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Managing Litigation before the International Court of Justice

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ABSTRACT

Conducting litigation before the International Court of Justice is a complex process that requires attention to detail and involves several tricky questions, most of them of acute practical import. This article seeks to present and highlight the most important among them, i.e. the preparation for the litigation, both at the substantive and procedural levels; budgetary issues; representation before the Court; choosing and appointment of a Judge ad hoc as well as counsel and advocates; logistics; meetings with the President and the other party; written and oral stages of proceedings; incidental proceedings; and preparing for and reacting to the final decision by the Court. On each aspect, a legal and theoretical framework is outlined, followed by highlights derived from the actual experience of the authors in participating in proceedings before the ICJ.

1 GENERAL OVERVIEW: PREPARING FOR INTERNATIONAL LITIGATION

At the heart of it, litigation is about the art of persuasion, understood as the effective advocating for a particular outcome under the applicable law. International litigation is not only about the fine-tuning of legal theory supporting a given position related to certain facts concerning a dispute under international law, it also involves

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numerous supplementary issues such as procedure and logistics, which we will examine in this piece.

While there might be cases considered to be relatively straightforward, proceedings before international courts and tribunals generally are or can become very complex. Hence, litigation before the International Court of Justice (ICJ), or before any other international tribunal, requires a fair deal of preparation, particularly if the dispute concerns substantive issues of foreign policy or is politically sensitive, predominantly if it involves issues of national security, defense or sovereignty. But, as the case is, just about any question of international law can be highly relevant for the concerned States, as the case law of the ICJ and other international tribunals amply demonstrates.

In the following pages, we set out to enumerate certain general notions concerning practical questions that arise when States become involved in litigation before the ICJ (the Court). This piece is a condensation of sorts of the practical experience of the authors in dealing with these questions in different capacities and as such it merely intends to highlight, without in any way pretending to exhaust, several practical aspects that deserve attention when the contentious jurisdiction of the Court is activated and a State is engaged in the litigation process.

2 SUBSTANTIVE AND PROCEDURAL PREPARATION

The substantive preparation focuses on the building up of the legal position that a party sets out to preserve or to gain in an international dispute. This involves identifying the facts of the dispute, the factual and historical background, the applicable law, the relevant case law, the sources of evidence and the legal strategy to be pursued.

The procedural preparation concerns the way in which proceedings must be carried out according to a given set of rules, and it involves a great deal of logistical preparation. That is, all actions that need to be undertaken to render an effective administration and delivery of the substantive position before the Court.

Therefore, substance and procedure go hand in hand. If a party plays down the importance of the procedural framework, it can and will affect the outcome of the case.

BOX 2.1. LITIGATION PROCEDURE AT THE ICJ: GOVERNING INSTRUMENTS

The governing instruments for the conduction of litigation before the ICJ are the *Statute*, the *Rules of Court* and the *Practice Directions*.

The Statute of the Court is an international treaty which is an integral part of the Charter of the United Nations. Every State member of the United Nations (UN) is therefore a party to the Court's Statute.

The Rules of Court are adopted by the Court pursuant to Article 30, paragraph 1 of the Statute. The Rules currently in force were adopted in 1978 and have been amended in 2000 and 2005.

The Court's Practice Directions are guidelines 'for use by States appearing before it'. They are adopted by the Court under a practice that began in October 2001. According to the Registry of the Court, 'Practice Directions involve no alteration to the Rules of Court, but

are additional thereto. They are the result of the Court's ongoing review of its working methods'.[1]

Other instruments of lesser importance pertaining to the internal workings of the Court are:

- The Resolution concerning the internal judicial practice of the Court, adopted in 1976;
- The 'Instructions for the Registry', drawn up in October 1946 and amended in March 1947 and September 1949.

The text of these documents can be downloaded from the excellent website of the Court at www.icj-cij.org

For example, the groundwork of expert reports, or the preparation of written pleadings, although purely procedural actions, are central to the substantive arguments in a case. Or if a piece of evidence has not been authenticated or has been wrongly translated, it may not be given its due evidentiary weight. This has a twofold effect in litigation. First, the concerned party may no longer be able to rely on that particular evidence; and second, the other party will surely attempt to benefit from this by casting doubt on the whole of the evidence submitted to the Court by the first party.

Thus, managing litigation requires acknowledgement that to achieve a legal objective, one needs to identify and understand the many processes that the litigation entails, even if they appear to be procedural, and thus, less significant than the substantive issues involved.

