily rule out.

Another prominent recent discussion of the duty of collaboration came in the aforementioned *Argentina-Footwear* case in which a Panel of the WTO adjudicative bodies stated that the very idea of the peaceful settlement of international disputes by adjudication is founded on the notion of co-operation between the parties, and that to this end there existed a ‘rule of

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<sup>1014</sup> See the position of the British Government in *Corfu Channel Case*; Mosk 100

<sup>1015</sup> Mosk 100; Kazazi 136; Riddell and Plant 98

<sup>1016</sup> *I.C.J. Pleadings, The Wall A.O.*, CR 2004/1, 23/2/2004, para 57; see argument of Palestine that ‘As a matter of policy a Member State should not be allowed to undermine the judicial function of the Court by refusing to place facts it considers essential before the Court, and then benefit from this situation by seeking to use it as a means of denying the Court jurisdiction.’

<sup>1017</sup> *Pulp Mills Case*, para 163

<sup>1018</sup> Kolb 943



collaboration' with regard to the production of evidence.<sup>1019</sup> Furthermore, in the context of National Treatment, it has been argued placing an onus of production in light of the duty of collaboration on to the party deemed to be 'better informed' could help to alleviate some of the informational issues facing adjudicators trying to establish the facts in cases before them.<sup>1020</sup> Being heavily influenced by law-and-economics literature, it has been argued that the best way to minimise the possibility of judicial mistakes, as well as assuring the adjudicative body have the most accurate picture of the facts upon which to make judicial determinations is to place the onus of production on the better informed party. Such 'better informed' parties are defined as those who have access to information that the other party does not or can simple access it at a substantially lower cost. In theory, this would achieve the result that 'information that would otherwise not be available will be presented...'<sup>1021</sup> Such proposals also arise in the in the anti-dumping context. These proposals advocate that in the case where a party does not answer the questions put to it by the Panel or in some way impedes the establishment of the factual record, the Panel may instead base its decision on the best facts available.<sup>1022</sup>

Similarly, and most recently, in the context of the Annex V SCM Agreement mechanism discussed above (at 3.1.2.8.), the AB stated that any interpretation of the information-gathering power contained in this provision that would frustrate the collection of evidence would be contrary not only to 'WTO Members' manifest intention to promote the early and targeted collection of information' but also, crucially, contrary to 'the duty of cooperation to which a responding Member is subject'.<sup>1023</sup>

In international arbitration too there have been recent pronouncements on the duty of collaboration. For instance, in the *Guyana/Suriname* arbitration discussed in Chapter 3 the

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<sup>1019</sup> *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, para 6.40; similarly in *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, 19 December 1997, the AB stated that parties should be 'fully forthcoming from the very beginning both as to the claims involved in the dispute and as to the facts relating to those claims...Claims must be stated clearly. Facts must be disclosed freely.' at para 94

<sup>1020</sup> See Grossman, Horn and Mavroidis 125; see also Mavroidis, *Trade in Goods* 295

<sup>1021</sup> Grossman, Horn and Mavroidis 126

<sup>1022</sup> Cameron and Orava 229; Note the additional obligations placed on states to comply with Investigating Authorities in the context of Anti-Dumping and Subsidies; see Article 6.8 Anti-Dumping Agreement and Article 12.7 Subsidies and Countervailing Measures Agreement – under these provisions the Investigating Authorities are competent to make determinations on the basis of the facts available to them and specifically allow for the drawing of adverse inferences in the case of failure to produce requested information.

<sup>1023</sup> *US-Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, Appellate Body Report, WT/DS353/AB/R, 12 March 2012, at para 520

Tribunal explicitly reminded the parties of the importance of the principle of collaboration in the course of international proceedings- citing Articles 5 and 6 of Annex VII of UNCLOS as well as Articles 7(1) and (2) of the Tribunal's own Rules of Procedure in support of this position.<sup>1024</sup> As stated above, it is significant that the Tribunal set out in clear terms that once consent has been expressed the parties have a duty to collaborate with the Tribunal in the interests of the proper administration of justice.

Of course there are potential drawbacks to insisting that states are under a duty of collaboration to put information within their sole possession before the Court such as the fact that it may not be clear when information is 'within the sole possession' of one party or when the other has done all it can to secure the information.<sup>1025</sup> Relatedly, there exists the danger that insisting on the duty of collaboration might encourage a flurry of speculative cases, or that any duty would disproportionately effect states with less resources.<sup>1026</sup> In addition, commentators such as Benzing have argued that imposing on parties the such a duty of providing evidence, '...would mean a virtually unlimited duty of the parties to disclose all relevant facts and evidence, even in relation to evidence adverse to the interests of the party in possession of the particular document.'<sup>1027</sup> Nevertheless, it is argued that the implication that the insistence on any such duty of collaboration resulting in practice to 'a virtually unlimited duty' is an exaggeration since the duty is in fact subject to a number of conditions which restrict the number of situations in which states can be compelled to comply with this duty.

*(iv) A Duty of Collaboration that is Conditional*

Whilst it is argued that the Court in fact has the right to insist that the parties, being under a duty of collaboration, cooperate with the Court in the fact-finding process,<sup>1028</sup> this duty is not absolute. Rather, it is subject to a number of conditions, illustrated well by the Panel in *Argentina –Footwear* which was careful to emphasise the two conditions that attach to the

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<sup>1024</sup> *Guyana v Suriname Arbitration*

<sup>1025</sup> And as Lichtenbaum ponders – 'are the answers different in the context of antidumping, countervailing duty, or safeguards proceedings, which are formal proceedings with administrative records?' See Lichtenbaum 1254

<sup>1026</sup> Mavroidis, *Trade in Goods* 295

<sup>1027</sup> *The Parker Case*, pp 35, 39 (*para 6*)– see also; Commission appointed under Art. 26 of the ILO Constitution, *Complaint by the Government of Portugal concerning the Observance by the Government of Liberia of the Forced Labour Convention*, 1930 (No. 29), Decision of 25 February 1963, ILR 36 (1968), p. 351, 378-9; Benzing 1247

<sup>1028</sup> Behboodi 582

rule of collaboration, namely: (i) that it only applies to the disclosure of evidence in the *sole possession* of the other party. The fact that states may be compelled to place before the Court any information within its sole possession is one with a long lineage with the Court stating in first case that a ‘State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal’.<sup>1029</sup> Secondly, (ii) the duty does not arise until ‘the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case’.<sup>1030</sup>

As a result of these conditions it is clear that parties do not have the right to full compulsory discovery of the kind generally found in domestic common law legal systems, but rather a narrower power to insist on collaboration in the production of evidence subject to strict conditions. It is argued that this distinction and the limitations on these powers that make the prospect of the Court insisting on such a power before the ICJ a more realistic prospect, compared to the alternative of a more all-encompassing power of discovery.

In sum, what can be said about the operation of the duty of collaboration in international judicial practice to date? Whilst the Court’s Statute and Rules do not explicitly mention the duty of collaboration, and whilst Article 43(2) of the Statute appears to only require that States put information before the Court ‘in support of their arguments’,<sup>1031</sup> it is nevertheless suggested that the argument that both parties appearing before the Court are under a duty of collaboration in relation to the production of evidence is strong. The number of international instruments and mentions of the duty in international jurisprudence lend weight to this argument. To this end, if the Court were to choose to do so, it is suggested that, subject to the conditions of sole possession, previous attempts to obtain information and the establishment of a *prima facie* case, the Court can insist that both parties are under a duty to put relevant information before the Court. Subsequent refusals to do so, it is argued, could result in the

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<sup>1029</sup> *Corfu Channel Case*, 18

<sup>1030</sup> *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, para 6.40; see Behboodi 582; furthermore these criteria are reminiscent of the treatment of this issue before the Iran-US Claims Tribunal which has developed a number of safeguards against so-called ‘fishing requests’. In guarding against such requests, the practice emerged that the request made is firstly ‘necessary’, ‘warranted’, or ‘appropriate’ and that secondly, the party had already taken ‘all reasonable steps’ to obtain the requested information; *Weatherford International Inc. and the Islamic Republic of Iran*, Case No. 305, Chamber Two, Order of 15 Feb 1985; *Brown & Root Inc. and the Islamic Republic of Iran*, Case No. 432, Chamber One, Order of 4 Jan 1993; See, for example, Order of March 14, 1983 in *William Stanley Shashoua and Government of the Islamic Republic of Iran, et al.*, Case No. 69, Chamber One

<sup>1031</sup> *Benzing* 1247

drawing of adverse inferences against that party and it is to this issue to which we will turn in section 4.2.6.<sup>1032</sup>

Whilst it has been demonstrated that the Court could insist that parties to a case before it are under a duty to put relevant information before the Court, it is easy to see the shortcomings of taking such an approach: in cases of refusal to cooperate it would appear that the only option left open to the Court is to draw adverse inferences – a power that the Court already possessed in the first place. As such, the utility of insisting upon the compulsory nature of its power to order the production of evidence by the parties is open to question. This is an issue that will be addressed in greater detail in Chapter 5 section 5.5. among with other shortcomings of the reforms proposed in this chapter. Presently, however, the following section will examine whether, drawing on the duty of collaboration, the Court could couch its requests for information within provisional measures in order to give them binding force.

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<sup>1032</sup> Sean D. Murphy, ‘The Experience of the Eritrea-Ethiopia Claims Commission’ [American Society of International Law] 106 Proceedings of the Annual Meeting (American Society of International Law) 237; Eritrea-Ethiopia Claims Commission, Rules of Procedure, art 1

#### 4.2. Provisional Measures

The following section argues that provisional measures are potentially a means of making binding requests for information that the Court could consider. The Court's previous interpretation of provisional measures and Article 41 of the its Statute represent a model for the kind of creative restyling that it is argued the Court could and should undertake in order to remedy some of the deficiencies in the Court's current approach to fact-finding.<sup>1033</sup> To elaborate, Article 41 of the Court's Statute, dealing with the Court's power to order provisional measures,<sup>1034</sup> states:

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

The Court's power to order provisional measures is discretionary and exceptional.<sup>1035</sup> This power is discretionary due to the fact that the Court is under no obligation to order provisional measures when requested to do so – Article 41 of the Statute stating that the Court need only provide provisional measures 'if it considers that circumstances so require'. The Court retains broad and unfettered discretion in this regard. Further, the power is exceptional due to the fact Article 41 of the Statute imposes strict constraints on when this power can be exercised, namely only in situations 'to preserve the respective rights of either party'.

Whilst the Court's power may be discretionary and exceptional, the power was for a long time somewhat uncertain due to the fact Article 41 does not explicitly state that such measures are binding on parties in cases that come before the Court. Although the Court's power to

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<sup>1033</sup> This creative restyling terminology is inspired by the proposals of the late Antonio Cassese; see Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady'

<sup>1034</sup> And indeed such measures are made in the form of an order, see Rüdger Wolfrum, 'Interim (Provisional) Measures of Protection' Max Planck Encyclopedia of Public International Law accessed 19 August 2013, at 4; The term used here will be 'provisional measures', in line with Article 46 of the Court's Statute. It should be noted however that the Rules of the Permanent Court of International Justice, and the rules of the ICJ until 1978 used the term 'interim measures of protection'. However, since the Rules were revised in 1978 to bring them into line with the Court's Statute, provisional measures shall be the terminology used here; see; H. Thirlway, 'The Indication of Provisional Measures by the International Court of Justice' in R. Bernhardt (ed), *Interim Measures Indicated by International Courts* (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Springer-Verlag 1994) 3, p. 119 onwards

<sup>1035</sup> Wolfrum, 'Interim (Provisional) Measures of Protection', para 4; this discretionary and exceptional nature is in line with the status of provisional measures in other international courts and tribunals, see Article 290 UNCLOS

indicate provisional measures lies in the Statute, the Rules clarify the extent of this power, providing for example that the Court has the power to make such provisional measures *proprio motu*<sup>1036</sup> and that it may indicate provisional measures not specifically requested by the parties.<sup>1037</sup>

The long-running academic debate surrounding the binding nature of provisional measures before the ICJ centre around the wording of Article 41 of the Court's Statute which refers to the power to 'indicate' provisional measures that 'ought to be taken'. The fact that Article 41 does not employ imperative terminology and the fact the ordinary meaning of the term indicate does not imply any obligations 'led most scholars to conclude that there is no question of a binding provisional measures order'.<sup>1038</sup> However, the Court has since clarified for the first time that its power to order provisional measures under Article 41 is indeed binding upon the parties in the *LaGrand* case.<sup>1039</sup>

In the course of the *LaGrand* case Germany argued that the US had failed 'to take all measures at its disposal' to ensure that Walter LaGrand was not executed for the crimes he had been convicted of pending the final judgment of the Court, as the provisional measure had stipulated.<sup>1040</sup> The US, on the other hand, argued that the drafting history of Article 41 did not support the argument that provisional measures were binding on the parties. The Court ultimately held that, after considering the object and purpose of the Statute, and the English and French versions of the text, provisional measures under Article 41 of the Statute were binding on the parties.<sup>1041</sup>

#### 4.2.1. What is the Object of Provisional Measures?

The Court in the *Fisheries Jurisdiction* case laid down its authoritative statement regarding

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<sup>1036</sup> Article 75(1) Rules

<sup>1037</sup> Article 75(2) Rules

<sup>1038</sup> A. Tzanakopoulos, 'Provisional Measures Indicated by International Courts: Emergence of a General Principle of International Law' [2004] 57 *Revue Hellénique de droit international* 53, 58; Hersch Lauterpacht, *The Development of International Law by the International Court of Justice* (CUP 1958) 253

<sup>1039</sup> *LaGrand (Germany v United States of America)*, Judgment, *ICJ Reports 2001*, p 466, paras. 102-109; in which the Court stated; 'It follows from the object and purpose of the Statute as well as the from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court.' (para 102)

<sup>1040</sup> *Ibid*, para 103

<sup>1041</sup> *Ibid*, para 103

the object of provisional measures, namely that the Court's power to order provisional measures 'presupposes that irreparable prejudice should not be caused to rights which are the subject of a dispute in judicial proceedings'.<sup>1042</sup> As such it is clear to see why provisional measures are often termed 'protective measures'; due to the fact they have been traditionally conceived of as having the sole object of protecting the parties' rights in international law and the integrity of the judicial process as a whole.<sup>1043</sup>

Provisional measures seek to ensure that the rights of parties existing at the time of the request for the order are protected through ensuring that neither party takes any action (or omission) that would frustrate the object of the adjudicative process.<sup>1044</sup> Not all international courts and tribunals have explicit powers to order provisional measures,<sup>1045</sup> although some have insisted on the inclusion of such a power in their rules of procedure and practice in this regard has suggested to some commentators that international courts and tribunals believe the power to order provisional measures to be an inherent judicial power.<sup>1046</sup> On whether there is an inherent power of international courts and tribunals,<sup>1047</sup> Thirlway has asserted that this is an academic question where the tribunal in question has a specific power in its constitutive instruments, as with the ICJ, except 'to the extent that the kind of measures which the Court has on occasion claimed the power to indicate might be thought to go in some respects beyond the exact wording of the Statute.'<sup>1048</sup>

On a more practical level, the need for the power to order provisional measures stems from the fact that, once the case is brought it may be some years before the judgment is handed down. The power to order provisional measures allows the tribunal in some small way to keep a handle on the dispute in the intervening period to ensure that the judicial process is not

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<sup>1042</sup> *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, *Interim Measures of Protection*, Order of 17 August 1972, *ICJ Reports 1972*, p 30, p. 34, para 22

<sup>1043</sup> Shabtai Rosenne, *Provisional measures in international law: the International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford University Press Oxford 2005) 3;

<sup>1044</sup> Wolfrum, 'Interim (Provisional) Measures of Protection', para 7; Igor V. Karaman, *Dispute Resolution in the Law of the Sea*, vol 72 (Martinus Nijhoff Publishers 2012) 95

<sup>1045</sup> For instance inter-State arbitrations under the PCA and Panels under the WTO adjudicatory system; see Brown, *A Common Law of International Adjudication* 123

<sup>1046</sup> For instance Sir Gerald Fitzmaurice argued that international courts and tribunals should have the power to order provisional measures 'in order to ensure that justice is done and that the eventual decision of the Court on the merits is not stultified by intermediate action on the part of one or other party rendering such decision unenforceable or unavailing'; see Fitzmaurice 542; see also the extensive discussion in Brown, *A Common Law of International Adjudication* 125

<sup>1047</sup> For an argument to this effect see Brown, *A Common Law of International Adjudication*

<sup>1048</sup> Thirlway, 'The Indication of Provisional Measures by the International Court of Justice' 3

frustrated by either party in the meantime.<sup>1049</sup> As Judge Ndiaye has said of provisional measures in the context of ITLOS, the actions of one party can threaten the entire judicial process and as such:

‘[t]he role of provisional measures is, therefore, to prevent those unfortunate consequences from happening, to ensure the effectiveness of the decision-making process, and to help maintain the *status quo* with regard to situations contested in the meantime, which the other party is allegedly seeking to alter.’<sup>1050</sup>

The most common course of action ordered by the Court is to oblige the parties to cooperate and enter into negotiations to resolve the dispute at hand,<sup>1051</sup> and to order that the parties do nothing that would aggravate or complicate the dispute.<sup>1052</sup> Further, provisional measures have the purpose of preserving the integrity of the judicial process, or ‘the effective functioning of the system and the proper administration of justice’, for which the Court itself is responsible.<sup>1053</sup>

#### 4.2.2. When Can Provisional Measures be Made?

A combination of the wording of Article 41 of the Court’s Statute and the case law of the Court have indicated that a number of conditions must be met for the Court to be able to order provisional measures.

First of all, the Court has established that it must have *prima facie* jurisdiction in order to

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<sup>1049</sup> Brown, *A Common Law of International Adjudication* 121; see also Bernard Oxman, ‘Jurisdiction and the Power to Indicate Provisional Measures’ in Lori F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Transnational 1987) 323; Maurice Mendelson, ‘Interim Measures of Protection in Cases of Contested Jurisdiction’ (1972-1973) 46 *Brit YB Int’l L*, 259

<sup>1050</sup> Karaman 96

<sup>1051</sup> Jean d’Aspremont, ‘The Recommendations Made by the International Court of Justice’ 56 *International and Comparative Law Quarterly* 185, 188; FN 22: *The Mox Plant* case, International Tribunal of the Law of the Sea, order, para 89; *Land Reclamation Malaysia v. Singapore (Provisional Measures, ITLOS) Order of 8 October 2003, Order, para 106*; see also Shigeru Oda, ‘Provisional Measures, The Practice of the International Court of Justice’ in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (CUP 1996) 551

<sup>1052</sup> d’Aspremont 188; *Nuclear Test (Australia v France)*, order, ICJ Reports (1973) 106; *Nuclear Test (New Zealand v France)*, order, ICJ Reports (1973) 142; case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, order, ICJ Reports (1984); *Armed Activities Case, para 47*; see the interesting argument by Thirlway, ‘The Indication of Provisional Measures by the International Court of Justice’ 14 in this regard that provisional measures in this respect are closely intertwined with the broader principle that parties before the Court must not frustrate the object and purpose of a treaty during the stage between the signature of the treaty and its coming into force, see Article 18, Vienna Convention on the Law of Treaties 1969

<sup>1053</sup> Kolb 616



consider ordering provisional measures.<sup>1054</sup> The Court must convince itself that on the face of it, the facts of the case indicate that the Court has jurisdiction over the dispute and that the rights sought to be preserved are the rights that will be at the heart of the dispute at the merits stage.<sup>1055</sup> Secondly, the Court must be convinced that there is the chance of irreparable harm.<sup>1056</sup> The Court's jurisprudence indicates that it will make an assessment on the risk of rights being irreparably harmed on the basis of probability, a standard short of certainty.<sup>1057</sup>

Finally, the Court must be convinced of the urgency of the situation. Provisional measures must be required as a matter of urgency.<sup>1058</sup> As such, this suggests that the temporal element relates to urgency at the time of the request, and not only 'pending the final decision'.<sup>1059</sup> Multiple orders for provisional measures can be made.<sup>1060</sup>

It is not inconceivable that these conditions may be met in cases regarding the preservation of evidence. There is no reason to doubt that there may be situations where the Court has *prima facie* jurisdiction, such as where there is a danger that evidence may be at risk of destruction, that the danger of irreparable harm and urgency requirements may be met.<sup>1061</sup> And indeed there are examples in the Court's case law in which it has utilised provisional measures in relation to evidentiary issues.

#### 4.2.3. *Provisional Measures and Evidence*

It is argued that the Court's power to order provisional measures to ensure the protection of parties' rights is broad enough to cover the proper conduct of the judicial process,<sup>1062</sup> to

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<sup>1054</sup> Paolo Palchetti, 'The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute' (2008) 21 *Leiden Journal of International Law* 623, 630

<sup>1055</sup> *Ibid*

<sup>1056</sup> See for instance; *Nuclear Tests Case 1974*, at 139; *Tehran Hostages Case*, para 36; *Bosnian Genocide, Provisional Measures*, para 34 amongst others; see Wolfrum, 'Interim (Provisional) Measures of Protection', para 14;

<sup>1057</sup> Brown, *A Common Law of International Adjudication* 140; *Certain Criminal Proceedings in France (Republic of the Congo v France)*, *Provisional Measure, Order of 17 June 2003*, *ICJ Reports 2003*, p 102, para 35

<sup>1058</sup> *Certain Criminal Proceedings in France*

<sup>1059</sup> Brown, *A Common Law of International Adjudication* 143

<sup>1060</sup> See *Bosnian Genocide* case where Bosnia made two requests [1993] ICJ Rep 3 and [1993] ICJ Rep 325; and *Pulp Mills* where the Court made two separate provision measures orders on 13 July 2006 and 29 November 2006.