3 A CRUCIAL ASPECT IN THE MANAGEMENT OF LITIGATION: THE BUDGET

This may be surprising. The public might think that among the most important aspects in managing litigation is knowing the Rules of Court inside out. That obviously is important, but experience dictates that above all one needs to have the necessary means to conduct litigation, and therefore, the first step is to find the money.

In private litigation this may seem rather obvious. Corporations may have big budgets set aside for litigation, and often litigation is expected and planned for. And even if there is no planning on litigation expenditures, a corporation or a private individual is better placed to move very swiftly in making a budget available in case of unexpected judicial proceedings.

Yet, the same cannot be said for States. While some States, particularly large ones, may have ready to go legal departments able and fully prepared to undertake litigation at a moment's notice, most States do not. Hence, confronted with imminent international litigation—either because a State is planning to bring a case before the Court or because it learns that it is a respondent in one—a State must first budget for it.

1 ICJ, 'Acts and Documents Concerning the Organization of the Court', No 6 (2007), 163.

Budgeting is in itself complicated. In some States it is a lengthy process involving several individuals and organizations. The process may involve overcoming the pitfalls of the State's Foreign Ministry internal machinery, the General Comptroller's Office, the Ministry of Finance, and, sometimes, even the Office of the President itself. After that process is completed, then it might also be up to Congress to pass the necessary budget laws. But once in Congress, approval of the budget could become a turbulent political issue.

Therefore, having the necessary resources available is quite relevant and should be addressed at the outset. Also important is that the authorities are aware of the scope of the challenges of international litigation together with its likely costs.

As such, it is advisable to consider the various elements that a State must specifically budget for, that is, the items generally tagged for international litigation. Predominantly, among others:

- legal fees for counsel and advocates;
- fees for technical services;
- fees for consultants and expert advice;
- local and international travel;
- per diems for individual members of a legal team;
- hiring costs for venues for meetings;
- translations;
- couriers;
- printing expenses;
- on-site visits;
- hiring or purchasing of specialized equipment (if the case has a technical component);
- oral hearings' war room;
- hotel accommodation during hearings;
- transportation to and from the Court;
- incidentals; and
- contingency funds.

BOX 3.1. FINANCING THE LITIGATION: THE UN TRUST FUND

In order to alleviate, to a certain extent, the financial burden for States coming to the ICJ and to encourage a wider recourse to judicial settlement, the Secretary-General of the UN established in 1989, a trust fund to provide financial assistance to States coming before the Court.[2] The Fund is replenished with voluntary contributions. By 30 June 2012, the Secretary-General reported that the total balance of the Fund net of awards already paid was $2,959,966.39.[3]

This list is not exclusive, as there could be several other expenses that may come up during critical periods of a proceeding.

Budgeting is important because in certain States public money cannot be spent without it being earmarked by law for specific expenditures, and it is the first thing to be satisfied before engaging in litigation.

4 THE SELECTION OF AN AGENT AND CO-AGENTS

This is an essential aspect of litigation before the Court. When confronted with international litigation, particularly unexpected litigation, many issues require immediate attention, such as the State's legal position, the logistics, the budget, and the selection of the legal team, all at once. But the selection of the Agent and Co-Agents, comes among the first, if not the first.

The Agent is, for all intent and purpose, the representative of the State before the Court. No individual can undertake the representation of the State in proceedings before the Court without first having his or her appointment formally notified to the Court.

Usually, a State will decide to appoint a person with a specific profile as Agent depending on the characteristics of the case. When matters relate to general questions of law and its interpretation, which may not be critical to the State concerned, it may appoint the legal advisor to the Foreign Ministry, or an Attorney General as Agent.

However, when the matter relates to acute political issues that could have a wide national impact, or is at least viewed as having a national impact, such as the matters outlined earlier, like defense, security and/or sovereignty, States may take a different approach to the appointment of this important figure. If the matter is politically sensitive, the appointed Agent would generally be a person with a recognized track record of excellence in public service in his/her country, such as a former Foreign Minister, a politician of great stature, or an internationally recognized practitioner of international law. This appointment has not merely legal significance, it is often of high political consequence, as the country is expected to rally and unify in support of the case, and the Agent plays an important role in achieving that unity.

But of course, what the State in question tries to attach to this appointment depends on how important the case is viewed, as a Government may wish to send out a signal that the case is very sensitive, or, alternatively, may suggest that the case is really not too important at all. However, most States attach great importance to litigation before the International Court of Justice, and the appointment of an Agent highlights that fact.

The Agent does not only represent the State in the Court's proceedings: he or she, for all practical matters, becomes the manager-in-chief of the case. Ultimately, how litigation is handled in all its possible compartments very much depends on the Agent.

2 *Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice,* Report of the Secretary-General, UN Doc A/47/444, annex. The revised version of the Terms of Reference can be found in UN Doc A/59/372.

3 UN Doc A/67/494.

BOX 4.1. STATE REPRESENTATION BEFORE THE COURT: GOVERNING INSTRUMENTS

The fundamental norm concerning representation of States before the Court is embodied in Article 42, paragraph 1 of the Statute, which states:

> 'The parties shall be represented by Agents.'

Article 40 of the Rules of Court develops this principle as follows:

> '1. Except in the circumstances contemplated by Article 38, paragraph 5, of these Rules, all steps on behalf of the parties after proceedings have been instituted shall be taken by agents. Agents shall have an address for service at the seat of the Court to which all communications concerning the case are to be sent. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves.
> 2. When proceedings are instituted by means of an application, the name of the agent for the applicant shall be stated. The respondent, upon receipt of the certified copy of the application, or as soon as possible thereafter, shall inform the Court of the name of its agent.
> 3. When proceedings are brought by notification of a special agreement, the party making the notification shall state the name of its agent. Any other party to the special agreement, upon receiving from the Registrar a certified copy of such notification, or as soon as possible thereafter, shall inform the Court of the name of its agent if it has not already done so!'

In February 2002, the Court adopted two Practice Directions establishing certain criteria for the appointment of agents, counsel and advocates. The first is Practice Direction VII, the closing sentence of which reads:
'(. . .) parties should (. . .) refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court.'
The second is Practice Direction VIII, which imposes a straightforward restriction on the State's freedom to designate its agent, counsel or advocate. It reads:

> 'The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before

the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court.'

A State does not always need to name a Co-Agent, or Co-Agents, in order to manage cases before the Court. However, it very much depends on the case and how a country decides to handle it. On occasion, a Co-Agent is named in order to balance out the political representation in a given case. Sometimes it is appointed to manage specific tasks in a case.

It is a good practice to appoint the Ambassador of the concerned State in the Netherlands, if not as Agent, as Co-Agent. This not only gives the State concerned a permanent representative dealing with issues before the Court in real time, but it also allows for a closer assessment of how the case may be perceived by the diplomatic and legal circles in The Hague. This insight is of great value when preparing the litigation strategy.

5 APPOINTMENT OF JUDGE *AD HOC*

The Statute of the Court permits a State which does not have a national judge sitting on the bench to nominate a judge *ad hoc*, who need not have the nationality of the appointing State.

Many States tend to nominate a person who is not their national. The reason behind this fact deals with perception, and that is, the belief that a State's own national may be geared to favour the position of its own country, and therefore, it is felt that his/her input in the decision-making process leading up to a judgment may be limited. For example, in recent proceedings before the Court both Costa Rica and Colombia have decided to nominate individuals of a recognized track record in international law, who are respected and who carry with them authority and objectivity, but who are not their nationals. These two elements, authority and objectivity, are thus important features when nominating a judge *ad hoc*. And just to make it clear, a judge *ad hoc* is not the party's own defense lawyer inside the Court, as someone

BOX 5.1. JUDGES *AD HOC*: GENERAL RULES

Article 31 of the Statute provides:

'1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in

> Articles 4 and 5.
> 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.
> 4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.
> 5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.
> 6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues'

As for the Rules of Court, the most directly relevant provisions concerning judges *ad hoc* are:

- Article 35—Procedure for the appointment and confirmation of a judge *ad hoc*
- Article 36—Parties in the same interest and judge *ad hoc*
- Article 37—Replacement of a national judge by a judge *ad hoc*

Practice Direction VII also refers to the appointment of certain persons as judge *ad hoc*. It reads:

> 'The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court.'

See also the contents of Practice Direction VIII, reproduced in **Box 4.1**.

wrongly suggested once. It would be seriously prejudicial to the bench, but also to a country's case, if a judge *ad hoc* was to behave in such a manner. It is also of the utmost importance that once a nomination has been made, the party in question breaks all possible contact with the judge *ad hoc*, so that the proceedings are not tarnished in the least.

6 THE SELECTION OF THE LEGAL TEAM—THE QUESTION OF LANGUAGE—*HOME TEAM V EXTERNAL COUNSEL*

This of course is a very relevant issue. The selection of the legal team is not only crucial, it can make or break a case, regardless of how good the legal position of the concerned party may be to start with.