<sup>1061</sup> R. Higgins, 'Interim Measures for the Protection of Human Rights' (1997) 36 *Columbia Journal of Transnational Law* 91, 108

<sup>1062</sup> Wolfrum, 'Interim (Provisional) Measures of Protection', para 7

ensure that the Court is able to render a judgment that is effective.<sup>1063</sup> To this end, the preservation of evidence ‘without which a party might not be able to prove its claim and the tribunal might not be able to settle the dispute’ is a legitimate aim of provisional measures.<sup>1064</sup>

Expanding more specifically on the Court’s ability to order measures that protect the integrity of the judicial process, significantly, there is some precedent for the use of provisional measures in relation fact-finding. In the *Cameroon v Nigeria* case, the Court referred to the fact-finding mission to the Bakassi Peninsula proposed by the Secretary-General<sup>1065</sup> in ordering the parties to ‘take all necessary steps to conserve evidence relevant to the present case within the disputed area’.<sup>1066</sup> Furthermore, crucially, the Court ordered the parties to ‘...lend every assistance to the fact-finding mission which the Secretary-General of the United Nations has proposed to send...’<sup>1067</sup> although the Court did not ultimately refer to the Secretary-General’s report in the final judgment.<sup>1068</sup>

That the Court, in an order binding on the parties, ordered cooperation with the Secretary-General’s fact-finding mission is significant in demonstrating the use of provisional measures to safeguard the judicial process as a whole and to aid the Court in its fact-finding task. In this regard the order in the *Cameroon v. Nigeria* case, it is argued, can be seen as precedent for the more extensive use of provisional measures by the Court in taking a more proactive approach to the facts. It is argued that, for example, the Court is competent to include in a provisional measure the obligation to disclose specific documents that lie in the sole possession of that party and that have been specifically requested by the other party. Again, there is some precedent for such action.

For instance, before the PCIJ in the *Denunciation of the Treaty of 2 November 1865 between China and Belgium* case, President Huber ordered, specifically referring to Article 41 of the Court’s Statute, that property and shipping not be sequestered or seized and be protected from

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<sup>1063</sup> Brown, *A Common Law of International Adjudication* 121

<sup>1064</sup> See *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, PCIJ, Series A, No 8, Order of January 8th, 1927, II (‘as regards property and shipping’); Brown, *A Common Law of International Adjudication* 122

<sup>1065</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996*, ICJ Reports 1996, p 13

<sup>1066</sup> Ibid

<sup>1067</sup> Ibid

<sup>1068</sup> *Land and Maritime Boundary between Cameroon and Nigeria case*

‘any destruction other than accidental’.<sup>1069</sup> Similarly, the ICJ in the *Frontier Dispute* case ordered that both parties ‘should refrain from any act likely to impede the gathering of evidence material to the present case’<sup>1070</sup> and in the *Land, Maritime and Frontier Dispute* case the Court ordered that the parties ‘take all necessary steps to conserve evidence relevant to the present case within the disputed area’.<sup>1071</sup>

Further, there is evidence of the use of provisional measures for preservation in other international courts and tribunals. For instance, in the *Biwater Gauff v. Tanzania* case the ICSID arbitral tribunal ordered the preservation and provision of documentation in respect of a number of pieces of evidence requested by the company.<sup>1072</sup> There is some evidence of this in other areas of international law, such as the *AGIP v. Congo* case in which the ICSID arbitral tribunal granted a discovery order in a provisional measure.<sup>1073</sup> Additionally, a particularly high-profile recent example of the use of provisional measures in relation to evidentiary matters arose during the provisional measures stage of the *Land Reclamation* case between Malaysia and Singapore.

In this case provisional measures were sought by Malaysia to prevent the continuation of land reclamation works being carried out by Singapore that were alleged to adversely affect the marine environment in the Straights of Johor – the body of water that separates Malaysia from Singapore.<sup>1074</sup> On 4 July 2003 Malaysia requested the establishment of an arbitral tribunal under Annex VII of UNCLOS to delimit the boundary between the territorial waters of the two states, determine whether Singapore’s land reclamation activities had breached its obligations under UNCLOS and to seek cessation of these activities. However, before the arbitral tribunal could render its decision Malaysia sought provisional measures from ITLOS as they were entitled to under Article 290(5) of UNCLOS.<sup>1075</sup> Malaysia’s request for

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<sup>1069</sup> See Order of January 8<sup>th</sup>, 1927, in *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, Ser A. (No. 8) 8 1927

<sup>1070</sup> *Frontier Dispute, Provisional Measures, Order of 10 January 1986, ICJ Reports 1986, p 3, B*

<sup>1071</sup> *Bosnian Genocide Case*

<sup>1072</sup> See Procedural Order No. 1, 31 March 2006, *Biwater Gauff v. Tanzania*, ICSID Tribunal case no. ARB/05/22

<sup>1073</sup> *AGIP v. Congo*, 1 ICSID Rep 306, 311 (1979); *Bosnian Genocide Case*, paras 66, 451, 467

<sup>1074</sup> *Land Reclamation Malaysia v. Singapore (Provisional Measures, ITLOS) Order of 8 October 2003*

<sup>1075</sup> Article 290(5) UNCLOS states; ‘Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea or, with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those

provisional measures attempted to bring a immediate halt to Singapore's land reclamation activities and to impose an obligation on Singapore to provide Malaysia with all relevant information on their planned works, afford Malaysia the opportunity to comment on these works and for Singapore to agree to negotiate with Malaysia.<sup>1076</sup>

During the course of proceedings Professor James Crawford made reference in passing to a meeting between the two states which had taken place on 22 August 2003 at which a proposal for a 'jointly-funded assessment process' had been discussed and remarked that the Malaysian delegation still wished this could happen.<sup>1077</sup> In response, Professor Koh in making Singapore's closing statement to the tribunal remarked that Singapore was willing to cooperate with Malaysia on a range of matters including cooperating to 'co-commission and co-finance a new scientific study by independent experts'.<sup>1078</sup> In its Order of 8 October 2003 the Tribunal subsequently noted that Singapore had accepted Malaysia's proposal to this end<sup>1079</sup> and prescribed that the two states 'shall...enter into consultations forthwith in order to...(a) establish promptly a group of independent experts...'<sup>1080</sup> Whilst this measure only imposes an obligation on the parties to enter into consultations with regards to the establishment of the group of experts, it is nonetheless remarkable that the Tribunal would indicate such a provisional measure which relates specifically to the gathering of evidence as opposed to the preservation of the rights of the parties *per se*. This fact appeared unremarkable to the judges, avoiding mention in any of the eight declarations and separate opinions made. It is perhaps even more remarkable that the Tribunal indicated this provisional measure *proprio motu* since this was not a measure that had originally been sought by Malaysia, but had merely been mentioned before the Court in passing.

Additionally, it is important to note that this group of experts (GOE) was in fact subsequently established and that it had a very real impact on the resolution of the dispute between the two states. Whilst the report of the GOE is not publicly available, after the group had submitted

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provisional measures, acting in conformity with paragraphs 1 to 4.'

<sup>1076</sup> See Request for Provisional Measures Submitted by Malaysia, 4 September 2003, available at: [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/request\\_malaysia\\_eng.1.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/request_malaysia_eng.1.pdf)

<sup>1077</sup> *Land Reclamation Malaysia v. Singapore (Provisional Measures, ITLOS) Order of 8 October 2003*; 27 September 2003, 9.30am, Oral Proceedings, Verbatim Record, page 18, line 19

<sup>1078</sup> *Ibid*; 27 September 2003, 9.30am, Oral Proceedings, Verbatim Record, page 37, line 36; Professor Koh subsequently stated that Singapore had accepted this proposal from Malaysia at the meeting in August and had reiterated its support in its 'Note' of 2 September 2003; see page 39 line 2

<sup>1079</sup> *Ibid*; para 86

<sup>1080</sup> *Ibid*; operative paragraph 1

their final report the states signed a Settlement Agreement on 26 April 2005 which specifically states that the parties ‘have considered and reviewed the GOE’s Final Report and accepted its recommendations’ and which terminates the arbitral proceedings before the PCA.<sup>1081</sup> Consequently, in taking a proactive approach to the fact-finding process in indicating a provisional measure *proprio motu* ITLOS has not only set an important precedent upon which the ICJ could draw but also materially contributed to the resolution of the dispute.

Through making a request for information through provisional measures under Article 41 of the Court’s Statute, coming either from the other party or from the Court itself, the Court has the ability to make its requests binding on the parties. In doing so, the Court would be able to circumvent the unclear legal issue as to whether its power to request information from the parties under Article 49 of its Statute (see Chapter 1 at 1.1.4.) is legally binding on the parties or merely recommendatory. Since the Court has been reluctant to make requests for information in the past, and has not regularly drawn adverse inferences in those few cases it has requested information it is suggested that having the weight of the binding authority of provisional measures behind it, the Court could more easily take a more proactive approach to securing the facts necessary to make sound legal determinations in cases that come before it.

#### *4.2.4. The Obstacle to Using Provisional Measures as part of a more Proactive Approach to Fact-Finding*

There is a potential obstacle to the Court more often utilising its power to indicate provisional measures to secure the protection and production of evidence – namely the requirement that the provisional measures can only be made to preserve the rights of the parties before the Court that will form the basis for the merits of the case. As Palchetti has stated; ‘[t]he Court does not have the power to protect *proprio motu* rights of the parties that are not in dispute in the case before it; this would constitute an *ultra petita*.’<sup>1082</sup> In practice the Court has always stressed that the measures in question were related to the dispute rights in the case at hand.

That having been said, Palchetti’s argument is open to question. First of all, the history of the Court’s use of provisional measures in relation to evidence can be said to have the underlying rationale of protecting the judicial process rather than protecting the rights of individual

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<sup>1081</sup> *Malaysia/Singapore Award, Annex, page 2*

<sup>1082</sup> Palchetti, ‘The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute’ 622

parties *per se*. As such, they are not designed to protect a right that is in dispute in the case, but rather to protect the integrity of the judicial process, and as such it is hard to see how the Court could be acting *ultra petita* in such cases.<sup>1083</sup> Consequently, in cases where the Court uses interim measures to protect or order the production of evidence, it is argued that the fact the orders do not relate to a right that is in dispute in the case at hand is inconsequential. As Kolb has stated, ‘measures indicated by the Court of its own volition can be slightly further removed from the subject matter of the dispute than measures to protect disputed substantive rights...since damage to the procedure will unfailingly, albeit indirectly, affect the parties’ substantive rights too’.<sup>1084</sup> In sum, it is argued that the Court is not precluded from couching its requests for information in provisional measures in this respect. However, the prospect of the Court making binding requests for information, or orders to preserve existing evidence, in light of states traditional control over the fact-finding process, raises the possibility that states will simply not comply with such requests.

#### *4.2.5. Legal Consequences of Non-Compliance with Provisional Measures*

There have been a number of recent examples of non-compliance with provisional measures in the practice of the Court. For example, in the *Armed Activities* case the Court found that Uganda had failed to comply with its provisional measure of 1 July 2000.<sup>1085</sup> However since the Democratic Republic had only requested a declaration to this effect and had not sought damages the Court did not make an award of compensation for the breach that it had found to have taken place. Similarly in the *Bosnian Genocide* case the Court found Serbia to have breached the provisional measures of 8 April 1993 and 13 September 1993.<sup>1086</sup> And in this case Bosnian and Herzegovina did seek monetary compensation for Serbia’s failure to comply with the Court’s provisional measures. However, ultimately the Court opted to make a declaratory statement to the effect that Serbia had breached its obligations rather than ordering monetary compensation.<sup>1087</sup>

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<sup>1083</sup> See Kolb 946, stating that 'good faith requires above all else, the preservation of the subject matter of the dispute. The parties must not take steps which might deprive the Court's proceedings of their value, or gravely affect them in some other way.'

<sup>1084</sup> Ibid

<sup>1085</sup> *Armed Activities Case*, para 264 and para 345(7)

<sup>1086</sup> *Bosnian Genocide Case*, paras. 66, 451, 467

<sup>1087</sup> Ibid, paras. 469, 471(1)

Nevertheless, the Court's reluctance to award monetary compensation is arguably inconsequential in the context of provisional measures relating to evidence. In such cases, what is sought is not a declaratory statement or compensation but rather the production or protection of documents for instance (although admittedly it would in some cases be difficult to establish whether the evidence had been preserved, or in other words whether the measure had been complied with.<sup>1088</sup>) In such cases where it could be established that the measure had not been complied with, it is suggested that a better course of action for the Court would be to draw adverse inferences from any failure of the parties to comply with (binding) provisional measures. Although the Court has not in the past shown a clear preference for drawing adverse inferences from refusals to providing requested information or to comply with provisional measures, it is argued that developing such a practice in the future could be a key part of the Court's taking a more proactive approach to fact-finding in order to remedy the current weaknesses of its current practice.

#### *4.2.6. Failure to Comply with Provisional Measures & Duty of Collaboration Generally-Adverse Inferences*

As mentioned above, it has been suggested that the Court may be able to address the problems caused by its traditionally reactive approach to fact-finding through creative use of Article 49 of its statute which enables it to take 'formal note' of any refusal to produce requested material (and subsequently draw adverse conclusions from any refusal to do so).<sup>1089</sup> The practice of drawing adverse inferences is commonplace in the practice of both domestic and international judicial bodies.<sup>1090</sup> As such, it has been suggested that it is an inherent judicial function.<sup>1091</sup> However, despite some support for this position from the bench,<sup>1092</sup> the Court

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<sup>1088</sup> Although this issue is beyond the scope of the present thesis, such a situation would require a similarly proactive approach from the Court in order to establish whether the order had been breached

<sup>1089</sup> Halink 19, Halink cites *Bosnian Genocide Case at para 205* and Teitelbaum 130 in which Teitelbaum argues that the Court drew 'conclusions' from (although didn't take formal note of) Serbia and Montenegro's failure to produce documents in the Bosnian Genocide Case

<sup>1090</sup> See Principles 17.3, 21.3 ALI/UNIDROIT Principles of Transnational Civil Procedure, Sandifer 150, J.A. Ragosta, 'Unmasking the WTO-Access to the DSB System: Can the WTO DSB Live up to the Moniker World Trade Court' 31 *Law & Pol'y Int'l Bus* 739, 764; Judge Jessup in *Barcelona Traction Preliminary Objections* stated that, despite the fact the Court's Statute does not explicitly provide for the power to draw adverse inferences, 'if a party fails to produce on demand a relevant document which is in its possession, there may be an inference that the document "if brought, would have exposed facts unfavourable to the party"'.  
<sup>1091</sup> Grando 264

<sup>1092</sup> This position has found support from the Court in the form of Judge Owada who has argued that the Court must not be so cautious about appearing impartial and that Article 49 is potentially a useful tool for 'levelling the playing field' in relation to the evidence presented by both parties before the Court (such as in cases

has never done so in practice. Is it feasible to envisage that the Court could make greater use of adverse inferences to entice the parties to disclose the necessary information?

An example of the Court's historical reluctance to draw adverse inferences can be seen in the approach of the Court in the *Corfu Channel* case in which the United Kingdom refused to produce specific information requested by the Court- namely Admiralty orders.<sup>1093</sup> However, the Court in this case declined to draw specific adverse inferences from the United Kingdom's refusal to comply with the Court's request. Similarly in the *Bosnian Genocide* case, Bosnia and Herzegovina requested Serbia and Montenegro to produce documents under Article 49 of the Court's Statute, however the Court did not accede to Bosnia and Herzegovina's request,<sup>1094</sup> merely stating that 'it [had] not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions'<sup>1095</sup> but that 'the Court observes that the Applicant has extensive documentation and other evidence available to it, especially readily accessibly ICTY records...'<sup>1096</sup>

Judge Al-Khasawneh heavily criticised the Court for its reasoning in this respect, arguing that the documents would have in all likelihood 'shed light on the central questions of intent and attributability' in the case and that the Court's reasoning behind not requesting the information 'is worse than its failure to act'.<sup>1097</sup> One commentator referred to the argument made by Judge Owada in the *Oil Platforms* case (see section 4.1.3. above) and stated that the Court found itself in a similar position in the *Bosnian Genocide* case – namely faced with a 'curable problem' that could have been solved through a more proactive approach to the facts.<sup>1098</sup>

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where some states retain exclusive access to some information that it does not let the other party see). See passage from Dissenting Opinion of Judge Owada in the *Oil Platforms Case at 321*: 'Accepting as given [the] inherent asymmetry that comes from the process of discharging the burden of proof...[i]t would seem to me that the only way to achieve this would have been for the Court to take a more proactive stance on the issue of evidence and that of fact-finding...' This is used by Halink to reinforce the argument that Article 49 could be used to offset the asymmetry in the production of evidence and in addition 'as a necessary tool to safeguard the equality of the parties and the fair administration of justice'; see Halink 20

<sup>1093</sup> *Corfu Channel Case 32*, the request being reproduced in *Pleadings, Oral Arguments, Preliminary Objection, Merits*, vol. 8, p. 428 and the refusal at *Pleadings, Oral Arguments, Documents, Preliminary Objection, Merits*, vol. V, p. 255; Benzing 1251

<sup>1094</sup> *I.C.J. Pleadings, Bosnian Genocide*, CR 2006/43, 8/5/2006, page 28, para 60

<sup>1095</sup> Paragraph 206 - Teitelbaum 131

<sup>1096</sup> *Bosnian Genocide Case*, para 206

<sup>1097</sup> *Ibid*, see Dissenting Opinion of Judge Al-Khasawneh at para 35, and the Dissenting Opinion of Judge Mahiou at para 53-63

<sup>1098</sup> Teitelbaum 133



As such, it is argued that in such situations the Court can feasibly make greater use of its powers under Article 49 of its Statute to request the required information. The fact that the request for information has come from the parties rather than from the Court *proprio motu* is not significant since neither Article 49 of the Court's Statute nor Article 62 of its rules lay down any stipulation outlawing this practice. In fact, Article 66 of the Court's Rules states that the Court may at any time 'either *proprio motu* or at the request of a party' utilise its fact-finding powers in the course of obtaining evidence – it is presumed that the same lack of distinction between requests from the parties and action *proprio motu* exists in relation to requests for information and the drawing of adverse inferences.

Chapter 3 highlighted that adjudicative bodies of the WTO have drawn adverse inferences from the refusal of one party to provide information requested of it by the other party or Panel in a number of cases.<sup>1099</sup> This is so despite the fact there is only one reference to adverse inferences in the WTO Agreements (namely Article 7(7) Annex 5 of the SCM Agreement). It is suggested that, drawing on the case law of various international courts and tribunals, only unexplained refusals to cooperate can warrant the drawing of adverse inferences.<sup>1100</sup> For example, in *Argentina-Footwear* the Panel drew an adverse inference from Argentina's refusal to provide information requested by the United States, stating this refusal taken together with the evidence presented by the US favoured their position.<sup>1101</sup> Whilst the power to draw adverse inferences more generally flows from the duty of collaboration found in international adjudication, see section 4.2.6. above, it is argued that the ICJ has a much more explicit power to draw adverse inferences than the WTO adjudicative bodies and that, as such, it could make greater use of this power in order to bring before it information that it requires for the resolution of the case at hand.<sup>1102</sup>

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<sup>1099</sup> See for example *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/RW (2 August 1999) para 203

<sup>1100</sup> *Levitt v. Iran* (1991) 27 Iran-US CTR 145 (Appendix BRA-II) at para 64 ('the Respondents have failed to submit the majority of the documents requested and have so *without adequate reasons for this failure*'); In the *Aerial Incident of 27 July 1955* case Israel protested that the Bulgarian Government was deliberately withholding material facts requested of it by Israel during the course of proceedings. Consequently Israel took the step of similarly withholding evidence in response, 'reserving all its rights in the matter of evidence, including the right to make appropriate applications to the Court under Article 49 of the Statute.' See *Aerial Incident of 27 July 1955 Case, Pleadings*, 98

<sup>1101</sup> *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Panel Report, WT/DS56/R, 25 November 1997, para 6.40

<sup>1102</sup> Mavroidis, 'Development of WTO Dispute Settlement Procedures' 174; It has been argued that the practice of drawing adverse inferences more accurately squares with the good faith obligation to cooperate with the proceedings that is placed on all Members rather than imposing on them a binding duty to disclose information by construing 'should' and 'shall', see section 3.1.2.1. above; Kuyper 321

As argued in Chapter 3, the practice of drawing adverse inferences is a potentially helpful tool that could be utilised by the Court to flush out the facts required to establish the factual foundations of the case that have not been placed before them by the parties themselves.<sup>1103</sup> As one commentator has pointed out, the real value of adverse inferences is not actually the inference itself but rather ‘its capacity to induce cooperation rather’ than the inference itself’.<sup>1104</sup>

Crucially, it should be stressed that the drawing of adverse inferences does not shift the burden of proof from the claimant to the defendant state. Rather, the drawing of adverse influences is a constituent part of the evaluation of the facts in the course of the judicial body’s important fact-assessment role. Whilst a party may undoubtedly run the risk of an adverse inference being drawn as a result of it not providing evidence to counter claims made against it, ‘this is not a true burden of proof, and the use of an additional label to describe what is an ordinary step in the fact-finding process in unwarranted’.<sup>1105</sup> As such, instead of conceiving of the burden of proof constantly shifting between one party and the other, it is argued that the burden remains on the party seeking to establish a claim (except where a party invokes a specific exception) and that matters such as the drawing of adverse inferences be left to the judicial body to manage in the course of their judicial function.<sup>1106</sup>

Of course there are drawbacks to the practice of drawing adverse inferences such as the fact that where neither the Court nor the other party are aware of information that has been withheld the power is rendered useless.<sup>1107</sup> Nonetheless, it is argued that if the Court is to take a more proactive approach to the facts that will involve the Court more often making requests for information and facilitating the production of evidence, the Court may encounter some resistance from some states. In this regard, it is argued that despite the obvious difficulties, the practice of drawing adverse inferences when information that has been requested is willingly withheld without justification, could be one that is of great potential value for the Court.

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<sup>1103</sup> Collins 372; Cameron and Orava

<sup>1104</sup> Grando 266; Kuyper 321

<sup>1105</sup> See the Supreme Court of Canada in *Snell v Farrell* [1990] 2 SCR 311, 107 NBR (2d) 94, 72 DLR (4<sup>th</sup>) 289, 110 NR 200,4 CCLT (2d) 229; Grando 85

<sup>1106</sup> As Grando argues, ‘...courts would be wise to refrain from stating that the burden of proof, even in the sense of the tactical burden, shifts’, *ibid*

<sup>1107</sup> Cameron and Orava

Further, such blatant refusals to comply with requests directly from the Court were it to insist on its right that the information be produced are likely to be a generally rare occurrence. It is argued that it is in the party's best interest to cooperate with the Court and comply with what is asked of it in order to give itself the best chance of prevailing in the case at hand. As Highet has stated:

‘...if a state wishes to prevail in a litigation, it had better do what is asked of it by the tribunal, sovereignty or no sovereignty...Of course, states are always... free to conduct their cases as they see fit, but if they wish to win, they should...exercise that freedom consistent with any preferences indicated by the Court or chamber’.<sup>1108</sup>

And indeed it is suggested that Highet's advice to states regarding their litigation strategy still rings true today. Turning now from the duty of collaboration, the following section will examine the issue of expert evidence and propose a clear strategy for the use of expert evidence before the Court.

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<sup>1108</sup> Highet, 'Evidence, The Chamber, and the ELSI Case' 63

### 4.3. Developing a Clear Strategy for the Use of Experts before the Court

A further way in which the Court could take a more proactive approach to the facts in cases that come before it is through better use of experts before the Court. This is a possibility that has been explicitly advocated by a number of judges in the recent jurisprudence of the Court and by a number of voices in international legal scholarship.<sup>1109</sup> For instance, in the *Pulp Mills* case Judge Yusuf made a plea to the Court to adapt the way it deals with factually complex cases and to develop ‘a clear strategy which would enable it to assess the need for an expert opinion at an early stage of its deliberations on a case’,<sup>1110</sup> arguing that such cases are increasingly going to come before the Court and, as such, states ‘will need to see that the facts related to their case are fully understood and appreciated by the Court’.<sup>1111</sup>

In order to improve the Court’s fact-finding process it is argued that the Court must ‘display greater readiness to use, indeed exhaust, the possibilities granted by its Statute, in an open and fair way’.<sup>1112</sup> In the words of Mbengue, the Court must ‘[interweave the] legal process with knowledge and expertise’<sup>1113</sup> by playing a more active role in weighing scientific or uncertain facts in order to determine whether factual or scientific assertions are ‘sufficiently supported or reasonably warranted’ by scientific evidence, for instance.<sup>1114</sup> It is argued that the Court, being ‘endowed with considerable discretion and two well-defined procedures to use outside sources of expertise’<sup>1115</sup> is more than capable of developing such a clear strategy in relation to the consultation of experts in which both the bench and experts alike respect the functional autonomy of the other.<sup>1116</sup>

The following subsection proposes such a clear strategy for the use of experts before the Court that comprises two main elements. First of all, the thesis proposes an end to the use of *experts fantômes* and to the practice of presenting experts as counsel once and for all in order to foster a culture of examination and cross-examination of experts in open court. Secondly it

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<sup>1109</sup> See for instance Foster 4; Treves; M.M. Mbengue, ‘International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-Finding in International Adjudication’ 34 *Loy LA Int’l & Comp L Rev* 53; Del Mar

<sup>1110</sup> *Pulp Mills Case, Declaration of Judge Yusuf at para 14*

<sup>1111</sup> *Ibid*, Declaration of Judge Yusuf at para 14

<sup>1112</sup> Simma

<sup>1113</sup> *Pulp Mills Case, Joint Dissenting Opinion of Judges Al-Kasawneh and Simma, para 3*

<sup>1114</sup> Appellate Body Report, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (16 January 1998) para 186, Mbengue 524

<sup>1115</sup> Simma

<sup>1116</sup> Jacur 453

is proposed that the Court appoint its own experts to assist it in cases in which the facts are of such a nature so as to be beyond what any judge could reasonably be expected to comprehend. It is argued that being armed with its own expert advice the Court will be better placed to play an active role in questioning and examining the experts put forward by the parties. Each element of the strategy will be examined in turn.

#### *4.3.1. Expert Evidence Before the Court*

In developing a clear strategy for the use of expert evidence before the Court it is first of all argued that the use of *experts fantômes* as examined in Chapter 2 at 2.1.2. and the practice of experts appearing as counsel must be brought to an end once and for all in order to encourage a culture of examination and cross-examination of experts in open court.

As argued in Chapter 2, the current practice of not informing the parties that the Court is seeking expert assistance whilst circumventing the procedure for doing so as set out in the Court's Statute and Rules denies parties the right they would have otherwise had under Article 67(2) of the Rules to comment on the expert evidence if such an expert had been properly appointed under Article 50 of the Court's Statute.<sup>1117</sup> This practice has been criticised in recent cases by members of the Court such as Judges Al-Khasawneh and Simma who have argued that this practice is unacceptable in cases in which complex factual issues form part of the crux of the case.<sup>1118</sup> Whilst these judges were correct to highlight the problem of informal resort to experts, it is argued that they did not go far enough in their assessment of the situation. Owing to the fact the use of informal expert evidence is inherently problematic, the practice of the Court in seeking informal advice from experts should be brought to an immediate and final halt in the interests of the proper administration of justice.<sup>1119</sup>

In addition to bringing an end to the practice of informal consultation of experts, it is argued that there is another practice which the Court ought to, and to some extent has already begun to, discontinue: that of parties presenting experts as counsel. This practice, highlighted as a weakness of the Court's fact-finding procedure in Chapter 2 at section 2.1.1., has been commonplace in the practice of the Court, despite being the subject of criticism in

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<sup>1117</sup> Tams, 'Article 50' 1118

<sup>1118</sup> *Pulp Mills Case, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 14*; see also Simma 231

<sup>1119</sup> Tams, 'Article 50' 1118;

international legal scholarship and posing problems for the Court in practice.<sup>1120</sup>

For instance, in the *ELSI* case, Giuseppe Bisconti, a lawyer who had advised the US corporation at the heart of the case was included as a member of the United States team before the Court. Problems arose in the course of his submission during the oral proceedings as it became clear that the lawyer was not only addressing the Court as counsel for the United States but also speaking to his own knowledge as legal advisor to the American corporation. President Ruda upheld Italy's complaint that Bisconti was not only appearing as counsel but also as a witness and as such should be treated as a witness subject to cross-examination and ordered that such cross-examination take place.<sup>1121</sup>

A similar issue arose before the ITLOS in the provisional measures stage of the *Land Reclamation* case. Whilst Malaysia called one expert, Professor Falconer, who was subsequently cross-examined, another, geomorphologist Professor Sharifah, made a statement as a member of Malaysia's defence team and as such could not be cross-examined.<sup>1122</sup> Ultimately the difficulty was overcome by ensuring that the expert made the solemn declaration required of experts under Article 79(b) of the Rules which meant that the expert could be examined as an expert by counsel of Singapore.<sup>1123</sup> It should be noted, however, that Malaysia technically retained discretion over whether they wished to do so or not. Had Malaysia preferred to keep Professor Sharifah as part of their delegation and not agreed to her subsequently making the declaration under Article 79(b), cross-examination could have been avoided. Despite such academic criticism and practical issues, such practice has been common in the jurisprudence of the Court.

This practice in the past left states with a decision to make – for whilst the state may benefit from avoiding having their expert subjected to awkward questions, there is no doubt that the perception of the individual as an independent expert is affected.<sup>1124</sup> As one commentator remarked:

‘an advocate is clearly partisan, putting forward what are known to be not so much his

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<sup>1120</sup> Watts, ‘Enhancing the Effectiveness of Procedures of International Dispute Settlement’ 30

<sup>1121</sup> See *ELSI case*; Watts, ‘Enhancing the Effectiveness of Procedures of International Dispute Settlement’ 30

<sup>1122</sup> See ITLOS/PV03/01, verbatim record of the sitting of 25 September 2003, at 25; *Land Reclamation Malaysia v. Singapore (Provisional Measures, ITLOS) Order of 8 October 2003*

<sup>1123</sup> Treves 486

<sup>1124</sup> Foster 89

personal views as simply the best arguments he can think of in support of his client's case, whereas an expert is known to be putting forward his own beliefs and opinions as to matters within his range of expertise, and is relying on his known authority in his own field.'<sup>1125</sup>

Whilst states consider the tactical pros and cons of each option, the decision is more important for the Court in that the decision to retain experts as counsel rather than putting them forward as experts subject to cross-examination deprives the Court of an important means of drawing out the facts and circumvents the procedure laid down in Article 50 of the Statute and the Rules for the examination of experts.<sup>1126</sup> The possibility of experts being cross-examined in the course of the oral proceedings is an essential part of the adjudicative process since, through the process of cross-examination, experts can be scrutinised in a way that is simply not possible when they appear as counsel.<sup>1127</sup> Cross-examination facilitates examination of the three main issues in relation to expert evidence: its relevance, probative value, and the reliability of the expertise.<sup>1128</sup>

To elaborate, in the absence of rules of admissibility and in light of the Court's relaxed approach to qualifications (see sections 1.3.2. and 2.1.1.) much emphasis falls on fact-assessment – the process through which the Court attributes probative weight to the evidence placed before it, including expert evidence. In this respect, the examination of an expert witness and subsequent cross-examination regarding the expert's methodology and supporting evidence can be extremely useful to the Court in determining the probative value and relevance of the evidence presented by one party.<sup>1129</sup>

Further, the adversarial nature of the cross-examination process is particularly helpful in relation to the testimony of experts due to its ability to expose underlying assumptions and contingencies 'thereby preventing an uncritical acceptance of alleged truths.'<sup>1130</sup> Cross-examination allows the Court to test experts and witnesses on evidence they have already given in written form to ask questions with regards to gaps in their testimony. Furthermore, experts' credentials, biases and scientific research are all likely to be called into question during cross-examination, with experts expected to answer immediately rather than given

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<sup>1125</sup> Watts, 'Enhancing the Effectiveness of Procedures of International Dispute Settlement' 29

<sup>1126</sup> Tams 1303

<sup>1127</sup> ICTY Rules, Rule 90 (H); ICTR Rules, Rule 90 (G)

<sup>1128</sup> Singh 601

<sup>1129</sup> Prosecutor v. Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) at 27

<sup>1130</sup> Sheila Jasanoff, 'What judges should know about the sociology of science' *Jurimetrics* 345, 1577

time to prepare written statements away from the spotlight of cross-examination.<sup>1131</sup>

Foster cites the example of Professor Vaughan Lowe's cross-examination of the aforementioned Malaysian expert witness Professor Falconer before the ITLOS in the *Land Reclamation* case as a clear example of the value of cross-examination for the fact-finding process.<sup>1132</sup> Lowe sought to call into question the testimony of Malaysia's expert as a whole, arguing that his expertise as well as the scope of the report presented were limited. Professor Lowe also forced the expert to confirm that he had been compensated for his services, calling his impartiality into question.<sup>1133</sup> Professor James Crawford's cross-examination and submissions to the Tribunal demonstrated a similar willingness and skill at dealing with complicated, technical and scientific issues.<sup>1134</sup> A comparable (and particularly lengthy) discussion took place regarding the independence of the experts appearing on behalf of the parties in the *Pulp Mills* case.<sup>1135</sup> Such developments, it is argued, are highly unlikely to occur where experts appear as counsel and are not subject to the scrutiny of the opposing party. As such, it is argued that the Court's fact-finding process is impoverished without cross-examination.<sup>1136</sup>

On a positive note it would appear that there is already evidence of a shift away from the practice of experts appearing as counsel. The strong words of the Court in the *Pulp Mills* would appear to indicate a shift in what the Court expects:

‘those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than as counsel, so that they may be submitted to questioning by the other party as well as the Court’.<sup>1137</sup>

Judge Greenwood further stated that the Court had unequivocally indicated that this ‘unhelpful’ and ‘unfair’ practice should not be repeated in future cases.<sup>1138</sup> Judge Greenwood went on to emphatically state that ‘[t]he distinction between the *evidence* of a witness or expert and the *advocacy* of counsel is fundamental to the proper conduct of litigation before

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<sup>1131</sup> Foster 101

<sup>1132</sup> *Land Reclamation (Provisional Measures)* Oral Proceedings 25 September, 35

<sup>1133</sup> *Land Reclamation (Provisional Measures)* Oral Proceedings 25 September, 35

<sup>1134</sup> *Land Reclamation (Provisional Measures)* Oral Proceedings 25 September, 32

<sup>1135</sup> Reference needed for this and possibly this must be expanded on

<sup>1136</sup> Foster 101

<sup>1137</sup> *Pulp Mills Case*, para 167, see also *Joint Dissenting Opinion of Judges Al-Khasawneh and Simma*, para 6

<sup>1138</sup> *Ibid*, separate opinion of Judge Greenwood at p. 231, para 27 onwards



the Court.’<sup>1139</sup>

Bringing an end to the practice of presenting experts as counsel will not have seismic effects on the way that the Court operates and certainly does not require amendment of the Court’s Statute. As a matter of fact, the Court would not need to change its current relaxed approach to qualifications of experts (see Chapter 2 at 2.1.1.) since any cross-examination would necessarily draw out any problematic issues with regards to the credentials of an expert.<sup>1140</sup> In fact, insisting that experts are put forward and examined in open Court is envisaged in the Court’s Statute and Rules and as such it is argued that states should merely consistently conform to the procedure for the examination of experts before the Court that exists but which has been underused to date. It is necessary to briefly set out this practice.

It should be made clear from the outset that the procedure for hearing party-appointed experts and party-appointed witnesses is the same and as such can be discussed together, owing to the fact that the procedure for both is set out in Articles 57, 58, 63, 66, 70 and 71 of the Rules of the Court which addresses procedural issues such as the timing and language of hearings.<sup>1141</sup> Witnesses have been heard in a number of cases before the Court,<sup>1142</sup> although the Court’s experience with cross-examination has been much criticised in the past. For instance, the process of examining witnesses in the *South West Africa* case involved the testimony of 14 “witness-experts” produced by South Africa over the course of two months of hearings. However, Hightet remarked that these witnesses ‘might as well have never come to The Hague’ as their testimony added so little to the case and delayed the proceedings to such an extent.<sup>1143</sup> Such criticism, it has been argued, may have dissuaded the Court from encouraging more widespread use of witness testimony.<sup>1144</sup>

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<sup>1139</sup> Ibid, separate opinion of Judge Greenwood at p. 231, para 27 onwards

<sup>1140</sup> See *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 3/7/2013, page 31, where during cross-examination Australia sought to call the independence of Japan’s expert Professor Walløe into question

<sup>1141</sup> Most important of these provisions is Article 58 of the Rules which requires parties to; ‘communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed. A copy of the communication shall also be furnished for transmission to the other party.’

<sup>1142</sup> Hightet has argued that *Corfu Channel* and *Nicaragua* are the ‘outstanding examples of the use of witnesses and experts to arrive at a decision in the International Court’; Hightet, ‘Evidence, the Court, and the Nicaragua Case’ 22; see also Hightet, ‘Evidence and Proof of Facts’ 357;

<sup>1143</sup> Hightet, ‘Evidence, the Court, and the Nicaragua Case’ 22

<sup>1144</sup> Ibid

However, witnesses have been heard by the Court in subsequent cases and a number of witnesses have been put forward in the *Croatian Genocide* case currently before the Court.<sup>1145</sup> It is argued that the experience of international criminal tribunals provide a counter-example to the Court's experience in *South West Africa* and demonstrate that a large number of witnesses can be heard without derailing the judicial process. For instance in the *Tadić* case the ICTY heard 126 witnesses and examined over 461 exhibits. Similarly large numbers of witnesses were heard in the *Kupreškić* case in which 157 witnesses were called and 700 exhibits produced and in the *Blaškić* case in which 161 witnesses were called and 1,423 exhibits produced.<sup>1146</sup> Further, most recently before the ICC in the *Lubanga* case the Chamber heard 67 witnesses over several months, including four expert Chamber witnesses.<sup>1147</sup>

In practice experts and witnesses have tended to testify between the first and second round of oral proceedings. The Statute and the Rules 'provide only very little information about the legal regime governing the examination of experts and witnesses'<sup>1148</sup> – there being only Article 65 of the Rules which states:

'Witnesses and Experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges. Before testifying, witnesses shall remain out of court'.

However, although brief, this provision clarifies a number of important issues such as conveying that the examination of witnesses and experts will be primarily conducted by the parties themselves,<sup>1149</sup> and overseen by the Court through the president, with the judges able to pose questions should they so wish.<sup>1150</sup> Although leaving many questions unanswered such as how long the period of examination should be, the Court has developed a 'reasonably well established' practice in the limited number of cases in which experts and witnesses have been presented by the parties.<sup>1151</sup> The approach taken by the Court in the very first case,

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<sup>1145</sup> See the oral proceedings on 4<sup>th</sup> and 5<sup>th</sup> March 2014 in *Croatian Genocide Case*

<sup>1146</sup> Richard May and Marieke Wierda, 'Evidence before the ICTY' in Richard May and others (eds), *Essays on ICTY procedure and evidence in honour of Gabrielle Kirk McDonald* (Martinus Nijhoff 2000) 250

<sup>1147</sup> Judgment, *Thomas Lubanga* (ICC-01/04-01/06-2842), Trial Chamber 1, 14 March 2012 at 11; Rosalynd C. E. Roberts, 'The Lubanga Trial Chamber's Assessment of Evidence in Light of the Accused's Right to the Presumption of Innocence' 10 *Journal of International Criminal Justice* 923, 924

<sup>1148</sup> Tams 1305

<sup>1149</sup> Ibid

<sup>1150</sup> Ibid

<sup>1151</sup> *Corfu Channel Case* 87

*Corfu Channel*, has been particularly influential in this regard.<sup>1152</sup>

Commentators have noted the general features of examination of witnesses before the Court as: four phases of examination – examination of witnesses and experts undertaken primarily by the parties themselves in four phases in the mould of English common law: examination-in-chief by the party calling the expert or witness, cross-examination by the other party, re-examination by the original party then a round of questioning from the judges.<sup>1153</sup> This has been the relatively uniform practice of the Court.<sup>1154</sup> However, the approach of the Court is far more flexible than that of any domestic court, the:

‘procedure is very liberal. There is no limit to the number of questions that may be put. The Court has one wish, and that is that as much light as possible should be cast upon the matter discussed by the Court, and secondly the Court wishes to give the Parties every opportunity to defend their points of view’<sup>1155</sup>

Following the Court’s remarks in the judgment in the *Pulp Mills* case commentators have argued that it is likely that cross-examination ‘can be expected to take on an increased importance and absorb a greater proportion of the Court’s time...’<sup>1156</sup> And indeed this was the case, as the recent *Whaling in the Antarctica* case saw the examination and cross-examination of party-appointed witnesses generally in line with the procedure for examining witnesses laid out above. The *Whaling in the Antarctic* case, it is submitted, represents an important post-*Pulp Mills* indication of how the Court will handle experts in cases that come before it in the future. The case saw the submission of individual opinions by three party-appointed experts at the written stage of proceedings, followed by cross-examination on the opinions expressed.<sup>1157</sup> Australia called Professor Mangel and Dr Gales who were examined by Professor Philippe Sands QC and subsequently cross-examined by Professor Vaughan Lowe QC. Presenting opposing expert evidence for Japan was Professor Walløe who was also cross-examined.

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<sup>1152</sup> Ibid, Tams 1306; Rosenne, *Procedure in the International Court: a Commentary on the 1978 Rules of the International Court of Justice* 140; Article 63(2) Rules provides for the examination of witnesses ‘otherwise than before the Court itself’ – this provision has never been used but would be where witnesses are examined during site visits under Article 66 of the Rules or by Commissions of Inquiry under Article 50 ICJ Statute.

<sup>1153</sup> See Rosenne, *The Law and Practice of the International Court* 1310

<sup>1154</sup> See *Temple of Preah Vihear Case*; although note that in *Corfu Channel Case* the questions were put by the judges before the re-examination; Tams 1307; Riddell and Plant 312; Rosenne and Ronen, 1309-1321

<sup>1155</sup> President of the Court, *Corfu Channel, Pleadings, Vol III, 428-429*; For a fuller examination of cross-examination before the Court see Tams 1307; Talmon, ‘Article 43’ 1149, paras 144-154

<sup>1156</sup> Foster 2, 7; *Pulp Mills Case, para 167*, 8; *ibid*, Separate Opinion of Judge Greenwood at 28

<sup>1157</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 26/6/2013, page 66, para 25; See *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 27/6/2013, paras 12 and 13

The cross-examination was overseen by the president who called counsel from each side to conduct the cross-examination. The President set out the procedure for cross-examination.<sup>1158</sup> Each expert was first examined by an agent of the party calling him (the ‘examination-in-chief’ lasting up to a maximum of thirty minutes), after taking the declaration under Article 64(b) of the Court’s Rules. The examination was to take the form of either answers in response to questions asked by agents or in the form of a prepared statement. In fact, Japan’s expert Professor Walløe was asked by Professor Lowe to present a twenty minute statement to the Court rather than answering questions put to him by counsel, as Australia had done.<sup>1159</sup> The opposing party was then given the opportunity to cross-examine the expert for up to sixty minutes, confined to any statement already made either in written or oral form by the expert. The Party who called the witness was then asked if it wished to have the opportunity to re-examine the expert for up to a further thirty minutes. Afterwards, the judges put their own questions to the experts.