It is not enough to put together recognized practitioners in international law. The possible appointment of recognized practitioners, of course, is important, and it is not only relevant just because the State concerned may wish to reassure its national public opinion. It is relevant because these individuals have achieved a recognized standing by way of insight, knowledge, wisdom, influence and experience. Therefore,

BOX 6.1. THE QUESTION OF LANGUAGE: GOVERNING INSTRUMENTS

Article 39 of the Statute provides:

> '1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.
> 2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.
> 3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.'

As for the Rules of Court, Articles 51 and 71, paragraphs 1 and 2 are relevant. They read:

> *'Article 51*
>
> 1. If the parties are agreed that the written proceedings shall be conducted wholly in one of the two official languages of the Court, the pleadings shall be submitted only in that language. If the parties are not so agreed, any pleading or any part of a pleading shall be submitted in one or other of the official languages.

2. If in pursuance of Article 39, paragraph 3, of the Statute a language other than French or English is used, a translation into French or English certified as accurate by the party submitting it, shall be attached to the original of each pleading.' (See **Box 10.2**)

'*Article 71*

1. A verbatim record shall be made by the Registrar of every hearing, in the official language of the Court which has been used. When the language used is not one of the two official languages of the Court, the verbatim record shall be prepared in one of the Court's official languages.
2. When speeches or statements are made in a language which is not one of the official languages of the Court, the party on behalf of which they are made shall supply to the Registry in advance a text thereof in one of the official languages, and this text shall constitute the relevant part of the verbatim record.'

Practice Direction IV is also applicable. It reads:

'Where one of the parties has a full or partial translation of its own pleadings or of those of the other party in the other official language of the Court, these translations should as a matter of course be passed to the Registry of the Court. The same applies to the annexes. These translations will be examined by the Registry and communicated to the other party. The latter will also be informed of the manner in which they were prepared.'

a State aims to recruit counsel that fulfill those conditions. Surely there are plenty of 'international law experts' who may be very knowledgeable, but with no insight into litigation before the Court; or general practitioners with great experience, but who know very little of the specifics of the matter the concerned State is dealing with.

Thus, the vetting process must be carried out judiciously. What a State seeks is to put together a balanced team, covering all aspects necessary to make a strong stand before the Court, and therefore, it is advisable to have seasoned advocates as counsel. But, at the same time, the State concerned must also evaluate exactly what are the contributions that these 'seasoned advocates' are likely to make. The State must also ensure balance between civil law and common law traditions, and between advocates who can address the Court in its two official languages.

If a State has decided to bring in several high-profile names, it is advisable to have certain level of chemistry between them. It does not mean that they need to be the greatest of friends. Actually, having counsel being close friends between them might not work very well, as certain positions may go unchallenged, something a State may

only find out when it might just be too late, right in the middle of a hearing, when the opposite counsel is taking apart that very position.

Therefore, it is prudent that the team includes seasoned divergent voices as well. Said that, when preparing the legal stance, the concerned State cannot allow its legal team to become a battleground of egos either, and that is known to have happened.

There are international law practitioners who are brilliant, but who are completely unable to function within the realm of a team. If they are brought in, the concerned State must compartmentalize its position, which means, people working in the same matter but not together. However, if a State is forced to do so to start with, its position maybe not sealed tight, as there could be inconsistencies arising from the failure to work as part of an integrated team.

For any aspiring practitioner of international law, it is important to be direct and honest. A counsel or advocate should undertake a case only if he or she knows to have the time and to be able to effectively advocate in favor of the party concerned. It would be very unfortunate for a State to instruct counsel that, regardless of how good he or she may be, has no time, or has lost interest in the case. Therefore, an aspiring practitioner must make sure that, as counsel, he or she will always have both, time and interest.

There are other factors at play as well. It is also relevant to consider giving young people the opportunity to prove their worth, and therefore, there should be a policy to allow bright young professionals to be part of a legal team. The same applies in relation to gender balance—women are as good, and in some cases better than some of their male colleagues! Everybody must have a fair chance if they bring value to the cause. It is all a matter of balance.

There is another challenge, which is that of the assembling of the 'home team'. By 'home team', it is meant assembling a team made up exclusively of professionals of the State party to a case, usually working at some Government department or other. This, experience shows, can be tricky, and it is tricky because political views of the local team may influence the way a case is conducted. There, of course, is the fact that to be member of a team pleading before the ICJ is a source of pride and accomplishment, and therefore competition is fierce to make it to the team. Sometimes when someone does not make the team, the person in question may become a source of endless and misinformed criticism, which could become distractive.

The setting up of a 'home team' is also of the greatest importance for various reasons. At the end of the day, the carpentry that makes a case rest, significantly, with them. That is particularly true when the dispute at hand involves facts that relate to substantial historical background, and/or where the evidence needs to be sourced on the ground, which is common.

International lawyers may be very good at international law, but many of them are not much concerned about understanding the details of national views or domestic settings. Yet, more often than not, a case is brought about precisely because of the sensitivities of national history and/or domestic settings, which cannot be disassociated from the case. The concerned advocate is not going to effectively bring about the result the State hopes for if he or she does not care to understand the underlying domestic issues surrounding a case. Even when it is felt that a client's case is very difficult to make, it is important to understand not just their narrative

and motives, but the political complex that surrounds the case. And that is where the home team is of great value, because they can bridge and help understand these realities.

Once the team is assembled, home and international, then comes the job of team building. That is of great importance because the very first barrier, which is language, needs to be ironed out as soon as possible. Chances are that a team would have to communicate, at any time, in three languages. That is the experience of Costa Rica and Colombia, where it was needed to bring in French, English and Spanish.

Naturally, like in any other human activity, a team is bound to have conflict, and the management of conflict here is quite important. If a State has a very senior counsel, who everybody knows would settle a dispute on a question of law, the Agent will generally go with his/her opinion, provided it does not undermine the very position the country is defending. Sometimes the Agent would argue for a view his country would like to make, and a senior member of the team would say that it is no relevant, and, if it is not essential to the country's position, the Agent would let it go. However, there are times when it is obvious that not only there is no consensus among team members about the importance of a given position, the team maybe sharply split about a point of fact, law or strategy, with no clear resolution; and as such, there comes a time when the Agent needs to stand up to his authority, regardless of how senior counsel may be, and make a final decision.

Obviously, there are arguments in a case that are much more interesting than others. For example, no many senior counsels would like to present the history of the dispute as background for hard legal argument. On the other hand, everybody wants to argue the substantive question of international law that forms the subject-matter of the dispute, particularly if it is known that the case is strong there. Ultimately, the Agent would need to be able to discern who is likely to best bring the different points to the Court that make up the State's case. For example, if it is a question of law, the Agent would want its most senior Counsel to do so; but if it concerns a question of evidence, the Agent may want the counsel who is more experienced in determining facts and handling evidence to do the job, and so on.

7 UNDERSTANDING PROCEDURE AND ITS IMPACT ON LOGISTICAL PREPARATION

This aspect of the preparation is complex. Procedure at the ICJ is a very relevant factor in the determination of the merits of a case.

In general terms, the Court is considerably more flexible in its approach towards procedure than many domestic courts. The Court seems to have understood very well that procedure is but a tool to rationalize litigation, one that cannot trump the ultimate purpose of the litigation, which is to determine the true facts of a case, to identify the applicable law and to ensure the correct application of said law to the demonstrated facts, thus ensuring that justice is rendered.

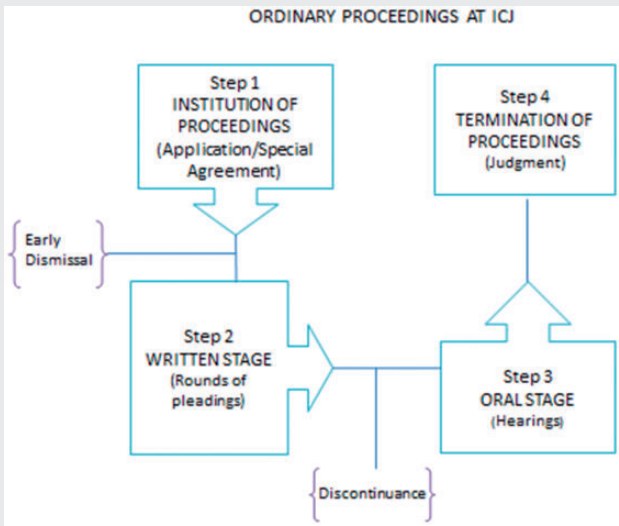
The Permanent Court of International Justice, predecessor of the current Court, recognized as much in an often-quoted decision in which it was stated that:

BOX 7.1. STRUCTURE OF PROCEDURE IN LITIGATION BEFORE THE COURT

Article 43 of the Statute provides:

> '1. The procedure shall consist of two parts: written and oral.
> 2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.
> (. . .)
> 5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.'