The cross-examination carried out by Professors Sands and Lowe QC were extensive and the maximum time allotted for examination was utilised.<sup>1160</sup> Subsequently the judges took advantage of their right to ask questions of the experts called by the parties and (at times multiple) questions were asked of Australia’s expert Professor Mangel by Judges Bennouna, Cançado Trindade, Greenwood, Donohue, Keith, and Owada.<sup>1161</sup> A similarly large number of questions were asked of Japan’s expert, with Judges Greenwood, Cançado Trindade, Yusuf, Bennouna, Keith and Charlesworth all asking questions.<sup>1162</sup> All except Charlesworth had back-and-forth exchanges evidencing some interaction with the proceedings.

The case also evidences a number of judges engaging in proceedings, asking questions of the parties and seeking clarification. For instance, Judge Greenwood asked a question of Australia,<sup>1163</sup> Judge Donoghue asked two questions of Japan regarding technical sample size questions regarding Japan’s whaling programme.<sup>1164</sup> The practice of the Court to date in

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<sup>1158</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 27/6/2013, page 38

<sup>1159</sup> See *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 3/7/2013, page 17

<sup>1160</sup> See *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 27/6/2013, pages 39-50 for the examination by Professor Sands for Australia and pages 51-63 for the cross-examination by Professor Lowe for Japan. See page 15 onwards See *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 3/7/2013, for examination by Professor Lowe and pages 23-48 for cross-examination by Mr Gleeson

<sup>1161</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 27/6/2013, pages 63, 64, 67, 69 and 70 respectively

<sup>1162</sup> See *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 3/7/2013, pages 49-50, 50-53, 53-55, 55-57, 57-59 respectively

<sup>1163</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 27/6/2013, 2/7/2013, page 63-64

<sup>1164</sup> *I.C.J. Pleadings, Whaling in the Antarctic*, CR 2013/7, 27/6/2013, 2/7/2013, page 64

relation to the asking of questions from the bench generally accords with the Court's reactive approach to fact-finding set out in Chapter 1. The Court has on the whole limited itself to individual judges asking questions from the bench only occasionally during the oral proceedings.<sup>1165</sup> Foster notes that practice before the ICJ differs substantially from that before the WTO adjudicative bodies which regularly put longer questions to the parties and are able for example 'to pursue the development of a thorough understanding of all aspects of the case by means of specific, direct questions to the parties after each of the oral hearings, or substantive meetings with the parties'.<sup>1166</sup>

Former Judge Mohammed Bedjaoui remarked upon the Court's reluctance to engage with the proceedings in accordance with its reactive approach. Judge Bedjaoui accurately describes the practice of the judges in not making regular use of their powers to ask questions or request information, but rather 'for the most part those on the bench remain silent, like a jury listening to arguments in order to weigh their merits. Hence, their passivity during the hearings is combined with impassivity.'<sup>1167</sup> In fact, Judge Bedjaoui has described the impact that the Court's impassive approach induces in the judges when they are made to sit through long, detailed oral arguments being made by counsel of the parties:

"Oh, those interminable speeches that fill a Judge, at times, with the unfulfillable longing to stretch his limbs; that prompt many a discreet rustle of black silk lest the bench too closely resemble that row of stuffed cats so unforgettably described by Pascal, Moliere and Lafontaine!"<sup>1168</sup>

Whilst the Court through Articles 60 and 61 of its Rules has the power to direct the oral proceedings and indicate which points it believes it has heard enough, the Court has been reluctant to undertake this 'exceedingly delicate' task for fear of creation the 'impression that it is inclined towards the party most sharing its view of that relevance.'<sup>1169</sup>

However, it is argued that the ICJ is particularly well placed to question counsel and examine

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<sup>1165</sup> Riddell and Plant 88; see for instance the technical and scientific questions asked of both Argentina and Uruguay by Judge Simma; *I.C.J. Pleadings, Pulp Mills.*, CR 2009/15, 17/9/2009, page 67, para 1

<sup>1166</sup> Foster 88; See for instance *Brazil – Measures Affecting Import of Retreated Tyres*, Complaint by the European Communities (WT/DS332), Report of the Appellate Body DSR 2007: IV, 1527, Report of the Panel DSR 2007: V, 1649

<sup>1167</sup> Mohammed Bedjaoui, 'Manufacture of Judgments at the International Court of Justice, The' 3 Pace YB Int'l L 29, 42

<sup>1168</sup> Ibid

<sup>1169</sup> Ibid

witnesses and that it should do so more regularly. This is so due to the fact that, compared to judges in some domestic legal systems, those sitting on the bench at the ICJ are well acquainted with the facts. As Damaška states, ‘...the interrogation process - to be effective - requires the questioner to be familiar with the subject matter of inquiry’.<sup>1170</sup> In this vein, ICJ judges, with consistently voluminous amounts of documentary evidence at their fingertips, can be said to be sufficiently informed to ask useful, probing questions of counsel and witnesses.

Returning to the use of experts in the *Whaling* case, however, whilst proactively asking questions of the parties, the procedure for replying to such questions has not changed, with the party being given a substantial period of time to reply as opposed to having to reply to questions on the spot as would be the case in any common law judicial process.<sup>1171</sup> Similarly, the Court chose to continue its practice of imposing time limits on examination and cross-examination – a practice that is not often found in domestic legal systems where cross-examination is commonplace. As a result of the Court’s decision to retain such time limits, ‘may impede a full exploration of the issues.’<sup>1172</sup>

Admittedly, there are some practical difficulties with respect to greater use of cross-examination during the oral proceedings before the Court including the fact that the Court consists of fifteen judges and that traditionally states have been reluctant to allow their representatives ‘full freedom to present their arguments in whatever way they think best’ and preferring to see the speeches of counsel before they are given before the Court. In addition, interpreters prefer to have a copy of the text before they are read out in Court so as to ensure the most accurate translation possible.<sup>1173</sup> Similarly, Boyle and Harrison have argued that the practice of experts appearing as counsel may not be inappropriate in all cases and point out that in the past there have been numerous cases in which this practice has gone unchallenged. They argue that in fact much depends on ‘whether the expert is giving evidence that is likely to be contested by the other side, or whether the role of the party’s expert is to assist the court

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<sup>1170</sup> Mirjan Damaška, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’ 45 *The American Journal of Comparative Law* 839, 850

<sup>1171</sup> See statement of the President that ‘Japan is invited to reply orally to the question if possible during the first round of oral argument, and Australia will be free during its second round of oral argument to comment on the reply of Japan. Should Japan require more time to prepare the answer to the question, and answers the question during the second round of oral argument, then the Court will determine the procedure for Australia having the opportunity to comment.’

<sup>1172</sup> Boyle and Harrison

<sup>1173</sup> Watts, ‘Enhancing the Effectiveness of Procedures of International Dispute Settlement’ 29

to understand the issues rather than to prove a case.’<sup>1174</sup>

Nevertheless, it is argued that when it comes to cross-examination of experts before the Court, the main benefit far outweighs the costs, namely that compared to the practice prior written statements or of experts appearing as counsel and avoiding examination, cross-examination provides the Court with ‘a critical method of testing the truthfulness, accuracy and reliability’ of the expert’s evidence.<sup>1175</sup> The Court is provided with the opportunity of seeing experts speaking to their opinions and defending them first hand, in their own words, and that counsel are more likely to clarify the disputed issues, avoiding the ‘merry contradiction’ that Judge Simma has spoken of in the past.<sup>1176</sup>

Undoubtedly, one can afford to be somewhat optimistic with regard to the prospect of reforming the Court’s practice in relation to the examination of party-appointed experts, which could be easily reformed and regulated by a Practice Direction.<sup>1177</sup> Ultimately, it can be hoped that, in light of the practice of other international courts and tribunals, a more active dialogue between the Court, the parties and the experts ‘would provide the opportunity for them to discover more about the essence of the issue under dispute and to help deal with issues requiring particular clarification.’<sup>1178</sup> In sum, it argued that the practice of experts appearing as counsel should be halted once and for all and that experts and witnesses alike should be put forward in accordance with the procedure set out in the Court’s Statute and Rules and that these should be cross-examined owing to the fact that this process is a crucial part of the judicial process.

The second necessary step in creating a clear strategy for the use of experts before the Court is for the Court to more regularly appoint its own experts to assist it in the handling of complex facts - it is to this issue we turn our attention.

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<sup>1174</sup> Boyle and Harrison

<sup>1175</sup> Roberts 936

<sup>1176</sup> John Jackson, ‘Finding the Best Epistemic Fit for International Criminal Tribunals Beyond the Adversarial–Inquisitorial Dichotomy’ 7 *Journal of International Criminal Justice* 17, 32; See also the ‘Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, *Tadić* (IT-94-1-T), Trial Chamber, 25 June 1996 at 11’: ‘[t]he physical presence of a witness at the seat of the International Tribunal enables the judges to evaluate the credibility of a person giving evidence in the courtroom. Moreover, the physical presence...may help discourage the witness from giving false testimony’

<sup>1177</sup> Talmon, ‘Article 43’ 1136, paras 114-115

<sup>1178</sup> Foster 134

### 4.3.2. Court-Appointed Experts

In addition to hearing party-appointed experts in open court subject to cross-examination it is argued that the appointment of the Court's own experts would act as a failsafe regarding the comprehension of factually complex evidence. The appointment of its own experts would assist the Court in situations where the parties have presented experts who have directly contradicted each other, leaving the Court no better informed. An independent expert, appointed by the Court, in line with the practice of other international courts and tribunals as we saw in Chapter 3, could assist the Court in understanding technical issues of methodology and advise as to the important nuances that exist in the particular field to which the parties' experts have spoken.<sup>1179</sup>

This failsafe is important given the fact that the greater cross-examination of party-appointed experts will not be entirely unproblematic. To elaborate, the adversarial process of cross-examination, whilst helpful in testing the credibility of experts, testing bias, and drawing out information to fill gaps in the evidentiary record, is not conducive to achieving consensus between the experts appointed by the parties. In fact it has been said that cross-examination '...often undermines the commonly held assumptions upon which consensus is built and thus further promotes the impression that there is little about which the experts agree' even if in fact there is very little disagreement between the parties' experts.<sup>1180</sup> As such, in emphasising the differences in opinions between experts, there is the danger that cross-examination has what has been termed a 'neutralizing effect' on expert testimony which is portrayed as being 'merrily contradictory' and which, ultimately, does not assist the court.<sup>1181</sup>

Of course, such issues are apparent in all domestic legal systems which make use of cross-examination. In the legal literature of such states a recurrent theme are the calls to move away from this adversarial procedure in order to counter some of the difficulties that cross-examination causes. Civil legal systems have a long tradition of making use of court-

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<sup>1179</sup> The role of Court-appointed experts is envisaged as being to serve the function described by Lord President Cooper in *Davie v. Magistrates of Edinburgh*: 'Their duty is to furnish the Judge... with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge... to form their own independent judgment by the application of these criteria to the facts proved in evidence' 1953 S.C. 34 at p. 40

<sup>1180</sup> Joseph Sanders, 'Expert witness ethics' 76 *Fordham L Rev* 1539, 1577; Jasanoff 1577

<sup>1181</sup> See Jeffrey L. Harrison, 'Reconceptualizing the Expert Witness: Social Costs, Current Controls on Proposed Responses' 18 *Yale J on Reg* 253, 263; Simma 231; Samuel R. Gross, 'Expert evidence' *Wis L Rev* 1113, 1166



appointed experts to assist the court with complicated matters of evidence particularly in civil cases.<sup>1182</sup>

Greater use of Court-appointed experts was described as the most compelling option open to the Court in the face of scientific or factual disagreement by a number of judges in the *Pulp Mills* case.<sup>1183</sup> Judge Yusuf for instance was of the view in the *Pulp Mills* case that the Court should have sought expert assistance as provided in Article 50 of the Court's Statute and is critical of the Court's approach to the factual complexity of the case.<sup>1184</sup> As we saw in Chapter 1, Article 50 of the Court's Statute allows the Court to 'at any time, entrust an individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.<sup>1185</sup>

Whilst the states parties are not provided with the explicit right to cross-examine such an inquiry or expert opinion,<sup>1186</sup> through Article 67 of the Rules of the Court parties are given the opportunity to express their opinion on the inquiry or expert opinion – granting them at least a voice on their findings. Any expert appointed under Article 50 of the Court's Statute can be perceived of as an *ad hoc* organ of the Court.

This having been said, it is argued that drawing on the experience of the WTO adjudicative body (see chapter 3 at 3.1.2.5.) the best means of examining experts is on an individual basis as opposed to expert groups.<sup>1187</sup> Whilst the WTO adjudicative bodies have the power to establish a so-called 'expert review groups' under Article 13 of the DSU it has never done so. It was argued that one of the reasons that an expert review group had not been established in the WTO context to date was due to the requirement in DSU App 4 paragraph 6 that such groups prepare a report of their findings and that such a report could be seen as 'transforming the expert group into a form of a "tribunal within a tribunal"'.<sup>1188</sup> In other words, Panels have been reluctant to tie their hands, both in terms of the flexibility of the process and limiting

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<sup>1182</sup> O'Donnell 317; Remme Verkerk, 'Comparative aspects of expert evidence in civil litigation' 13 *International Journal of Evidence and Proof* 167, 172

<sup>1183</sup> *Pulp Mills Case, Joint Dissenting Opinion of Judges Al-Kasawneh and Simma, para 8*

<sup>1184</sup> *Ibid*, Declaration of Judge Yusuf at 1

<sup>1185</sup> [emphasis added] Article 50 of the Court's Statute, *ibid*, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 8

<sup>1186</sup> Article 51 ICJ Statute, Rule 67(2) ICJ Rules; Tams, 'Article 50' 1127; Yaël Ronen, 'Participation of Non-State Actors in ICJ Proceedings' 11 *The Law and Practice of International Courts and Tribunals* 77, 81

<sup>1187</sup> Foster 15

<sup>1188</sup> Pauwelyn, 'The use of experts in WTO dispute settlement' 328; such concerns have been voiced in the context of international criminal law, see; Derham and Derham 27

their discretion as to the ultimate factual determination. And indeed this may also be the case with the ICJ who may have very real concerns of having the final factual determination taken out of its hands. Whilst any commission of inquiry established under Article 50 of the Court's Statute would not be able to formally bind the Court, the very production of a report of a number of experts, which would carry a great deal of epistemic weight, may be different to distinguish or depart from.<sup>1189</sup> As such the Court's position as the final arbiter of fact may be called into doubt.

In addition, there is the suggestion that the production of a report by a group of experts could result in a 'vague and monolithic consensus position' – a common criticism of the collegiate process of adjudication.<sup>1190</sup> Considerations of cost and time also play a role and it has been suggested that it may be easily to simply call upon one expert rather than establishing an expert review group given the time constraints imposed by the DSU.<sup>1191</sup> For these reasons it is suggested that the appointment of an individual expert or a small number of experts may be preferable for the Court as opposed to a commission of inquiry.

The use of independent experts also has potential drawbacks, however. To elaborate, Court-appointed experts must be sure not to disrupt the nature of the judicial process, since their own fact-finding may disproportionately aid the party bearing the burden of proof in the proceedings. It is for these reasons that in the WTO context, where Panel-appointed experts are common, that the establishment of a *prima facie* case by the applicant state is a prerequisite for the appointment of experts.<sup>1192</sup> Such concerns have also led to the development of the so-called 'ultimate issue rule' in other contexts in international adjudication as an attempt to ensure the integrity of adjudicators as final arbiters of fact and law.

### *The 'Ultimate Issue Rule'*

The prospect of increased use of experts by the Court will undoubtedly raise concerns regarding whether the Court would be potentially delegating its judicial function to the

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<sup>1189</sup> Pauwelyn, 'The use of experts in WTO dispute settlement' 328

<sup>1190</sup> Ibid

<sup>1191</sup> See DSU Article 12.9 - ibid

<sup>1192</sup> *Japan – Measures Affecting Agricultural Products*, Appellate Body Report, WT/DS76/AB/R, 22 February 1999 at para 129; Boyle and Harrison 273

experts. This issue has arisen in other contexts and sparked widespread academic debate.<sup>1193</sup> Ultimately, however, it can be said that such concerns are not sufficient reason to detract from the advantages that great use of experts would bring. In other contexts the ‘ultimate issue rule’ has come to govern the relationship between the bench and experts.

Essentially the ultimate issue in any case is the disputed legal issue which represents the very reason the tribunal was convened. The rule holds that despite the fact an expert has been appointed and although their determinations may prove significant to the outcome of the case, an expert should never be the person left to make a final legal determination, such as whether a person is criminally responsible for committing a crime – that task remains with the adjudicator.<sup>1194</sup>

For instance, the ICTY Trial Chamber upheld the objection of the defence and prevented reliance on an evidentiary report which related to the ultimate issue of the case – saying that this was the exclusive competence of the Trial Chamber.<sup>1195</sup> Similarly the *Prosecutor v. Brima et al* case<sup>1196</sup> before Trial Chamber II of the Special Court for Sierra Leone stated that whilst any information that was relevant was admissible under Rule 89(C), it would disregard any information presented by the experts which ‘draws any conclusions or inferences which the Trial Chamber will have to draw, or makes any judgments which the Trial Chamber will have to make.’<sup>1197</sup>

In the *Pulp Mills case* Judge Yusuf specifically addressed this issue, playing down concerns for two main reasons. First of all, Judge Yusuf argued that it was for the expert merely to

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<sup>1193</sup> Foster 14; Jacur 444; Boyle and Harrison 271

<sup>1194</sup> See *Prosecutor v. Kordic and Cerkez*, Case No IT-95-14, Transcript, 29 January 2000, pp 13-89, see also Special Court for Sierra Leone, *Prosecutor v. Brima et al* – see also; Gert-Jan Alexander Knoops, ‘The Proliferation of the Ultimate Issue Rule Pertaining to Expert Witnesses Testimony before International and Internationalized Criminal Courts: Pitfalls and Paradoxes’ in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2001*, vol 1 (2006 2007); *Prosecutor v Casimir Bizimungu et al* (Decision on the Admissibility of the Expert Testimony of Dr Binafair Nowrojee) ICTR-99-50-T (8 July 2005); ‘The judge...can determine equally well...[and] thus the special legal knowledge of the judge [renders the witness’ opinion unnecessary], see Deon J. Nossel, ‘The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials’ (1993) 93 Colum L Rev 231, citing J. Wigmore, *Evidence in Trials at Common Law* (3<sup>rd</sup> Edition, 1952) 103

<sup>1195</sup> See *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14, Transcript, 28 January 2000, at 13-89; see also *Prosecutor v Kovacevic* (Transcript of 6 July 1998) IT-97-24-T (6 July 1998) 13305-7 in which the Trial Chamber held that expert opinion contained many ‘conclusions, drawing inferences, drawing conclusions, which is the duty of the Trial Chamber to consider and to draw if appropriate or reject’ which would ‘invade the right, power and duty of the Trial Chamber to rule upon this issue’

<sup>1196</sup> *Prosecutor v. Brima et al*, Case 16, Transcripts, 14 October 2005, p. 38

<sup>1197</sup> Knoops 289

elucidate and ‘clarify the scientific validity of the methods used to establish certain facts’, but importantly, it is not for the expert to weigh the probative value of the facts.<sup>1198</sup> Secondly, the judge sought to assuage fears over the use of experts by highlighting that ‘the elucidation of facts by the experts is always subject to the assessment of such expertise and the determination of the facts underling it *by the Court*’.<sup>1199</sup> Judge Yusuf also provided guidance as to how the Court should utilise experts in such situations, namely not by entrusting the clarification of ‘all the facts submitted to it’ in a wholesale manner, but rather should identify specific areas in which the Court needs specific assistance or clarification before employing experts’.<sup>1200</sup>

In the context of international criminal law commentators have argued that issues such as individual criminal responsibility should not be determined by expert witnesses and that they should not assist the tribunal in question in making such determinations which remain within the sole purview of the tribunal itself.<sup>1201</sup> That the ultimate issue rule operates in this way it is argued is essential in safeguarding the rights of the accused and preventing extra-judicial bodies from having inappropriate influence over tribunals – ‘Of course, the key question is what the ultimate issue is. This will inevitably call for a case-by-case approach based on an analysis of the indictment in each case’.<sup>1202</sup> It is argued that such an approach could easily be taken by the ICJ – relying only on expert evidence to assist in the course of proceedings but the crucial ultimate issues remaining with the sole competence of the bench.<sup>1203</sup>

Utilising the ultimate issue rule, it is argued that judges are capable of critically considering the assistance provided by the Court-appointed expert and taking this into account when making both factual and legal determinations. As Moreno has stated;

‘Judges do not need to become trained scientists to achieve accurate and consistent legal decision-making in cases involving scientific evidence. They need to become savvy consumers of the scientific evidence that comes before them.’<sup>1204</sup>

Consequently, it is argued that through the appointment of experts to assist the Court judges

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<sup>1198</sup> *Pulp Mills Case, Delcaraiton of Judge Yusuf at para 10*

<sup>1199</sup> *Ibid*, Delcaraiton of Judge Yusuf at para 10 (emphasis added)

<sup>1200</sup> *Ibid*, Delcaraiton of Judge Yusuf at para 11

<sup>1201</sup> Knoop 291

<sup>1202</sup> *Ibid*

<sup>1203</sup> Simma

<sup>1204</sup> Joelle Moreno, ‘Einstein on the Bench?: exposing what judges do not know about science and using child abuse cases to improve how courts evaluate scientific evidence’ 64 *Ohio State Law Journal* 531, 549

can become the aforementioned ‘savvy consumers of scientific evidence’ which has great potential to improve the Court’s handling of complex factual issues. Being assisted by Court-appointed experts, judges would be better-informed regarding the underlying complex factual issues in the case and would potentially have a better idea of which questions to ask in order to most efficiently get to the heart of the factual issues in the case. As one commentator has stated, ‘[j]udges need to know what to listen and look for when expert evidence is presented and what they should be asking about when the information is not forthcoming.’<sup>1205</sup> It is argued that relying on the assistance of the Court’s own experts is the best way to know exactly what to listen and to look for and brings us to the third and final element of the strategy for improving the use of expert evidence before the Court; the related issue of questions from the bench.