The following figure shows the general structure of litigation in contentious cases in which no incidental proceedings take place.



> The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.[4]

However, being flexible does not mean that procedure is irrelevant. Quite on the contrary, it could have a direct impact on the outcome of a case.

And of course, in the overall preparation to undertake litigation before the Court, it is critical to understand how a case will be handled procedurally. For example, it is

4 Mavrommatis, Jurisdiction, Judgment No 6, 30 August 1924, PCIJ Series A, No 2, p 34.

one thing to have the Court decide on interpretation of a single clause in a given treaty, with a single submission; than say, having a case where the dispute refers to the simultaneous interpretation and application of several international instruments, coupled with extensive technical evidence regarding multiple breaches of sovereignty and environmental obligations.

However, proceedings in which no incidents occur are the exception rather than the rule. The *Certain Activities* and *Construction of a Road* cases, involving Costa Rica either as an Applicant or as a Respondent, are examples of complex proceedings.[5] Those cases were formally joined, and as a result, at the end of the proceedings the Court had to deal with some 31 combined submissions. Those were also cases in which much of the Rules of Court were applied, since they included incidental proceedings—or 'cases within cases'—concerning (several) requests for the indication of provisional measures, counter-claims, joinder of proceedings and multiple questions related to evidence and proof of facts. Because of this, these joined cases were particularly challenging from a legal tactical point of view.

Likewise, in three recent cases involving Colombia, there were incidental proceedings concerning challenges to the Court's jurisdiction or the admissibility of the Application in the form of preliminary objections, and in one of them the Court had to deal with not one but two separate requests for permission to intervene submitted by third parties.[6] These are also good examples of complex proceedings.

In general terms, if a case is going to involve various rounds of written pleadings, incidental proceedings, the calling of experts or witnesses, the examination of technical evidence, requests for permission to intervene and several oral hearings, then long and protracted legal tactical warfare is to be expected. The State or States involved need to put together a procedural strategy and assemble a wide-ranging professional team. In these circumstances it means that the State concerned need to compartmentalize the work, and make sure that in every aspect of the preparation everyone involved understands the procedural stage it is at, as well as the procedural requirements for the effective delivery of the legal product required for that stage. That means that, besides managing processes, the Agent, the Co-Agents and the counsel become, effectively, lecturers of international law, as they need to constantly give crash courses to the various members of the wider team, so that they can grasp the procedural requirements at the stage of the proceedings the party is at.

As to the legal scope of the procedural rules that may be applied by the Court in a given phase, it is necessary to examine how the Court has applied those rules in past cases, so that the State concerned gets a general sense of their application and

5 See *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*)—*Construction of a Road Along the San Juan River* (*Nicaragua v Costa Rica*) <http://www.icj-cij.org/en/case/150> accessed 10 July 2018.

6 Cases concerning the *Land and Maritime Dispute* (2001–2012); the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (2013 to date); and the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (2013 to date). In all three cases, Nicaragua appears as Applicant and Colombia as Respondent.

scope in proceedings. Yet, it is considered that many of the rules of procedure appear to be rather sketchy, and therefore, their practical interpretation and application may be quite different from what, at a first glance, it is believed to be their purpose and scope. Ultimately, the interpretation and application of the rules of procedure rests with the Court and depends heavily on the specifics of each case.

8 PREPARATION OF MEETINGS WITH THE PRESIDENT OF THE COURT AND OPPOSING AGENT AND COUNSEL

First, a word on the role of the Registry and the President of the Court. Not only they represent the Court, formally, but their offices are the first and only point of contact between the parties to a proceeding and the Court.[7] Naturally the President is a figure of great importance. He or she not only administers the Court, he or she also presides over hearings, meetings and deliberations, and certain decisions, including decisions on proceedings that need to be made urgently, would be made by him or her.[8]

The Registry receives and transmits all correspondence, pleadings and material between the parties. The Registry would also ensure that the parties comply with practice directions and will arrange for every logistical action relative to proceedings. For example, in the case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v Nicaragua*), the Court arranged for an expert opinion,[9] only the second time in its history that it has done so. All the practical details of this sort of appointments and other logistical arrangements are, therefore, carried out by the Registry.

Before the proceedings start in earnest, the President of the Court calls for a meeting with the Agents. These meetings have the purpose of inquiring the view of the parties about deadlines and other practical matters. On occasion they are short, and the parties briefly state their views. However, such meetings may also be viewed as an opportunity to advance a tactical position. While generally it is not advisable to engage in heated discussions before the President of the Court, it is obvious that a party to a case must be prepared for surprises. For example, say that from the outset a concerned State has planned on a single round of written pleadings, and the opposite party has planned on a two rounds strategy. The determination of the number of written rounds could be very relevant because not only this could mean that the strategic planning of the first party may be seriously impacted, but also that the case may take more or less time than the concerned State may have planned for, thus affecting the budget, or more importantly, impacting the scope of the dispute and with it, the outcome.

Other scenario that may present itself is that one of the parties has more or less made up its mind to challenge the Court's jurisdiction or the admissibility of the Application—an entirely reasonable course of conduct in a system in which the

7 On the functions and powers of the President and the Registrar see, in general, arts 12 and 26 of the Rules of Court.

8 For a full listing of decisions that can be delegated to the President under the Court's governing instruments, see Juan J Quintana, *Litigation at the International Court of Justice—Practice and Procedure* (Brill/Nijhoff 2015) 175–77.

9 See *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v Nicaragua*), Order by the International Court of Justice, 16 June 2016 <http://www.icj-cij.org/files/case-related/157/157-20160616-ORD-01-00-EN.pdf> accessed 10 July 2018.

BOX 8.1. MEETINGS OF THE PRESIDENT OF THE COURT WITH THE AGENTS: GOVERNING INSTRUMENTS

Article 31 of the Rules of Court provides:

> 'In every case submitted to the Court, the President shall ascertain the views of the parties with regard to questions of procedure. For this purpose he shall summon the agents of the parties to meet him as soon as possible after their appointment, and whenever necessary thereafter.'

In order to implement the provisions of Article 31 of the Rules, the Court has adopted two Practice Directions. In the first place, Practice Direction X, issued in July 2004, states:

> 'Whenever a decision on a procedural issue needs to be made in a case and the President deems it necessary to call a meeting of the agents to ascertain the views of the parties in this regard pursuant to Article 31 of the Rules of Court, agents are expected to attend that meeting as early as possible.'

Secondly, in January 2009 the Court approved a new Practice Direction XIII, which reads:

> 'The reference in Article 31 of the Rules of Court to ascertaining the views of the parties with regard to questions of procedure is to be understood as follows:
>
> > After the initial meeting with the President, and in the context of any further ascertainment of the parties' views relating to questions of procedure, the parties may, should they agree on the procedure to be followed, inform the President by letter accordingly. The views of the parties as to the future procedure may also, should they agree, be ascertained by means of a video or telephone conference.'

jurisdiction of the tribunal depends in absolute terms on State consent—but would want to circumvent the procedure of formally filing preliminary objections. It could then avail itself of the opportunity afforded by this initial meeting to voice its intentions, thus triggering the application of the special procedure provided for in paragraphs 2 and 3 of Article 79 of the Rules of Court.[10]

10 This procedure was codified and introduced into the Rules of Court only in year 2000. Prior to that date it had been resorted to and developed exclusively on the basis of the practice of States (Quintana (n 8) 759–67).

If a party wishes to have backup in case this meeting becomes contentious on legal points, the concerned Agent would generally bring along counsel, although it is not advisable to bring a whole team of lawyers. That means that the party must assess carefully what are the tactics that the other party may feel inclined to advance and prepare a response in turn. Experience shows that these meetings are generally pleasant, and the parties maintain a high measure of courtesy.

9 PREPARING FOR THE WRITTEN STAGE: DIFFERENT APPROACHES FOR APPLICANT AND RESPONDENT

There appear to be advantages and disadvantages to being either Applicant or Respondent. An Applicant may be best placed to set the general terms under which a dispute would be addressed. Still, some experienced Agents have said that they prefer to be Respondents, because they would always have the last word.

Regardless of preference, the overall approach when a State is Applicant or Respondent is different. An Applicant will always have to shoulder two important undertakings: First, it is for that party to provide most of the evidence, as it generally has a larger *onus probandi* than the Respondent. While the Respondent would also need to provide evidence to support its claims, its burden of proof is less exhaustive.

BOX 9.1. INSTITUTION OF PROCEEDINGS: *APPLICATION V SPECIAL AGREEMENT*

Article 40, paragraph 1 of the Statute provides:

> 'Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.'

In the Rules of Court, the *unilateral* institution of proceedings—by means of an Application—is governed by Article 38, while the joint institution of proceedings—by means of a Special Agreement—is governed by Article 39.