#### *4.3.4. Summary – A Clear Strategy for the Use of Experts Before the Court*

In short, it has been argued that the third option open to the Court is to develop a clear strategy for dealing with the use of experts before the Court. This would potentially involve a more proactive approach to asking questions of parties from the bench and cross-examination of party-appointed witnesses to draw out the information needed to make solid factual determinations. Further, the Court could make greater use of its powers to appoint its own experts under Article 50 of the Statute, however the practice of other Courts warns against appointing groups of experts. In this vein the Court ought to ensure, in accordance with the ‘ultimate issue rule’ that it retains the final determination of both law and facts.

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<sup>1205</sup> Gatowski and others 455

#### *4.4. Chapter 4 Summary – Realistic Measures to Achieve a More Proactive Approach to Fact-Finding*

This chapter focussed on a small number of issues related to the Court's procedural operation which realistically could be adapted should the Court so choose to in order to remedy some of the current weaknesses in its procedure. It was argued that the Court could viably develop a power to compel the production of evidence through purposively interpreting its current fact-finding powers and by relying on the duty of each party to collaborate in the production of evidence. Similarly, it was argued that the Court could make greater use of provisional measures to giving binding force to its requests for information, subject to a number of conditions. Further, a substantial part of the chapter focussed on the Court's use of experts and set out a number of ways in which the Court could develop a clear strategy for better use of expert evidence in cases that come before it in order to remedy some of the weaknesses of its fact-finding procedure as set out in Chapter 2.

This chapter has chosen to focus on a small number of changes that could realistically be made through orders or practice directions, crucially without amendment of the Court's Statute, and that are based on the practice of other inter-state courts and tribunals. The value of drawing on the comparative exercise undertaken in Chapter 3 is that all the suggestions made in this chapter are currently in operation with regards to a similar inter-state Court – lending additional realism and credibility to the suggestions. Nevertheless, even if the Court were to decide to adopt a more proactive approach to the facts, perhaps through utilising one of the means proposed in this chapter, there are a number of potential obstacles and limitations facing the Court. It is these obstacles and limitations that are the subject of the final Chapter.

*Chapter 5 – A More Proactive Approach to Fact-Finding: Darien Scheme or Necessary Reform to Ensure a Court on which the Sun Never Sets?*

*5.1. Introduction*

In 1698 a number of ships carrying the hopes and the fortunes of a nation (literally as well as metaphorically) left Edinburgh bound for Darien, Panama. Somewhere between a quarter and half of Scotland's wealth had been invested in a scheme to establish a trading post in Panama which was to bring untold riches to Scotland and establish it as the newest European colonial power.<sup>1206</sup> Yet only nine months after the expedition left Edinburgh more than two-thirds of the 1,200 original settlers were dead from tropical diseases or at the hands of Spain – the much larger and more dominant colonial power in the region. When a second expedition arrived in Darien one year later they found that the settlement had been burned to the ground by the Spanish and abandoned by those Scots who had survived.

Records show that the settlers were poorly prepared, both materially (bringing more ceremonial wigs and hats than building materials<sup>1207</sup>) and politically, as various Machiavellian machinations by both Spain and England left the Scots isolated and exposed. The failure of the Darien Scheme as it was known was disastrous for the Scottish economy which was brought to the edge of collapse. Less than ten years later the Treaty of Union of 1707 was signed with England – a treaty which included a clause specifically compensating those who had lost money in the Darien Scheme. The question that we must ask ourselves is whether a more proactive approach to fact-finding, facilitated in the manner set out in the previous chapter, is a fool's errand such as the Darien Scheme or whether it is in fact sensible, necessary reform required to ensure that the Court continues to be attractive in contemporary international law.

In assessing the relative merits of a more proactive approach this final chapter first considers the merits of the Court's current approach to fact-finding. Whilst it is clear that the Court's current approach is not without its merits, it is maintained that the criticisms of this approach explored in detail in Chapter 2 are justified. As such, the chapter then moves on to consider a more proactive approach to fact-finding. In doing so, Chapter 5 first of all addresses the

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<sup>1206</sup> <http://www.bbc.com/news/magazine-27405350>

<sup>1207</sup> Ibid

fundamentally important question of whether the Court has completely unconstrained discretion to take a more proactive approach to fact-finding or whether its discretion is somehow fettered by factual determinations made by other UN organs (in particular the Security Council under Chapter VII of the Charter). Ultimately it is argued that there is nothing in either the Court's constitutive instruments or practice which would fetter the Court's discretion and that accordingly the Court, as an independent international tribunal, possesses the discretion required in order to adopt a more proactive approach to fact-finding.

Chapter 5 next illustrates in practical terms what the more proactive approach set out in Chapter 4 would look like. Whilst a case was made for such reforms in the preceding chapter, Chapter 5 considers the limitations of the Court's fact-finding powers that have been advocated and ruminates on the merits of the Court's current reactive approach to fact-finding. Having considered the limitations of the Court's fact-finding powers, it is clear that taking a more proactive approach to fact-finding is no panacea for the current problems that the Court faces. Nevertheless, it is maintained that implementing the proposals set out in Chapter 4 would ultimately leave the Court better placed to make accurate factual determinations upon which the law could be decided.

### *5.2. Positive Aspects of the Court's Current Reactive Approach*

At this stage it should be reiterated that it has not been argued that the Court has ever unjustifiably taken a position whereby it has avoided focussing on factual issues in favour of solely addressing the law. As stated above, having not been in the Court's position, it is often difficult to imagine how one could prove that a decision taken by the Court to focus on legal issues and not conduct further fact-finding was the wrong decision. It may be that the Court had sound reasons for not conducting its own fact-finding such as considerations of judicial economy or due to the fact that resolution of those factual issues was not central to the resolution of the dispute at hand.<sup>1208</sup> Rather, it was argued that instead of talking in terms of the Court using 'avoidance techniques' in order to negate the need to engage with the facts, the most that can be said is that the Court has very clearly displayed a number of tendencies which, taken together, demonstrate a consistently reactive approach to the facts in cases that have come before it.

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<sup>1208</sup> The Court has referred to the principle of judicial economy as 'an element of the requirements of the sound administration of justice...' see; *Croatian Genocide Preliminary Objections*, para 89



In addition, it should be made clear that the reactive approach is not without its benefits. For instance, it could be said that by focussing on the legal issues in a particular case the Court reduces the possibility of the case being distinguished on the facts in the future, therefore increasing the (already extremely significant) legal value of the Court's pronouncements.<sup>1209</sup> In addition, there are a number of practical reasons why it may be sensible for the Court to place the emphasis on the parties in terms of fact-finding. This is the case since the Court is often significantly removed from the facts of the dispute, both in terms of distance and time. Given that the highly political nature of cases before the Court means that it may take many years for the proceedings to begin, the value of 'descending' on the site to conduct its own fact-finding is somewhat dubious. As such, it arguably makes more sense for the parties themselves, who are generally closer to the facts, to put such evidence before the Court, than for the Court (limited as its resources are) to embark on a fact-finding expedition from The Hague.

Staying with the nature of the cases that come before the Court, the sheer breadth of legal and factual issues, number of witnesses and expanse of territory can often in some way justify the Court's reactive position. For instance, in cases such as *Armed Activities*, *Bosnian Genocide* and *Croatian Genocide*, the disputes in question involved a dizzying array of factual and legal issues which took place on the territory of a number of different states and over the course of many years. In such circumstances the Court's decision to rely on information submitted by the parties, established in cases before other international tribunals such as the ICTY or in UN commissions of inquiry is eminently understandable.

Furthermore, as stated above, many states see it as part of their privilege as sovereign states to choose what evidence they put before the Court. The traditional argument is that states prefer to retain as much control over the evidentiary process as possible and as such they would be hostile to the Court taking greater control over the process and becoming more actively involved.<sup>1210</sup> For instance, Foster has argued that 'international disputants will generally want to bear primary responsibility for mustering the evidence in support of their cases and

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<sup>1209</sup> This is so despite the Court's legal pronouncements having no binding force apart from between the parties to the case before it under Article 59 of the Court's Statute, and despite there existing no formal doctrine of *stare decisis*, the Court's pronouncements have always been accorded significant respect by states, scholars and other international tribunals; see Shahabuddeen

<sup>1210</sup> J.K. Cogan, 'The 2010 Judicial Activity of the International Court of Justice' 105 *American Journal of International Law* 477

presenting it to an international court'.<sup>1211</sup> It has been argued that the presentation of the case being left to the parties themselves is fundamentally important regarding the parties' perception of the fairness of the procedure.<sup>1212</sup> As such, it would appear to make little sense for the Court to duplicate the fact-finding efforts of the parties. Ultimately, in such cases the Court's decision to accept the evidence put before it by the parties and to concentrate on the points of contention as defined by the parties could in the circumstances turn out to be the most prudent option available to the Court.

Indeed the thesis has not at any stage argued that the Court should completely disregard all evidence submitted to it by the parties in favour of undertaking wide-ranging fact-finding on its own accord – this is simply not practicable. Rather, the thesis has argued that there are a number of deficiencies in the way the Court currently operates and that the practice of other international courts and tribunals in some way provides helpful reference points when considering reform in order to ensure that the Court makes factual determinations that are as accurate as they possibly can be.

These deficiencies have presented the Court with real problems and as such, despite the positive aspects of the Court's current approach to fact-finding (which undoubtedly exist), it is maintained that there is a pressing need for the Court to consider reform. As chapter 2 set out in detail, the Court's reactive approach to fact-finding can be a recipe for an unsure factual foundation upon which to make legal judgments.<sup>1213</sup> The Court's approach to expert evidence and use of *experts fantômes*, cross-examination, and over-reliance on UN Commissions of Inquiry all have problematic aspects which undermine the Court's fact-finding process. Furthermore, in cases where a party fails to appear before the Court, its reactive approach to fact-finding is found wanting due to the fact it only has the evidence of one party upon which to make its findings of fact. Without conducting its own investigations into the factual background of the case at hand the Court's reactive approach, which makes the court dependent on states to submit the facts to it, is a handicap for the Court. Drawing on the practice of other international courts and tribunals, Chapter 4 set out a number of proposals which, it was suggested, the Court could adopt in an attempt to remedy the current deficiencies of the Court's current approach to the fact-finding process. As such, it is useful at

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<sup>1211</sup> Foster 80

<sup>1212</sup> Ibid

<sup>1213</sup> Alvarez 87

this stage to consider how the Court's approach to fact-finding would look if it were to adopt a more proactive approach to fact-finding.

### 5.3. How to Deal With Factually Complex Cases Before The Court

Early consultation between the parties regarding those factual issues upon which there is agreement and those which are likely to be contentious could help to focus the Court's attention on the areas where it is most needed.<sup>1214</sup> Rosenne's suggestion that the Court's procedure for pre-trial conferences set out in Article 40(1) of the Court's rules be amended and updated to meet the current demands of contemporary adjudication is a good one in this regard.<sup>1215</sup> At the moment pre-trial conferences are 'limited to participation of the representatives of the parties and the President...' and are 'off the record'.<sup>1216</sup> The suggestion that the Court make greater use of pre-hearing conferences is one that certainly could benefit the operation of the Court.<sup>1217</sup> The reform of this process would not be problematic and could be achieved through an order under Article 48 of the Court's Statute.

Any party requiring access to information held by the other party (subject to the conditions of sole possession, previous attempts to obtain information and the establishment of a *prima facie* case<sup>1218</sup>) could make this known to the Court.<sup>1219</sup> At this early stage the Court could consider utilising its provisional measures powers, which, it is argued, are broad enough to cover the proper conduct of the judicial process to ensure that the Court is able to render a judgment that is effective.<sup>1220</sup> To this end, the preservation of evidence 'without which a party might not be able to prove its claim and the tribunal might not be able to settle the dispute' is a legitimate aim of provisional measures.<sup>1221</sup> During the initial stages of the proceedings, however, the initiative for placing information before the Court would by and large remain with the parties.

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<sup>1214</sup> Foster 79; See Rosenne, 'Fact-Finding Before the International Court of Justice' 247

<sup>1215</sup> See Rosenne, 'Fact-Finding Before the International Court of Justice' 247

<sup>1216</sup> See *ibid*

<sup>1217</sup> Holtzmann has argued that pre-trial conferences dramatically reduce the volume and duplication of evidence in international arbitration and there is no reason to say that they would not similarly benefit the international adjudicative process; Howard M. Holtzmann, *Streamlining Arbitral Proceedings: some Techniques of the Iran-United States Claims Tribunal* (Kluwer Law International 2007)

<sup>1218</sup> See Chapter 4 at 4.1.4. (iv)

<sup>1219</sup> See section 4.1.

<sup>1220</sup> See section 4.2.; Wolfrum, 'Interim (Provisional) Measures of Protection', para 7; Brown, *A Common Law of International Adjudication* 121

<sup>1221</sup> See *Sino-Belgium case, Order of January 8th, 1927, II ('as regards property and shipping')*; Brown, *A Common Law of International Adjudication* 122

In an ideal world, in cases of non-appearance the Court would take a more proactive approach to fact-finding and attempt to test the applicant states' claims itself.<sup>1222</sup> It is argued that being proactive in cases of non-appearance by employing 'whatever means and resources may enable it to satisfy itself whether the submissions of the applicant State are well-founded in fact and law'<sup>1223</sup> is the only way to properly ensure parties' due process rights, for example by appointing its own expert under Article 50 of the Statute to assist it in assessing the evidence put forward by the appearing party.<sup>1224</sup> Instances of non-appearance have occurred in some of the most politically significant cases in the history of the Court and as long as the Court's jurisdiction operates on a consensual basis it can never be ruled out that at any time the Court may again be faced by the difficulties that non-appearance poses to its reactive approach to fact-finding.<sup>1225</sup>

Should the parties wish to present expert evidence, such experts should be put before the Court subject to examination and cross-examination. In no circumstances should experts appear as counsel.<sup>1226</sup> It is argued that in doing so the Court will reap the benefits of cross-examination of the expert evidence and avoid the 'merry contradiction' of two (equally well-qualified) experts with opposing views.<sup>1227</sup> Relatedly, in such situations the Court should seriously consider the appointment of its own expert to assist it in the evaluation of the technical or factually complex elements of the dispute.<sup>1228</sup> At no time should the Court consult 'phantom experts' as this practice is contrary to due process.<sup>1229</sup> During the cross-examination of the parties' experts, and with the assistance of the Court's own expert, the Court, having access to copious amounts of documentary evidence, should be encouraged to put questions to the parties on issues on which it feels require further clarification or elaboration as the Court is entitled to do under Article 61 of the Court's Rules.

If at any time the Court encounters resistance from the parties it should display greater willingness to draw adverse inferences from this lack of cooperation. Whether a party has refused to comply with a provisional measure indicated by the Court or an order for the

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<sup>1222</sup> Riddell and Plant 223; *Nuclear Tests Case 1974*, para 15 and 257, para 16

<sup>1223</sup> *Nicaragua Case*, para 59

<sup>1224</sup> Riddell and Plant 224; *Nicaragua Case*, 29-30, para 59

<sup>1225</sup> Von Mangoldt and Zimmermann 1353

<sup>1226</sup> See section 4.3.1.

<sup>1227</sup> Simma 231

<sup>1228</sup> See Article 50 of the Court's Statute as elaborated in Article 62(2) of the Rules

<sup>1229</sup> See section 4.3.1.

disclosure of information (this order being compulsory, in line with the interpretation of Article 49 ICJ Statute set out in Chapter 4 at 4.1.), the Court should utilise its Article 49 ICJ Statute power to draw adverse inferences in a way that it has hitherto been reluctant. As stated above, the real utility of such action is in inducing disclosure rather than the actual inference itself.

The thesis proposes these reforms which are relatively small in number and which could realistically be made through orders or practice directions, crucially without amendment of the Court's Statute, and that are based on the practice of other inter-state courts and tribunals. It is argued that the value of drawing on the comparative exercise undertaken in Chapter 3 is that all the suggestions made in this thesis are currently in operation with regards to a similar inter-state Court – lending additional realism and credibility to the suggestions.

However, it must be conceded that, even if the Court were to follow this exact procedure, a more proactive approach from the Court, which makes greater use of the Court's fact-finding powers, is no panacea. In relation to all of the avenues that it is suggested the Court could take in improving its fact-finding process, there are obstacles. One particular obstacle that must be examined first of all is the issue of whether the Court has the discretion required to change its approach to fact-finding in order to become more proactive, or whether its position within the institutional machinery of the United Nations in any way fetters this discretion. It is to this particular potential obstacle that we now turn before the limitations of the Court's fact-finding powers are considered in the subsequent subsection.

#### *5.4. Does the Court have Unlimited Discretion to Pursue a More Proactive Approach to Fact-Finding?*

This part seeks to examine whether the Court's discretion to take a more proactive approach to fact-finding is in fact any way fettered by its position as part of the institutional framework of the United Nations. Not every international court and tribunal may be completely free to adopt a proactive approach to fact-finding. In fact, the institutional structure to which the court belongs may have a significant influence on how it approaches fact-finding.<sup>1230</sup> For instance, Alvarez has argued that 'whether a court's assessment of the facts (or the law) is

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<sup>1230</sup> See Martin Shapiro - M. Shapiro, *Courts: a comparative and political analysis* (University of Chicago Press 1986)

likely to remain the last word within the specific legal regime in which it operates is likely to influence how (or even whether) it engages in fact-finding.’<sup>1231</sup> Ultimately, any international court or tribunal’s factual determinations ‘may turn on whether the court thinks it can get away with such determinations, or whether it needs to pay heed to its own fragile legitimacy or jurisdiction’.<sup>1232</sup>

There has been some suggestion that the Court might not be completely free to make factual determinations. For instance, the Court in the *Namibia* advisory opinion stated that;

A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial function if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end...<sup>1233</sup>

In a similar vein, in its written submissions in *The Wall* advisory opinion, Belgium argued that since General Assembly Resolution ES-10/13 of 21 October 2003 had already ‘identified the applicable law but also expressly declared the wall to be in contradiction to international law’<sup>1234</sup> the Court’s legal opinion was not necessary, suggesting that when another organ of the United Nations has made a factual determination, the Court is precluded from examining the same factual issue.

Relatedly, Germany argued that any opinion the Court would give would be ‘devoid of object and purpose’<sup>1235</sup> since

‘the question on which the opinion of the Court has been sought concerns issues where the Assembly has already taken a clear legal position. In its resolution ES-10113, the General Assembly not only *identified* the law that applies to the issue (International Humanitarian Law) but also already formally *declared* the wall to be in contradiction to international law. Thus, the General Assembly requires no guidance from the Court on the legality of the wall.’<sup>1236</sup>

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<sup>1231</sup> Alvarez 92

<sup>1232</sup> *Ibid*

<sup>1233</sup> *Namibia Advisory Opinion*, p. 52, para 117

<sup>1234</sup> *The Wall Advisory Opinion, Submission of Belgium*, para 8

<sup>1235</sup> *Contrary to Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, ICJ Reports 1989*, p 177, at p. 188

<sup>1236</sup> *The Wall Advisory Opinion, Submission of Germany*, page 8, stating ‘What is more, the General Assembly has already answered the question as to what “legal consequences” arise from the construction of the wall: in resolution ES-10113, and by applying the norms of international law on state responsibility, it *demand*ed that Israel “stop and reverse” the construction of the wall.’; see also *The Wall Advisory Opinion, Submission of Germany*, Page 60, 5. 63

Comparably, in the same case Jordan submitted that '[w]here the Security Council has decided or determined or declared that a situation is in violation of international law, and has thus considered it to be illegal, or where the General Assembly's consistent conduct over many years reflects an *opinio juris* to that effect, the Court cannot disregard such legal conclusions'.<sup>1237</sup>

However, it is argued that this ought not to be the case with regards to the ICJ. It is argued that the Court is not bound to accept findings-of-fact made by other UN Organs and that in fact it is not desirable for it to do so. In examining more closely the Court's role as final arbiter of the facts, and following on from the examination of the principles that guide the Court in the course of fact-assessment, the following section will focus in greater detail on the Court's freedom to depart from findings-of-fact made by other UN Organs.

#### *5.4.1. Gagged and Bound? The International Court of Justice and its Relationship with other Principal Organs*

Factual determinations made in Security Council and General Assembly resolutions play a significant role in the Court's assessment of the facts.<sup>1238</sup> But how exactly is the Court affected by factual determinations made by other principal organs of the United Nations? Is it formally bound to follow findings-of-fact as espoused by the General Assembly or the Security Council for example or is it free instead to determine and assess the facts for itself in its capacity as a judicial body? In answering these questions it is suggested that conducting a static examination of the traditional roles of the principal organs based on the role envisaged for them in the UN Charter is a helpful starting point.

#### *5.4.2. A Static Examination of the Traditional Roles of the Principal Organs*

It is firstly important to note that the Court is just one of six principal organs of the United Nations. All six principal organs of the Organisation are (at least) formally equal.<sup>1239</sup> The

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<sup>1237</sup> *The Wall Advisory Opinion, Submission of Germany*, Page 60, 5.63

<sup>1238</sup> Teitelbaum 148; This can take many forms: directly submitted to the court (such as dossiers and written statements prepared by the Secretary-General on behalf of the UN in advisory proceedings – following a request from the Court under Article 69(4) of the Statute of the Court) or by state parties before the Court bringing UN Documents to the attention of the Court (in advisory or contentious proceedings), see also; Del Mar 395

<sup>1239</sup> Mohammed Bedjaoui, *The New World Order and the Security Council: Testing the legality of its acts* (Martinus Nijhoff Publishers 1994) 13

Court's status as both principal organ and principal judicial organ is the basis for this formal equality.<sup>1240</sup>

#### 5.4.3. *The Court: Principal Organ*

There are a number of important legal implications of the Court's status as principal organ under Article 7(1) of the UN Charter.<sup>1241</sup> For our purposes, however, it is first of all crucial to note that the principal organs of the UN are to a large extent interdependent and operate under a duty of co-operation with the other principal organs.<sup>1242</sup> Furthermore, there is no hierarchy between it and the other principal organs, ('at least not between the ICJ and the Security Council and General Assembly'.<sup>1243</sup>) As such, the Court's status as principal organ 'means that it exists on a par with the other principal organs'.<sup>1244</sup>

#### 5.4.4. *The Court: Judicial Organ – Functional Distinction*

Further, despite the fact the Court's status under Article 94 of the UN Charter as a judicial organ distinguishes it, and marks its independence from, the other principal organs,<sup>1245</sup> this judicial status does not impact upon the relationship between it and the other principal organs which continues to be governed by the principle of equality. As Gowlland-Debbas has stated;

'[a]s a "principal organ", the ICJ is bound to cooperate with the other principal organs and to give effect to their decisions; as a "judicial organ" it distinguishes itself from the other organs in its composition and functions which direct it to maintain its judicial integrity and its distance from the other, politically-oriented bodies'.<sup>1246</sup>

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<sup>1240</sup> Article 7(1) UN Charter which marks the Court out as a principal organ of the Organization must be read in conjunction with Article 92 UN Charter which refers to the Court as the principal judicial organ of the UN and Article 1 of the Court's Statute which refers to the Court as having been established by the Charter of the UN as the principal judicial organ of the UN

<sup>1241</sup> Including the incorporation of the Court's Statute into the UN Charter and that the Court is bound to the goals and principles expressed in Articles 1 and 2 of the Charter, S. Rosenne, *The Law and Practice of the International Court* (2 edn, Martinus Nijhoff 1987) 64, A. Pellet, 'Strengthening the Role of the International Court of Justice as the Principal Organ of the United Nations' 3 *The Law and Practice of International Courts and Tribunals* 159, 161

<sup>1242</sup> V. Gowlland-Debbas, 'Article 7' in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press 2006) 87; see also; Bedjaoui 13; Pellet 162

<sup>1243</sup> The Secretary General has also referred to the 'complementary relationship between the three concerned organs' (1991 Report of the SG - UN Doc. A/46/1, 1991, p 4);<sup>1243</sup>; see also; Bedjaoui 78; Gowlland-Debbas 88; see also; Rosenne, *The Law and Practice of the International Court* 71, T.D. Gill, 'Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under chapter VII of the Charter' 26 *Netherlands Yearbook of International Law* 33, 117

<sup>1244</sup> T.D. Gill and S. Rosenne, *The World Court: What it is and how it Works*, vol 41 (United Nations Publications 2003) 36

<sup>1245</sup> Gowlland-Debbas 93

<sup>1246</sup> *Ibid* (emphasis added).



The functional distinction between the Court and the other principal organs can be seen in relation to its responsibilities, its composition and its method of operation. The Court is an independent judicial body composed of impartial judges as opposed to appointed politicians or civil servants, and whilst it may share the ultimate goal of the maintenance of international peace and security and settlement of international disputes, the Court operates in accordance with its Statute in a legal manner in conducting purely legal proceedings.<sup>1247</sup>

This functional distinction extends to the fact-finding and fact-assessment activities of the different UN organs. As we have seen in Chapter 1, the Court possesses broad fact-finding powers which are judicial in character. On the other hand the Security Council, as the executive arm of the UN, is political in terms of its composition and its fact-finding activities reflect this.<sup>1248</sup> Information relied upon by the Council when passing resolutions would not necessarily be accorded any weight by the Court.<sup>1249</sup>

The Court itself has considered the functional distinction between the UN organs, contrasting the Court's legal methods of dispute settlement with the Council's methods.<sup>1250</sup> For instance, the Court has said that whilst Members of the Council are legally entitled to base their decisions on political considerations<sup>1251</sup> the Court's judicial function prohibits it from making decisions based on practicability or political expediency.<sup>1252</sup> As such, in the words of Judge Weeramantry, the Court's '...tests of validity and the bases of its decisions are naturally not the same as they would be before a political or executive organ of the United Nations.'<sup>1253</sup> The position of the Court as set out in the Charter is well summarised by Judge Schwebel in the *Nicaragua* case;

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<sup>1247</sup> V. Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' 88 *The American Journal of International Law* 643, 653

<sup>1248</sup> G. Distefano and E. Henry, 'The International Court of Justice and the Security Council: Distinguishing Themis from Ares' in Karine Bannelier, Théodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The enduring impact of the Corfu Channel Case* (1 edn, Routledge 2012)

<sup>1249</sup> *Ibid*, citing *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992*, p 114, paras 42-3

<sup>1250</sup> *Lockerbie*, 1992 ICJ Rep. at 22, 134, and 34, 144, respectively, Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' 653; see also; 1992 ICJ Rep at 96, 201 (El-Kosheri, J., Dissenting), *ibid*

<sup>1251</sup> *Admission of a State to the United Nations (Charter, Art 4), Advisory Opinion: ICJ Reports 1948*, p 57, *Basdevant, Winiarski, McNair & Read, JJ., dissenting*

<sup>1252</sup> *Haya de la Torre Case, Judgment of June 13th, 1951 : ICJ Reports 1951*, p 71, 79

<sup>1253</sup> 1992 ICJ Rep. at 56, 166. See also Elihu Lauterpacht, *Aspects of the Administration of International Justice* 42-43 (1991).

‘...[W]hile the Security Council is invested by the Charter with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression – or, as more often is the case, fail to arrive at a determination of aggression – for political rather than legal reasons. However, compelling the facts which could give rise to a determination of aggression, the Security Council acts within its rights when it decides that to make such a determination will set back the cause of peace rather than advance it. In short, the Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them’.<sup>1254</sup>

As such, the Court’s role as both principal and judicial organ puts it in a position of both interdependence and independence. The records of the United Nations Conference on International Organization (UNCIO) confirm that the position of equality between organs created by Articles 7(1) and 94 UN Charter was envisaged of the drafters of the Charter.<sup>1255</sup> Despite the fact ‘there appears to have been no [explicit] discussion at San Francisco of the mutual relations of the different principal organs established by the Charter’<sup>1256</sup> the protracted debate regarding the role that the principal organs should play in interpretation of the Charter provides valuable guidance as to the way in which the drafters envisaged the relationship between the principal organs and the Court.

By way of illustration, a proposal that would have seen the inclusion of a provision explicitly addressing the issue of Charter interpretation in the body of the UN Charter itself was not adopted by the Subcommittee.<sup>1257</sup> Rather, the Subcommittee favoured a decentralised approach whereby no single principal organ was given exclusive authority to interpret the Charter.<sup>1258</sup> The Subcommittee Report stated that ‘in the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its functions.’<sup>1259</sup> The Subcommittee Report further stated that states and competent UN organs were free to interpret the Charter in a

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<sup>1254</sup> *Nicaragua Case*

<sup>1255</sup> Del Mar 395

<sup>1256</sup> Rosenne, *The Law and Practice of the International Court* 64

<sup>1257</sup> Doc. 933, IV/2/42(2), Documents of the United Nations Conference on International Organization, San Francisco, 1945, (Volume 13, Commission IV, Judicial Organization, Library of Congress, United Nations Information Organizations) 709

<sup>1258</sup> B. Martenczuk, ‘The Security Council, the International Court and judicial review: what lessons from Lockerbie?’ 10 *European Journal of International Law* 517, 526

<sup>1259</sup> Doc. 933, IV/2/42(2), Documents of the United Nations Conference on International Organization, San Francisco, 1945, (Volume 13, Commission IV, Judicial Organization, Library of Congress, United Nations Information Organizations) 709

whole number of ways ‘including by reference to the International Court of Justice’<sup>1260</sup> in the course of contentious or advisory proceedings.<sup>1261</sup> Consequently, whilst the Court has a role in Charter interpretation like all other principal organs, the role of the Court, or of any other principal organ for that matter, is not exclusive or definitive.<sup>1262</sup>

In lieu of any principal organ having exclusive domain over interpretation of the Charter, the concept of ‘general acceptance’ plays a central role. To elaborate, if any organ were to interpret the Charter in a way that was not conceived as of as being ‘generally acceptable’ by the other organs, that particular interpretation would be rendered without binding force.<sup>1263</sup> This ensures that the equality of principal organs is respected and that the power of interpreting the Charter is dispersed.<sup>1264</sup> Taken together, this results in a situation in which ‘there is no institutional hierarchy as between these [principal] organs’<sup>1265</sup> as ‘each of the principal organs possesses its own interpretation of certain elements of the Charter’.<sup>1266</sup>

Furthermore, in interpreting the Charter each organ must balance its freedom to interpret the Charter with the principle of legality,<sup>1267</sup> a general limitation on the power of UN organs,<sup>1268</sup> which essentially provides that UN organs must operate ‘in accordance with the present Charter’.<sup>1269</sup> In the absence of judicial review of the acts of UN organs to determine their legality, this decentralized system for ensuring compliance with the law is the only one that is truly ‘compatible with the reality of the Charter as a treaty and with the consensual character

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<sup>1260</sup> Martenczuk 526; c.f. G.R. Watson, ‘Constitutionalism, Judicial Review, and the World Court’ 34 Harv Int’l LJ 1, 8

<sup>1261</sup> Article 96(1) UN Charter; see also; Doc. 933, IV/2/42(2), Documents of the United Nations Conference on International Organization, San Francisco, 1945, (Volume 13, Commission IV, Judicial Organization, Library of Congress, United Nations Information Organizations) 709.

<sup>1262</sup> N. Singh, *The Role and Record of the International Court of Justice* (Martinus Nijhoff Publishers 1989) 39; Martenczuk 526;

<sup>1263</sup> Article 96(1) UN Charter; see also; Doc. 933, IV/2/42(2), Documents of the United Nations Conference on International Organization, San Francisco, 1945, (Volume 13, Commission IV, Judicial Organization, Library of Congress, United Nations Information Organizations) 709. - Doc. 933, at 710.

<sup>1264</sup> Doc. 933, at 710; see also; Watson 12; Bedjaoui 11

<sup>1265</sup> M.N. Shaw, ‘The Security Council and the International Court of Justice: Judicial Drift and Judicial Function’ in A.S. Muller (ed), *The International Court of Justice: Its Future Role After Fifty Years*, vol 3 (Martinus Nijhoff 1997) 237

<sup>1266</sup> Bedjaoui 11

<sup>1267</sup> F. Francioni, ‘Multilateralism à la carte: the limits to unilateral withholdings of assessed contributions to the UN budget’ 11 European Journal of International Law 43, 52

<sup>1268</sup> See *Admission of a State to the UN Advisory Opinion* 64 in which the Court stated: ‘The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its power or criteria for its judgment’.

<sup>1269</sup> To use the terminology of Article 25(5) of the Charter

of the underlying relations' at this stage of development in the international legal order.<sup>1270</sup>

#### 5.4.5. Functional Parallelism

However, it is clear that the relationship of equality between principal organs brings with it considerable potential for conflict. As Pellet has stated '[t]o be blind to the tensions which might arise from this requires a large amount of angelism or naïvité'.<sup>1271</sup> In such cases the question arises as to whether, for example, in acting under Chapter VII of the Charter, the Council can bind the Court. As we have seen, however, a static examination of the Charter system reveals that this is not so and that in formal terms no organ is entitled to bind the other. Rather, the Charter envisages that the Court and the Council cooperate in matters that are of concern to both organs a relationship whereby the two organs operate in tandem. The Court has echoed this sentiment, stating in the *Nicaragua* case:

‘the Council has functions of a political nature assigned to it whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events’.<sup>1272</sup>

Consequently the functional distinction between the organs is clear-cut - “the function of the Court is to state the law”<sup>1273</sup> and it can decide only on the basis of law’<sup>1274</sup> meaning that ‘no objection of *lis pendens* or *res judicata* may be raised against the ICJ acting simultaneously...in a case pending before the SC’.<sup>1275</sup> As a result, whilst the Court will always apply the law to the case at hand, ‘its power of action and decision is subject to no limitation deriving from the fact that the dispute before it might also be within the competence of some other organ.’<sup>1276</sup>

Unlike the General Assembly, which under Article 12 UN Charter fetters the competence of the General Assembly to make recommendations on matters of international peace and

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<sup>1270</sup> Francioni 58

<sup>1271</sup> Pellet 159

<sup>1272</sup> Ibid

<sup>1273</sup> *Northern Cameroons (Cameroon v United Kingdom), Preliminary Objections, Judgment, ICJ Reports 1963 p. 33*, see also; Shaw 238

<sup>1274</sup> *Haya de la Torre Case at p 79*; see also; Shaw 238

<sup>1275</sup> J. Delbrück, ‘Article 24’ in B. Simma (ed), *Charter of the United Nations: A Commentary* (Oxford University Press 2002) 447

<sup>1276</sup> Rosenne, *The Law and Practice of the International Court* 118

security when a particular situation is already before the Security Council,<sup>1277</sup> ‘the ICJ has not generally considered itself to be similarly constrained.’<sup>1278</sup> On the other hand, it is clear that just as the Council cannot bind the Court, the fact that a matter is before the Court does not prevent the Council from also dealing with the matter – ‘the ICJ does not benefit from any privilege of primacy in the exercise of its law-adjudicating function’<sup>1279</sup> - consequently ‘the Court is not bound to defer to the Council in a particular case and vice versa’.<sup>1280</sup> As Rosenne has famously stated, this ‘well illustrates the functional parallelism of two principal organs of the United Nations, each of which has competence, under the combined Charter and Statute, to deal with the same ‘dispute’.<sup>1281</sup>

Article 36(3) of the UN Charter provides another example of a clear functional distinction between the organs and again action by one organ does not preclude action by another: again we see functional parallelism. Article 36(3) of the Charter sets out that the Security Council should take into account the fact that ‘legal disputes should as a general rule be referred by the parties to the Court’.<sup>1282</sup> As the Court confirmed in the *Tehran Hostages* case,<sup>1283</sup> whilst the Court ought not to be precluded from addressing the legal issues that arising in the settlement of an international dispute, and whilst the juxtaposition of Articles 36(1) and (3) hint at a distinction between legal and political disputes, any suggestion that the Council should be legally obliged to refrain from dealing with a dispute on the fact it is ‘purely legal’ is not feasible in practice.<sup>1284</sup> The Court itself said as much in the *Nicaragua* case, questioning whether the Council should shy away from a case brought before it because it has

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<sup>1277</sup> *ibid*

<sup>1278</sup> K.R. Cronin-Furman, ‘The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship’ *Columbia law review* 435, 442

<sup>1279</sup> Distefano and Henry 68

<sup>1280</sup> *Nicaragua Case* 392

<sup>1281</sup> I. Petculescu, ‘The Review of the United Nations Security Council Decisions by the International Court of Justice’ 52 *Netherlands international law review* 167, 170; *in practice, the Court has abided by this conception of parallelism*. In the *Nicaragua* case, the Court stated that ‘even after a determination under Article 39, there is no necessary inconsistency between Security Council action and adjudication by the Court’. Rosenne and Ronen 87; see also; Stein and Richter, ‘Article 36’ in Bruno .Simma and Hermann Mosler (eds), *The Charter of the United Nations : a commentary* (Oxford University Press 1996) 545

<sup>1282</sup> Recommendations of the SC made under Art 36(1) (made only once in practice – in the *Corfu Channel* case) are not binding and do not establish the jurisdiction of the Court: and, ‘to interpret Art 36(6) as suggested above would amount to a recognition of compulsory jurisdiction because the parties themselves would be forced to abstain from voting in the SC under Art 27(3)’; see; Stein and Richter 545

<sup>1283</sup> In the *Tehran Hostages* case the Court stated that it was for the Court itself as the principal judicial organ of the UN ‘to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important and sometimes decisive, factor in promoting the peaceful settlement of the dispute. This is indeed recognized by Article 36 of the Charter, paragraph 3’ *Tehran Hostages Case, p. 22, para 40*

<sup>1284</sup> Stein and Richter 545

legal implications.<sup>1285</sup> Indeed, nothing in the Charter imposes a binding obligation the Council to refer a dispute to the Court on the basis that it has legal implications, in all likelihood since it is almost impossible to imagine any international dispute that did not have legal implications. At most it could be said that Article 36(3) obligates the Council to consider other procedures for settlement of the dispute.<sup>1286</sup> It would appear that the only way in which the traditional distinction between the political and the legal have any relevance is in whether the Council, in exercising its considerable discretion (Article 36(3) uses ‘should’ rather than ‘shall’),<sup>1287</sup> feels that the behaviour of the parties to any dispute would benefit from a legal judgment to settle their dispute through referral to the Court or whether the political powers of the Council itself would be better suited.<sup>1288</sup>

#### 5.4.6. Chapter VII Considerations & The Principle of Speciality

A further argument based in the principle of speciality can be anticipated in which it is asserted that, as a result of the Council’s primary responsibility for international security under Article 24(1) UN Charter, the Council’s powers might supersede the principle of functional parallelism and mean that it is competent to usurp the Court on such matters.

The principle of speciality was addressed by the Court in the *WHO Advisory Opinion* in which the Court stated that the principle governed international organisations as a result of the fact that they are ‘invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them’.<sup>1289</sup>

This principle can be seen as a ‘basic and uncontroversial rule of the law of international organisations, namely the principle of enumerated powers or attributed competences.’<sup>1290</sup>

Could it be said that matters of international peace and security are ‘pith and substance’ the domain of the Security Council as a result of the principle of speciality? It is argued that in order to make this judgement two questions must be asked; (i) does there exist a situation of

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<sup>1285</sup> *Nicaragua Case*, p. 435, para 96

<sup>1286</sup> Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ 656, see Kelsen 405, T.J.H. Elsen, *Litispence Between the International Court of Justice and the Security Council* (TMC Asser Instituut 1986) 54.

<sup>1287</sup> Stein and Richter 545

<sup>1288</sup> *WHO Advisory Opinion*, para 25

<sup>1289</sup> *Ibid* at para. 25

<sup>1290</sup> M. Bothe, ‘The WHO Request’ in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1 edn, Cambridge University Press 1999) 106. The Court further notes that this principle is supplemented by the concept of implied powers; see *WHO Advisory Opinion* at para. 25

mutually exclusive powers? And (ii) to which organ does this exclusive power belong?<sup>1291</sup>

Whilst identifying the ‘pith and substance’ of a case is possible in order to determine which organ is most specialised to deal with it, it is much more difficult in practice. As Bothe states ‘...in any system of mutually exclusive powers, an attempt to bring a matter of overlapping jurisdiction into the jurisdiction of one sphere will pose serious difficulties’.<sup>1292</sup> In addition, both international scholarship and the Court have always rejected this argument ‘both for the relationship between the General Assembly and the Security Council and for the relationship between itself and the Council’.<sup>1293</sup> Delbrück argues that such priority of the Council over the Court in relation to matters of international peace and security ‘can neither be deduced from the notion of the primary responsibility of the SC for the maintenance of peace, nor find support in any other Charter provisions or any general principles of law’.<sup>1294</sup> Further, Gowlland-Debbas states that the Court itself has on several occasions underlined that ‘the term primary or principal responsibility in Art 24 UN charter, did not mean exclusive responsibility...’<sup>1295</sup> In *The Wall* advisory opinion the Court reasserted this point, stating that ‘Article 24 refers to a primary, but not necessarily exclusive, competence’.<sup>1296</sup> Ultimately it is clear that the preceding static conceptualisation of the relationship between the principal organs of the UN as one of two essentially equal organs does not give a complete picture of the contemporary relationship between the two organs in practice. As such, a closer examination of the contemporary relationship between the principal organs is required. In the following section, it is suggested that instead of creating ‘watertight compartments of functions’ that draw discrete lines between the competences of the organs as the principle of speciality might suggest, the practice of the United Nations to date has been to accept the fact of overlapping competences and activities.<sup>1297</sup> As Bothe has noted, the emphasis has fallen on ‘concerted action between various agencies of the United Nations system.’<sup>1298</sup>

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<sup>1291</sup> Bothe, ‘The WHO Request’ 108; Bothe makes reference to the phrase ‘pith and substance’ as used by Lord Atkin in a Canadian case before the Privy Council; *Attorney General for Canada v. Attorney General for Ontario*, (1937) AC 335

<sup>1292</sup> *Ibid*

<sup>1293</sup> *Ibid*

<sup>1294</sup> Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ 656

<sup>1295</sup> Gowlland-Debbas, ‘Article 7’ 95

<sup>1296</sup> Jost Delbrück, ‘Review of Fact-Finding Before International Tribunals, Edited by Richard B. Lillich.’ 88 *Am J Int'l L* 191, 447, originally made in the *The Wall Advisory Opinion* 148 at para 26, see also; C. Tomuschat, ‘Uniting for Peace’ United Nations Audiovisual Library of International Law <[www.un.org/law/avl](http://www.un.org/law/avl)>

<sup>1297</sup> Bothe, ‘The WHO Request’ 110

<sup>1298</sup> *Ibid*

#### 5.4.7. *A Dynamic Examination of the Roles of the Principal Organs – The Contemporary Reality*

The significance of the practice of the Court and factual determinations made by its resolutions lies in the fact that it is possible that through the acquiescence of states, a ‘subsequent practice’ in terms of Article 31(3)(b) of the Vienna Convention on the Law of Treaties could be formed.<sup>1299</sup> But is there a basis to the argument that the practice of the Council brings into question the formal equality of the two organs? In other words; is there any evidence that the Court has considered its own discretion fettered by Security Council action? In order to answer these questions, it is essential to consider a number of significant cases.

#### 5.4.8. *Jurisprudence of the Court - Functional Parallelism*

The jurisprudence of the Court brings out very clearly the theme of the absence of any hierarchy between the principal organs (at least between the Court and the Council). In the cases that have come before the court in which there have been issues of concurrent exercise of powers, there has never been any suggestion from either the Council or the Court that the simultaneous exercise of their respective functions would be problematic.<sup>1300</sup> To give but one example, the Court in *Certain Expenses* stated that:

‘It is not to be assumed that the General Assembly would...seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion.’<sup>1301</sup>

As such, it is argued that the position is that as stated by the United States during the *Tehran Hostages* crisis; ‘[t]here is absolutely nothing in the United Nations Charter or in this Court’s

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<sup>1299</sup> Article 31(3)(b) Vienna Convention on the Law of Treaties 1969, Done at Vienna on 23 May 1969, United Nations Treaty Series, vol. 1155. p 331; see also; Watson 15; S. Lamb, *Legal limits to United Nations Security Council Powers* (Guy S. Goodwin-Gill; Stefan Talmon, *The Reality of International Law Essays in Honour of Ian Brownlie*, Oxford University Press 1999) 365

<sup>1300</sup> *Hostages Case*, 1980 ICJ Rep. at 21-22; the Court stated that ‘[t]he reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute.’

<sup>1301</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962: ICJ Reports 1962, p. 157



Statute to suggest that action by the Security Council excludes action by the Court, even if the two actions might in some respects be parallel.<sup>1302</sup> But what of factual determinations more specifically?

#### 5.4.9. *Jurisprudence of the Court - Factual Determinations*

Whilst the Court has considered factual determinations made by the Security Council and General Assembly on a number of occasions – its pronouncements could not accurately be described as particularly coherent or enlightening until relatively recently. In the *Northern Cameroons* case the Court found that the case before it was non-justiciable since the legal issue in question, the legal status of the territory, had already been determined by the General Assembly.<sup>1303</sup> In addition, at the merits stage of the *Armed Activities* case the Court held that the UPDF had violated territorial sovereignty ‘on the Security Council’s determination that the conflict constituted a threat to peace, security and stability in the region and that the Security Council called for states concerned “to bring to an end the presence of these uninvited forces”’.<sup>1304</sup> It has been said that the Court in *Armed Activities* ‘seemed to consider some of the Security Council Resolutions as providing a factual basis from which the Court could draw legal conclusions, almost as if a Security Council Resolution constituted fact-finders of a lower court’.<sup>1305</sup>

Similarly, in *The Wall* advisory opinion the Court’s argument that the territories in question remained occupied was based on Security Council Resolutions that condemned the occupation and action taken by Israel.<sup>1306</sup> Further, in relation to the applicability of the Geneva Convention IV to the Occupied Territory the Court expressly referred to General Assembly and Security Council resolutions as authority.<sup>1307</sup> The Court also employed, albeit as subsidiary authority, resolutions in relation to the right of the Palestine to self-

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<sup>1302</sup> Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ 656; see also the oral proceedings in *The Wall* in which Palestine made the compelling argument that the Court should bear in mind that its task is not simply to give ‘just another political opinion’ but as principal judicial organ of the United Nations, the Court ought to remain ‘faithful to the requirements of its judicial character’ and give a legal judgment that necessarily entails autonomous factual determinations; see *The Wall Advisory Opinion, Submission of Palestine*, page 33, para 14

<sup>1303</sup> *Northern Cameroons Case* 21

<sup>1304</sup> *Armed Activities Case* 224 at para 151; UNSC Resolution 1234, 9 April 1999, Del Mar 408

<sup>1305</sup> Teitelbaum 149

<sup>1306</sup> UNSC Resolution 242 (1967), 22 November 1967; UNSC Resolution 298 (1971) 25 September 1971; UNSC Resolution 478 (1980), 20 August 1980, See the Separate Opinion of Judge Higgins *The Wall Advisory Opinion* 136 at paras 74-5

<sup>1307</sup> *Ibid*, paras 98-99

determination<sup>1308</sup> and that the settlements breach the Geneva Convention IV.<sup>1309</sup> It was in relation to this last issue, the illegality of the settlements, however, that the Court was most heavily reliant on UN resolutions – referring exclusively to Security Council Resolutions 446 (22 March 1979), 452 (20 July 1979) and 456 (1 March 1980) for legal justification.<sup>1310</sup> Criticism of *The Wall* advisory opinion for precluding itself from participating in any fact-finding and accepting that the SG's Report mentioned in the question provided for a 'given factual situation'.<sup>1311</sup> Commentators at the time remarked upon the fact that it is surprising that the Court would rely so heavily on resolutions that were not technically binding under Chapter VII, and with no reference to the interpretation of this provision in state practice.<sup>1312</sup>

The combination of Article 25 UNC and Article 103 UNC render Security Council resolutions binding on all Member States and create obligations that take precedence over all other legal norms (save, perhaps, for *jus cogens* norms). Whilst clearly intended to cover inter-state relations, these fundamentally important provisions of the UN Charter nevertheless mean that is 'difficult...for the Court to deviate from an assessment of fact by the Security Council that forms the basis of measures adopted by the Council acting under Chapter VII of the UN Charter'.<sup>1313</sup>

In addition, Pellet's suggestion that 'the resolutions of other principal organs, whether of the General Assembly or the Security Council, are not relied on that much by the Court unless they have a compulsory nature',<sup>1314</sup> has been challenged. For example, one commentator has pointed out that 'the Court attributes weight to both binding and non-binding paragraphs of General Assembly and Security Council Resolutions' citing the Court's reliance on a

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<sup>1308</sup> Ibid, para 118, 88, 156; I. Scobbie, 'Unchart (er) ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine' 16 *European Journal of International Law* 941, 943

<sup>1309</sup> *The Wall Advisory Opinion, para 120*

<sup>1310</sup> Ibid, para 99, 120; Despite, as Scobbie has pointed out, other material being available on this point; Scobbie, 'Unchart (er) ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine' 943

<sup>1311</sup> See *The Wall Advisory Opinion at para 37*

<sup>1312</sup> Such as international legal scholarship, including the work of the ICHRC, and statements of parties to the Geneva Convention; Scobbie, 'Unchart (er) ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine'

<sup>1313</sup> Del Mar 407

<sup>1314</sup> Pellet has argued that criticism of the Court's reliance on General Assembly and Security Council resolutions is 'not well-founded' since 'it is normal and legitimate that the principal judicial organ of the United Nations demonstrates that it is particularly attentive to the "trends" expressed in the resolutions of the political organs.' Pellet 169

preambular paragraph of Security Council Resolution 1304 (2000) in aiding its determination that massive human rights violations and grave breaches of IHL had taken place<sup>1315</sup> and the Court's reliance on a preambular paragraph of a General Assembly Resolution which referred to the 'abhorrent policy of ethnic cleansing being carried out in Bosnia-Herzegovina' as examples.<sup>1316</sup> Further, it has been shown that 'the Court referred to and quoted from a number of preambular and operative paragraphs of Security Council and General Assembly resolutions that referred to sexual violence, and which were "based on reports before the General Assembly and Security Council, such as Reports of the Secretary-General, the Commission of Experts, the Special Rapporteur for Human Rights...and various United Nations agencies in the field".<sup>1317</sup>

Whilst the Court in the past has stated that any factual or legal determinations made by the Security Council 'had the same legal force as the provision of the resolution in which it was contained' until the recent *Kosovo* Advisory Opinion the Court had not squarely addressed the issue in any case that had come before it.<sup>1318</sup> The Court has on several occasions in the past made a distinction between resolutions that have binding legal effects known as decisions and resolutions that do not have such binding effect, known as recommendations.<sup>1319</sup> As such, it could be said that any factual determination contained in a decision was legally binding on the addressee of the situation whilst a determination made in a recommendation would not have the same binding character, and so on. However, the Court had never given any guidance on whether any factual determination made in a decision of the Council or the General Assembly would be binding on the Court.<sup>1320</sup>

The closest that the Court has come to addressing the issue before the *Kosovo* opinion was in

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<sup>1315</sup> *Armed Activities Case at para 206-207* and UNSC Resolution 1304 (2000), 16 June 2000.

<sup>1316</sup> *Bosnian Genocide Case at para 190*

<sup>1317</sup> *Del Mar 409; Bosnian Genocide Case 109 at paras 301-305*

<sup>1318</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 2010 General List No 141, at para 85; The Court's statement in paragraph 85, "Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations," should not be misunderstood. A Security Council resolution does not need to be adopted under Chapter VII to have binding legal effect, and can contain language that does not create binding effect. See; *M.D. Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ'* 16 *European Journal of International Law* 879, 884

<sup>1319</sup> Öberg's definition of a resolution as one that 'may create obligations, rights, and powers; contain factual and legal determinations that trigger such effects; and establish how and when they operate' is helpful in this regard, see Öberg 82.

<sup>1320</sup> See *ibid*, at 890-923

its rejection of Portugal's argument in the *East Timor* case that certain factual determinations contained within resolutions of the General Assembly and Security Council should be taken as 'givens'.<sup>1321</sup> The Court highlighted conflicting state practice in coming to the conclusion that the resolutions in question could not be considered as factual 'givens' capable of settling the dispute.<sup>1322</sup>

However the recent *Kosovo* Advisory Opinion is undoubtedly the Court's most significant contribution to the Court's jurisprudence in this regard, addressing the issue squarely for the first time.<sup>1323</sup> In the *Kosovo* Advisory Opinion the Court rejected suggestions that it should not give an opinion because doing so would require interpreting or applying a number of decisions of the Security Council, saying that it has done so in the past in both advisory and contentious proceedings.<sup>1324</sup> The relevance of the *Kosovo* opinion lies in its reformulation of the scope of the question requested of the Court by the General Assembly. In its request for the *Kosovo* advisory opinion, the General Assembly stated that the unilateral declaration of independence had been adopted by the Provisional Institutions of Self-Government of Kosovo. However, the factual assertion that the declaration had been adopted by the Provisional Institutions of Self-Government of Kosovo was challenged by a number of parties.<sup>1325</sup>

In doing so, the question arose as to whether, in formulating the question in the way it was, the General Assembly had already predetermined a particular factual element of the case – namely the identity of the authors of the declaration.<sup>1326</sup> The Court itself noted that the factual issue of the identity of the authors of the declaration of independence could have an important effect on the answer to the question posed by the General Assembly.<sup>1327</sup> However, this did not deter the Court from exercising its inherent right to reformulate the question asked of it. The Court explained its decision to do so, arguing that '[i]t would be incompatible with

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<sup>1321</sup> *East Timor (Portugal v Australia)*, Judgment, ICJ Reports 1995, p 90 103, paras. 30-32

<sup>1322</sup> Ibid, paras. 30-32

<sup>1323</sup> Öberg 82

<sup>1324</sup> *Kosovo Advisory Opinion*, at para 46, here the Court cited *Certain Expenses Advisory Opinion* 175 and *Namibia Advisory Opinion*, 51-54, paras. 107-116, also provisional measures in *Lockerbie Provisional Measures*, 15, paras. 39-41 although note that Judge Stotnikov criticised the use of these precedents as the said they do not support the argument that the Court has interpreted acts and decisions of the Security Council; Juan J. Quintana, 'Procedural Developments at the International Court of Justice' 10 *The Law & Practice of International Courts and Tribunals* 135, 197

<sup>1325</sup> *Kosovo Advisory Opinion*, at para 52

<sup>1326</sup> Ibid, paras. 49-56

<sup>1327</sup> Ibid, at para 52

the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.’<sup>1328</sup> The Court went on to elaborate on its reasoning, stating that as an independent judicial organ ‘the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.’<sup>1329</sup>

In the course of the opinion the Court found that the General Assembly’s identification of the authors of the declaration of independence had been incorrect and made a contrasting factual finding. This factual finding has been described as constituting a crucial step in the Court’s reasoning on the way to the conclusion that Security Council Resolution 1244 did not bind the authors of the declaration.<sup>1330</sup> This bold step from the Court, denying that factual determinations made in resolutions of the General Assembly has been praised for a number of reasons to which we will turn our attention presently.<sup>1331</sup> However, a caveat must be added here in relation to the scope of the Court’s pronouncements. It would seem unlikely that the Court would adopt a practice of making contradictory factual findings from its fellow organs. In fact, in the Kosovo opinion the Court qualified its reformulation of the facts of the case stating that the General Assembly had not intended to fetter the Court’s jurisdiction in this regard.<sup>1332</sup> This begs the question as to whether the Court would take the same step of reformulations were the requesting organ to explicitly determine the facts in the question asked of the Court.<sup>1333</sup>

In addition, doubt remains surrounding the application of the Court’s pronouncements beyond the facts of the Kosovo case. To elaborate, the factual determination overturned by the Court in the Kosovo case ‘was contained in an authorization rather than an obligation, and was made by the General Assembly rather than the Security Council (let alone under Chapter VII of the Charter).’<sup>1334</sup> As such, doubt remains as to whether the Court would consider itself similarly unconstrained by a binding determination of a threat to the peace made by the Security Council under Article 39 of the UN Charter for instance.<sup>1335</sup>

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<sup>1328</sup> Ibid, at para 52

<sup>1329</sup> Ibid, at para 52

<sup>1330</sup> Ibid, at paras 113-21

<sup>1331</sup> Distefano and Henry 81

<sup>1332</sup> *Kosovo Advisory Opinion, at para 53*

<sup>1333</sup> Ibid, at para 53

<sup>1334</sup> See also T. O’Donnell, ‘Naming and shaming: The sorry tale of Security Council Resolution 1530 (2004)’

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<sup>1335</sup> Öberg 83

Taken as a whole, where does this examination of the practice of the Court leave us? The preceding section has sought to illustrate that the position taken by the Court on factual determinations made by other UN organs has not been unequivocal to date. Nevertheless, it is argued that there is a sufficient suggestion in the pronouncements of the Court to suggest that the Court would not consider itself bound by such factual determinations in most cases. As such, the concluding section of this chapter examines the policy implications of the Court taking this position and indeed, whilst it is not asserted that the Court is necessarily best placed to definitively determine the facts, it is nonetheless argued that as an independent judicial organ it should not be bound by other political organs for a number of reasons.

#### *5.4.10. The Policy Argument: Functional Parallelism & Functional Distinction*

In order to round off this examination of the issue of whether the Court's discretion to take a more proactive approach to fact-finding is affected by its place as part of the institutional structure of the United Nations, it is argued that, in light of the preceding static and dynamic examination of the relationship between the Court and other principal organs that the Court should not consider itself bound by factual determinations made by them, in the words of Judge Bedjaoui, so long as no action taken by the Council under Chapter VII of the Charter 'sets aside, rules out or renders impossible the juridical solution expected of the Court.'<sup>1336</sup>

As the preceding sections sought to illustrate, whilst nothing in the Charter precludes the functional parallelism of the Court and other principal organs, and whilst the Court has rejected any notion of litispence in cases that have come before it, staunchly defending the Court's ability to operate in tandem with the Council, it is unavoidable that the adoption of a decision under Chapter VII of the Charter by the Council may deprive the situation before the Court of all meaning.<sup>1337</sup>

Whilst such a dose of realism is essential regarding the Chapter VII powers of the Council, it should nonetheless be emphasised that short of such frustration or material change in

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<sup>1336</sup> *Lockerbie Provisional Measures*, at 44, 1541992 ICJ REP, at 44, 154; see also; Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' 659;

<sup>1337</sup> Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' 661; see; H.D. de Vabres, *L'action publique et l'action civile dans les rapports de droit pénal international* (Hachette 1929) 207

circumstances with regard to a dispute before the Court, the Court should in no way consider itself bound by a factual determination made by the Council.<sup>1338</sup> The Court should not consider itself unable to contradict the Council in relation to a factual determination for reasons of judicial propriety nor consider it an inherent limitation of the judicial function.<sup>1339</sup> In other words, it is argued that the relationship between the Court and other principal organs should be ‘one of coordination and functional cooperation in the attainment of the aims of the Organization, not one of competition or mutual exclusion...’<sup>1340</sup> in all but the most extreme circumstances (those being the frustration of the case before the Court by the action of the Council under Chapter VII).

That the principle of litispendence does not operate in relation to the principal organs is due to the fact that each organ does not try to avoid the duplication of proceedings as in domestic law but rather seeks to operate as different processes within the framework of an ‘integrated structure for the peaceful settlement of disputes on the international plane.’<sup>1341</sup>

In addition, the fact-finding processes of the General Assembly and Court are substantially different and could in theory, and in fact have in practice, led to different results. Such criticisms of the Council’s fact-finding have come up in cases before the Court. For instance, Uganda challenged reliance on a factual determination made by the Security Council in Resolution 1304 in the course of the *Armed Activities* case contending that ‘it is evident that in reaching its conclusions about the law the Security Council has not acted in a way that would normally be recognised as judicial. The Security Council emphasis is on political adhesion rather than impartial conclusions based on unbiased consideration of the facts and the objective examination of the law’.<sup>1342</sup>

Furthermore, were the Court to consider its discretion fettered by other organs of the United Nations, it is argued that its judicial independence would be detrimentally affected. The

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<sup>1338</sup> Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ 674; Benzing 1242, para 24

<sup>1339</sup> Gowlland-Debbas, ‘The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case’ 674; as referred to by the Court in the Northern Cameroons case for example; see Northern Cameroons 1963 ICJ REP. at 29.

<sup>1340</sup> Ibid, see Judge Ni – 1992 ICJ Rep. at 22, 134

<sup>1341</sup> See E. McWhinney, *Judicial Settlement of International Disputes: Jurisdiction, Justiciability, and Judicial Law-Making on the Contemporary International Court* (Martinus Nijhoff 1991) 39; Higgins, supra note 55, at 83. See also Arrangio-Ruiz, supra note 98, at 38

<sup>1342</sup> Counter Memorial of the Republic of Uganda, Case Concerning Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda) 2001 ICJ at 191 para 191.

principle of *compétence de la compétence*, that the Court ‘determines the limits of its own jurisdiction, and it decides on challenges to it’ is fundamentally important to the independence of international judicial organs. Should an international court’s jurisdiction be defined by another organ, it is difficult to imagine how that court could be described as independent in any way. The same might be said for factual determinations: if the Court’s ability to make such determinations was subject to those of another organ, that court’s judicial independence would be called into question, as Geroges Abi-Saab has stated ‘[i]f you are not the one who has the final word, it makes you always look behind your back, which greatly undermines independence.’<sup>1343</sup>

And indeed it is clear there are significant differences between the fact-finding procedures of the Court (as outlined in Chapter 1) and those of the Council, mainly due to the different goals that the two organs are seeking to achieve. As a political organ the Council has different, more political, priorities and as a judicial organ, fact-finding lies at the heart of the judicial function. On this, it should be noted that the Security Council has a history of making inaccurate factual findings, see for example Resolution 1530 of 2004 which incorrectly attributed the Madrid bombings to the ‘terrorist group ETA’ hastily after the incident, when in fact it emerged that the attacks were the doings of a cell of Al-Qaeda.<sup>1344</sup>

As a result of such slackness it is argued that a more proactive judicial approach to the facts could be an advantage in this regard. Of course in cases of functional parallelism it is not beyond the realms of possibility that, for example, the Court and the Council may come to conflicting factual determinations but such conflicts must be dealt with as they arise whilst all the while bearing in mind that both organs are ultimately operating as part of the same institutional apparatus and are seeking to achieve the same goals, albeit by different means.

#### *5.4.11. Summary – The Court’s Discretion Unfettered*

In sum, it can be argued that, to some extent, the principles of equality and functional parallelism would equally apply to findings-of-fact as to interpretation of the Charter. Just as the Court does not have a Charter-based power to review the legality of acts of the Security

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<sup>1343</sup> Georges Abi-Saab, ‘Independence of the Judiciary from Political Organs’ in L. Boisson de Chazournes, C. Romano and R. Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational 2002) 246

<sup>1344</sup> Distefano and Henry 81



Council as a result of the functional parallelism envisaged by the drafters of the Charter, the corollary is that the Security Council cannot formally bind the Court in relation to determinations of fact made by it, for example, in resolutions. As Pellet has stated, '[t]his constitutes the primary consequence of the institution of the Court as the principal judicial organ of the United Nations.'<sup>1345</sup>

As such, it is argued that the Court is not formally bound by assertions of fact contained within resolutions of the General Assembly or Security Council, regardless of whether they are in relation to an issue being concurrently dealt with by the Council in the course of maintaining or restoring international peace and security under Chapter VII of the UN Charter (except from those cases in which the Council frustrates the action of the Court through materially affecting the dispute before the Court by means of a decision under Chapter VII).<sup>1346</sup> Even in such circumstances the Court 'must at all times preserve its independence in performing the functions which the Charter has committed to it as the United Nations' principal judicial organ'.<sup>1347</sup> This independence or autonomy is key – flowing from both the UN Charter and the Court's Statute and from the very nature of the judicial function, the essence of any court.<sup>1348</sup> The Court *itself* must at all times ensure the proper administration of justice, maintain its high juridical character and integrity<sup>1349</sup> whilst safeguarding its judicial function.<sup>1350</sup> The significance of the Court's independence in relation to its assessment of the facts cannot be overstated. As such, it is submitted that the Court should ensure on all occasions that it strictly evaluates the probity of evidence before it, whether emanating from a UN source or otherwise, and should not consider itself bound by determinations of fact made by other UN organs in ensuring the proper administration of justice.

Ultimately, it is argued that we can answer the fundamentally important question posed at the start of this subsection, namely whether or not the Court's discretion to take a more proactive approach to fact-finding is in any way fettered by its position within the institutional machinery of the United Nations, in the negative. The foregoing examination has shown that there is nothing in either the Court's constitutive instruments or practice which would fetter the Court's discretion and that accordingly the Court, as an independent tribunal, possesses

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<sup>1345</sup> *Certain Expenses Advisory Opinion* Pellet 177

<sup>1346</sup> See Öberg 892, Del Mar 405

<sup>1347</sup> *Lockerbie Provisional Measures, Dissenting Opinion of Judge Weeramantry, at 58*

<sup>1348</sup> Shaw 245, Singh 173

<sup>1349</sup> *Northern Cameroons Case at 29*

<sup>1350</sup> *Ibid* at 38, see also, Dissenting Opinion of Judge Skubiszewski in the *East Timor Case at 258*

the discretion required in order to adopt a more proactive approach to fact-finding, should it choose to do so. Having shown that the Court is capable of taking a more proactive approach to fact-finding should it choose to do so, it is necessary to turn to the limits of the Court's fact-finding powers before a position can be taken on the relative merits of adopting such an approach.

### 5.5. *The Limits of the Court's Fact-Finding Powers*

There are a number of significant limits to the proposals for a more proactive approach designed to improve the Court's approach to fact-finding as set out in Chapter 4. As such, it is important to emphasise that the proposals set out in Chapter 4 do not represent blind faith in the increased use of all of the Court's fact-finding powers as the answer to those problems that it currently faces. A number of examples serve to illustrate this point.

First of all, although states have not voiced their opposition to the progressive interpretation of the equivalent fact-finding power in the context of the WTO, there of course remains the danger that states could reject similar moves by the ICJ in relation to interpreting Article 49 of its Statute to be binding on the parties as advocated in Chapter 4.<sup>1351</sup> In such circumstances, owing to the consensual nature of the Court's jurisdiction, it is likely that the threat of states 'taking their business elsewhere' could influence the Court in future decisions as to whether to uphold this progressive interpretation of Article 49.

Furthermore, even if the Court were to insist that its Article 49 power is compulsory, should any party refuse to cooperate (whether it be with a request for information contained in a provisional measure or under Article 49 specifically, or more general non-cooperation with the Court) it would appear that the only option left open to the Court is to draw adverse inferences. However the power to draw adverse inferences is one that the Court explicitly possesses (again in Article 49 ICJ Statute) and as such the utility of insisting upon the compulsory nature of its power to order the production of evidence by the parties is open to question.<sup>1352</sup>

In addition, it is unclear to what extent greater use of the Court's fact-finding powers will help to remedy those problems the Court faces in cases of non-appearance as discussed in the second half of Chapter 2. To elaborate, it was argued in Chapter 2 that in cases of non-appearance the Court should be more proactive in utilising those fact-finding powers that it already possesses such as requesting information from an existing UN Commission of Inquiry or requesting the establishment of such an inquiry to assist it.<sup>1353</sup> However, recent practice of

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<sup>1351</sup> See section 4.1.

<sup>1352</sup> For a full account see M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, vol 215 (Springer Verlag 2010)

<sup>1353</sup> See section 2.2.

UN Commissions of Inquiry have illustrated that even where additional fact-finding is carried out, lack of consent from the state involved in the investigation can amount to a near-insurmountable obstacle.

A clear example of this can be seen in the experience of the UN Human Rights Council's Gaza inquiry in 2009. Israel's refusal to cooperate with the Goldstone Inquiry is a clear example of how non-cooperation can present serious difficulties in terms of fact-finding.<sup>1354</sup> Goldstone himself has recently spoken of the difficulties presented by Israel's non-cooperation which he states, along with the emergence of further information subsequently, caused him many 'sleepless nights' and cast doubt upon a number of the factual determinations made in the Goldstone Inquiry which ultimately caused Goldstone to 'row back' on a number on some of the inquiry's factual determinations in a now infamous *Washington Post* opinion-editorial.<sup>1355</sup> Non-cooperation necessarily entails greater reliance on secondary sources such as press reports and interviews with individuals who claim to have witnessed certain events which, whilst still useful to some extent, are of less probative value than primary fact-finding.<sup>1356</sup> It is suggested that such practice cautions against reliance on factual determinations made in fact-finding inquiries which were not granted consent to visit the area under investigation (and indeed in practice consent is denied on a regular basis.<sup>1357</sup>) As such, the extent to which increased use of the Court's fact-finding powers will actually result in more information coming before the Court is unclear.

Moreover, there are a number of the Court's fact-finding powers which were not advocated in relation to the improvement of the Court's fact-finding process. For instance, as stated above, greater use of the Court's power to conduct site visits under Article 44(2) of its Statute is not advocated. In most instances such site visits appear to have a merely 'illustrative function', providing helpful background to the complex facts of a case rather than being a fact-finding

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<sup>1354</sup> HRC Resolution A/HRC/12/48, 25/9/2009

<sup>1355</sup> Richard J. Goldstone, 'Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes' in Morten Bergsmo (ed), *Quality Control in Fact-Finding* (Torkel-Opahl Academic EPublisher 2013) 50

<sup>1356</sup> See section 1.4.

<sup>1357</sup> Chinkin 488. Such refusal of admittance is in fact commonplace in practice; See; Weissbrodt and McCarthy 59; "the great bulk of human rights fact-finding by both IGOs and NGOs is accomplished without on-site visits"; see also; for example, Israel refused to allow the Human Rights Council's fact-finding mission to visit the Occupied Palestinian Territory under HRC Resolution S-1/1. Similarly, the high-level fact-finding mission to Darfur was unable to obtain visas from the government of Sudan. HRC Res 4/8 (March 30, 2007); see also for example HRC Resolution S-17/1, 23 August 2011; see First Report A/HRC/S-17/1/2/Add.1 and Second Report A/HRC/19/69, 22/2/12

tool capable of bringing important new information before the Court.<sup>1358</sup> Ultimately, the utility of a group of judges who are not experts making site visits under Article 44(2) ICJ Statute in cases involving particularly complex or technical facts is doubtful.

Similarly, it should be noted that increased use of the Court's competence to establish a commission of inquiry under Article 50 of the Court's Statute as it did in the *Corfu Channel* case is not advocated in the thesis. This reluctance can be attributed to the fact that other inter-state tribunals such as the WTO and inter-state arbitrations have displayed a preference for reliance on individual experts rather than commissions of inquiry or expert review groups. It is suggested that this can be attributed to a fear of creating a 'tribunal within a tribunal'.<sup>1359</sup> As stated above, the Court may be loath to fetter its own discretion, both in terms of the flexibility of the fact-finding process and limiting its discretion as to the ultimate factual determination by establishing a commission of inquiry under Article 50 of its Statute. On the other hand, individual experts offer the Court greater control over the fact-finding process and avoid the Court being presenting with a report representing the common findings of a group of experts which would carry great epistemic weight and would be extremely hard to contradict or nuance. In addition, of course, this reluctance can also result from resource constraints which obviously limit the Court's ability to establish a commission of inquiry under Article 50 of its Statute. Both financial and time restraints would appear to favour the appointment of an individual expert as opposed to a commission of inquiry under Article 50 of the Court's Statute.<sup>1360</sup> Time and resource constraints are fundamentally important to the Court and must not be overlooked at any stage when considering reform of the Court's procedure.

The practice of other international courts and tribunals as examined in Chapter 3 also cautions against advocating greater resort to witness testimony. The problematic handling of witnesses and the dubious value that such witnesses have brought to international proceedings to date, coupled with the fact that the Court has never called a witness *proprio motu* under Article 50 of its Statute cautioned against advocating this particular reform.<sup>1361</sup> In the same vein, the

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<sup>1358</sup> Walter 1048

<sup>1359</sup> See Section 3.1.2.5.

<sup>1360</sup> See DSU Article 12.9 - Pauwelyn, 'The use of experts in WTO dispute settlement' 328

<sup>1361</sup> Article 50 states that 'The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.'; See Section 1.1.5.; Higgins, 'Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly'; Talmon, 'Article 43', see paras. 133-136

WTO's experience in utilising the burden of proof raises fears that manipulating the burden of proof before the ICJ would complicate rather than improve the Court's fact-finding process.<sup>1362</sup> To date the Court has somewhat shied away from making explicit statements on the burden and standard of proof in cases that have come before it. Whilst increasingly complex cases coming before the Court may lead some to call for a clearer articulation of the burden of proof, it is suggested that the practice of the adjudicative bodies of the WTO should be a somewhat cautionary tale for the Court as attempts to utilise the burden of proof have brought an element of uncertainty to proceedings.<sup>1363</sup>

The Court's Article 30(2) ICJ Statute power to appoint assessors without the right to vote to assist the Court has been advocated by some commentators.<sup>1364</sup> However such proposals are not taken up in the current thesis due to the fact that such provisions in the constitutive instruments and rules of procedure of other international courts and tribunals have never been utilised.<sup>1365</sup> Similar reasoning has cautioned against proposals to the effect that, drawing on the experience of judges in the US Supreme Court, the Court could develop an open list of standard questions that it could utilise when examining complex or particularly scientific evidence.<sup>1366</sup> Some commentators have argued that such questions could be structured in such a way as to methodically provide the Court with information on the hypothesis of the expert appearing before it and the methodology that the expert has used in reaching that hypothesis.<sup>1367</sup> However, it can be anticipated would not consider such limits on its discretion by adopting a standard set of questions desirable and as such it is unlikely that the Court would adopt this proposal.

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<sup>1362</sup> See the lengthy section on the WTO's experience with the burden of proof in 3.1.4.

<sup>1363</sup> Ibid

<sup>1364</sup> C. Payne, 'Mastering the Evidence: Improving Fact-Finding by International Courts' 41 *Environmental Law Journal* 1191, 1217; See Federal Rules of Civil Procedure 53 (c)(1); Such Masters were appointed by the US Supreme Court in almost every case between 1961 and 1992; now authorized by Federal Rules of Civil Procedure, Rule 53, and corresponding state measures; See Federal Rules of Civil Procedure 53, e.g. Massachusetts Rules of Civil Procedure 53; the appointment of assessors is explicitly provided for in Article 30(2) of the Court's Statute and similar provisions exist in the constitutive instruments of other international courts and tribunals such as Article 289 UNCLOS; see Myron H. Nordquist, *United National Convention on the Law of the Sea*, vol V (Myron H. Nordquist, S. Rosenne and Louis B Sohn eds, Volume V, Articles 279 to 320, Annexes VI, VI, VII, VIII and IX, Final Act, Annex I, Resolutions I, II, III and IV, 1 edn, Martinus Nijhoff 1989) 51; Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (Martinus Nijhoff 2000) 67

<sup>1365</sup> Most probably because such figures 'are too close to being judges or arbitrators'; Treves 485; Annex VII is different in that arts 2 and 3 stipulate qualifications for experts

<sup>1366</sup> O'Donnell

<sup>1367</sup> It has been argued that such questions 'would provide structure...expose methodological flaws, avoid unwanted inferences, and clarify the legal standard'; see Moreno 565

One proposal that deserves slightly closer attention is that of making more regular use of Article 34(2) of the Court's Statute. Article 34(2) provides that the Court may request of public international organizations information relevant to cases before it and represents another fact-finding tool for the Court.<sup>1368</sup> Although the Court has not made significant use of this provision to date, greater use of this provision could provide the Court with additional information that would not have been put before the Court by the parties.<sup>1369</sup> To elaborate, in taking a more proactive approach to the facts, under Article 34(2) the Court could request the Human Rights Council or the UN Secretary-General, for instance, to establish a commission of inquiry to provide it with more information in relation to factual issues that have arise in cases that come before the Court.

Utilising Article 34(2) as such it could be foreseen that the Court could exert control over a number of procedural issues relating to the establishment of the fact-finding inquiry, including the specifying exactly what issues it requires further assistance on. Furthermore, there is the addition benefit of being a relatively inexpensive way of bringing additional information before the Court due to the fact that the costs incurred would be borne by the General Assembly or Secretary-General. This would be particularly advantageous given the fact that resource constraints have often been cited as a reason as to why the Court has more often made use of its Article 50 ICJ Statute powers to establish a commission of inquiry.

However, whilst Article 34(2) of the Court's Statute is, at least in theory, another means by which the Court can bring information not submitted by the parties before the Court, in reality jurisdictional constraints mean that Article 34(2) is unlikely to ever meaningfully alter the way in which information comes before the Court, as the following subsection demonstrates. Cases can be brought under the Court's advisory jurisdiction under Article 96(1) of the UN Charter.<sup>1370</sup> It can be envisaged that in the course of advisory proceedings before the Court a factual issue could arise for which the establishment of a fact-finding inquiry could be potentially useful.<sup>1371</sup> However, the issue of which entities are competent to request an

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<sup>1368</sup> The corresponding Rules of the Court, Article 69 (1) to (3) state that the Court can 'at any time prior to the closure of the oral proceedings, either *proprio motu* or at the request of one of the parties...request a public international organization...to furnish information relevant to a case before it'; Chinkin and Mackenzie 140

<sup>1369</sup> For a fuller discussion of the merits of taking the course of action considered in this subsection see; Devaney

<sup>1370</sup> In accordance with this provision the General Assembly and the Council can request an advisory opinion on 'any legal question' and under Article 96(2) any other organ or specialised agency, if so authorised by the Assembly, can request an opinion on any question 'arising within the scope of their activities'; B. Simma, 'Article 92' in B. Simma (ed), *The Charter of the United Nations: A Commentary* (2 edn, OUP 2002) *ibid*

<sup>1371</sup> Such was the case in *The Wall* advisory opinion where, in the absence of Israel, the Court relied to a large

advisory opinion has always limited the number of requests put to the Court.<sup>1372</sup> Since states themselves are not competent to request an advisory opinion, any state wishing to do so must achieve the support of a majority of Security Council Members or secure sufficient support to achieve a two-thirds majority in the General Assembly – difficult tasks for any state and almost impossible for an unpopular or controversial state.<sup>1373</sup> These strict jurisdictional constraints combined with the Council’s reluctance to seek guidance from the Court (something which the Court has only ever done once<sup>1374</sup>) explains both why there have not been more advisory proceedings before the Court and why Article 34(2) of the Court’s Statute is an unlikely means of bringing additional information before the Court.<sup>1375</sup>

Similarly, with regard to the Court’s contentious jurisdiction, jurisdictional constraints operate such as Article 34(1) of the Court’s Statute which provides that only states can be party to contentious proceedings before the Court, and as such excludes non-state actors.<sup>1376</sup> Put simply, for the possibility of the Court making use of Article 34(2) to arise, an evidentiary gap capable of being remedied through resort to this provision must form part of the dispute between the (state) parties.<sup>1377</sup> In the end the Court can only utilise UN fact-finding when it is given the chance of doing so, and as the previous subsection has attempted to demonstrate, the Court will only have the opportunity to do so in a limited range of circumstances owing to in-built jurisdictional constraints.

In addition to such jurisdictional problems there are of course the dangers associated with

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extent and placed considerable reliance on UN Documentation such as the Secretary-General’s report referred to in the request for the opinion; For an critical view of this practice see the Declaration of Judge Burgenthal in *The Wall Advisory Opinion* 240 at para 1; Judge Burgenthal argued that since this was an advisory opinion, Israel was under no obligation to present facts to the Court, '[t]he Court may therefore not draw adverse evidentiary conclusions from Israel's failure to supply it or assume, without fully enquiring into the matter, that the information and evidence before it is sufficient to support each and every one of its sweeping conclusions'; see Separate Opinion of Judge Higgins in *ibid* at para 57; for further reliance on the Secretary-General's Report and Written Statement by the United Nations see 168-171, paras 80-85, and 184, para 122

<sup>1372</sup> V. Arangio-Ruiz, 'The ICJ Statute, the Charter and Forms of Legality Review of Security Council Decisions' in L.C. Vorah (ed), *Man's Inhumanity to Man, Essays in Honour of Antonio Cassese* (Kluwer Law International, the Hague 2003) 60

<sup>1373</sup> Gowlland-Debbas, 'The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case' 670

<sup>1374</sup> *Namibia Advisory Opinion*

<sup>1375</sup> Bardo Fassbender, 'Review essay: Quis judicabit? The Security Council, its powers and its legal control' 11 *European Journal of International Law* 219, 223; Gill 122; Philippe Weckel, 'Le Chapitre VII de la Charte et son application par le Conseil de Sécurité' 37 *Annuaire français de droit international* 165; Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council' 64 *The American Journal of International Law* 1, 64

<sup>1376</sup> Not to mention a lack of Optional Clause Declarations under Article 36(2) of the Court’s Statute

<sup>1377</sup> E. De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 70



executive-administrative finality as discussed at length in Chapter 2. The notion of executive-administrative finality, as demonstrated in the recent *Armed Activities* and *Bosnian Genocide* cases illustrates that the Court attributes ‘greater weight to UN reports than to other types of secondary evidence such as press reports’ ostensibly due to the presumption that such UN reports are based on solid, objective and impartial fact-finding.<sup>1378</sup> In relation to the establishment of a commission of inquiry under Article 34(2) of the Court’s Statute, there is of course always the possibility that the dangers associated with executive-administrative finality as outlined in Chapter 2 reoccur in a different form and pose the same problems to the proper administration of justice.

Ultimately the preceding sections have sought to demonstrate two points. First of all, not all of the Court’s fact-finding powers are advocated as ways in which the Court could address the weaknesses in its current fact-finding process. Secondly, those reforms that are proposed which involve greater use of certain fact-finding powers are limited in nature and are not a perfect solution to the problems the Court currently faces. In short, not only does the Court’s current reactive approach to fact-finding have its merits but the Court’s fact-finding powers are also limited in nature. Nevertheless, it is maintained that the reforms proposed in Chapter 4, were they to be adopted, have the potential to materially improve the fact-finding process before the International Court of Justice.

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<sup>1378</sup> Teitelbaum 145 Riddell and Plant 237; Further, it has been suggested that a case recently removed from the Court’s docket, the *Aerial Spraying* case would also have raised issues of reliance on evidence emanating from UN sources, namely UN Special Rapporteurs appointed to examine the Ecuador-Colombia border; see Boyle and Harrison 270



## *Epilogue*

This thesis has examined the ICJ's approach to fact-finding, drawing on the practice of other inter-state tribunals including a number of recent arbitrations and the adjudicative bodies of the WTO. Other inter-state tribunals such as ITLOS and the international criminal tribunals were referred to in a number of discrete areas, most often to provide context or a point of comparison in relation to the argument being made. However, what is clear is that the issue of judicial fact-finding is equally in need of academic attention in other areas. For instance, international investment law is one of the most exciting and active areas of international law at present. Consideration of issues of evidence and fact-finding before investment tribunals would undoubtedly raise pertinent issues. Similarly, whilst there has been some discussion of the use of evidence before international criminal tribunals,<sup>1379</sup> further academic attention is merited, especially given the fact that individual liberty is at stake in such cases.

The reforms proposed in this thesis are a select few and, it is argued, could realistically be adopted should the Court choose to do so. The rationale behind the modest, realistic nature of the proposals is summed up well by former President of the Court Rosalyn Higgins, who has stated that '[o]ne hasn't to be grandiose, but if we can help in particular cases, in coping with what otherwise could be disintegrating into violence, it's very good.'<sup>1380</sup> It should be made clear that the thesis has never at any stage proposed that the Court completely disregard the evidence put before it by the parties and undertake its own wide-ranging fact-finding. Instead, the thesis has argued that the Court's current reactive approach to fact-finding is at times problematic and that the practice of other inter-state tribunals provide inspiration as to how to reform the Court's current approach in order to ensure that it can make factual determinations that are as accurate as they can possibly be.

The reforms proposed would provide the Court with a power to compel the production of evidence through purposively interpreting its current fact-finding powers, relying on the duty of each party to collaborate in the production of evidence or by couching its requests within provisional measures which are binding on the parties (subject to a number of conditions). Furthermore, the reforms proposed in Chapter 4 would provide the Court with a clear strategy

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<sup>1379</sup> Combs; K. A. A. Khan, C. Buisman and C. Gosnell, *Principles of Evidence in International Criminal Justice* (Oxford University Press 2010)

<sup>1380</sup> J. Joor and H.V. Stuart, *The Building of Peace, A Hundred Years of Work on Peace Through Law: The Peace Palace 1913-2013* (1 edn, Eleven International Publishing 2013) 405

for better use of expert evidence which would assist the Court in cases involving particularly complex or technical evidence, which Chapter 2 showed present the Court with very real difficulties and threaten the proper administration of justice. This issue provides just one example of how fruitful the comparative exercise undertaken in Chapter 3 was in terms of providing models for reform of the Court's problematic approach to fact-finding. For instance, the *Guyana/Suriname* arbitration provided a clear example of the value of a tribunal-appointed expert in cases where the discovery of certain information is disputed,<sup>1381</sup> whilst the *Kishenganga* arbitration provided a useful alternative in this respect, demonstrating how discussions between the parties with the adjudicators *in camera* can similarly lead to satisfactory results in terms of the disclosure of contested information.<sup>1382</sup>

As highlighted above, these select reforms would not require amendment of the Court's Statute – a process that would be difficult if not impossible. Rather, the proposed reforms could all be realistically made through increased use of fact-finding powers that the Court already possesses, orders or practice directions. Furthermore, Chapter 5 showed that the Court's discretion to take a more proactive approach to fact-finding is not fettered by its role within the institutional structure of the United Nations.

Of course, the ultimate decision as to whether the Court reforms its fact-finding process lies with the Court itself. Those who sit on the bench of the World Court may well decide to carry on regardless, dealing with cases that are consistently complex in terms of the facts, unconvinced of the benefits of taking a more proactive approach to fact-finding. Or perhaps more likely, whilst there may be some within the Court who recognise a need for reform, the institutional culture of the Court may prove resistant to change. Nevertheless, it is argued that, at the very least, serious reconsideration of how the Court deals with facts is warranted. Otherwise, in the words of the late Antonio Cassese '...there is a risk that more cases will go elsewhere (eg to arbitral courts or to specialized tribunals...) and the Court will become a less attractive institution.'<sup>1383</sup>

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<sup>1381</sup> Order No. 4 1(a) 1(b) and 2(a); See *Guyana v Suriname Arbitration*, see paras 64-70; see also Procedural Order No. 8, at 3.1

<sup>1382</sup> See Procedural Order No. 8, at 3.4, 3.5

<sup>1383</sup> Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady' 239

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