An important, if formal, consequence of the method chosen to institute proceedings is that in the case of unilateral applications there will be per force an Applicant (or claimant) State and a Respondent (or defendant) State. In the event of joint recourse to the Court there will only be two 'parties' to the case and both of them will act, as the case may be, either as applicants or as respondents—or as both. This is entirely without consequence with regard to the question of the burden of proof, but it will have important effects as to the number and order of pleadings that will be exchanged during the written stage of proceedings (see **Box 9.2**).

BOX 9.2. THE WRITTEN STAGE: GENERAL RULES

The most directly relevant provisions in the Rules of Court concerning aspects of the written stage of proceedings are:

- Article 45—Number and order of pleadings in cases begun by Application;
- Article 46—Number and order of pleadings in cases begun by Special Agreement (this rule is supplemented by Practice Direction I);
- Article 49—Contents of the written pleadings;
- Article 52—Formal aspects of the pleadings (signature; certified and additional copies; dating of pleadings; correction of errors).

Apart from Practice Direction I, concerning the order of pleadings in Special Agreement cases, Practice Direction II is also pertinent, as it refers specifically to the contents of any pleading. It reads:

> 'Each of the parties is, in drawing up its written pleadings, to bear in mind the fact that these pleadings are intended not only to reply to the submissions and arguments of the other party, but also and above all, to present clearly the submissions and arguments of the party which is filing the proceedings. In the light of this, at the conclusion of the written pleadings of each party, there is to appear a short summary of its reasoning.'

This obviously applies only in general terms, as there is a general obligation of both parties to provide the Court with the evidence substantiating the facts and allegations that they are making, and both are obliged to assist the Court in establishing all the relevant facts. Yet, depending on the particulars of the case, the Applicant would generally have to positively prove the case it chose to bring before the Court, whereas the Respondent would generally have to negatively refute the case. That is, of course, unless there are counter-claims, a rather more elaborate scenario in which the Respondent in the main case becomes the claimant with regard to part of the dispute and the situation just described with regard to the burden of proof is automatically reversed.

A second undertaking for the Applicant is to propose the timing for the proceedings. Generally, it is for the Applicant to suggest the length of the first and second rounds of written pleadings, or even if there is going to be a second round at all. Obviously, the Respondent has the right to make known its views, and to propose alternatives as well, and Respondents often do, sometimes even more vigorously than the Applicants. However, the impulse of the proceedings, to a point, rests largely with the Applicant.

BOX 9.3. THE DEVICE OF 'NEW DOCUMENTS': GENERAL RULES

An important procedural device with which the practitioner must be familiar with is that of the 'new documents', ie, evidence of a documental nature that is to be filed belatedly, after the closing of the written stage of proceedings. The question was foreseen in general terms in Article 52 of the Statute and has been meticulously regulated by the Court, through the following provisions:

'*Statute, Article 52*

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.'

'*Rules of Court, Article 56*

1. After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or as provided in paragraph 2 of this Article. The party desiring to produce a new document shall file the original or a certified copy thereof, together with the number of copies required by the Registry, which shall be responsible for communicating it to the other party and shall inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.
2. In the absence of consent, the Court, after hearing the parties, may, if it considers the document necessary, authorize its production.
3. If a new document is produced under paragraph 1 or paragraph 2 of this Article, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.
4. No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute or this Article, unless the document is part of a publication readily available.
5. The application of the provisions of this Article shall not in itself constitute a ground for delaying the opening or the course of the oral proceedings.

Practice Direction IX

1. The parties to proceedings before the Court should refrain from submitting new documents after the closure of the written proceedings.
2. A party nevertheless desiring to submit a new document after the closure of the written proceedings, including during the oral proceedings, pursuant to Article 56, paragraphs 1 and 2, of the Rules, shall explain why it considers it necessary to include the document in the case file and shall indicate the reasons preventing the production of the document at an earlier stage.
3. In the absence of consent of the other party, the Court will authorize the production of the new document only in exceptional circumstances, if it considers it necessary and if the production of the document at this stage of the proceedings appears justified to the Court.
4. If a new document has been added to the case file under Article 56 of the Rules of Court, the other party, when commenting upon it, shall confine the introduction of any further documents to what is strictly necessary and relevant to its comments on what is contained in this new document.

Practice Direction IX bis

1. Any recourse to Article 56, paragraph 4, of the Rules of Court, is not to be made in such a manner as to undermine the general rule that all documents in support of a party's contentions shall be annexed to its written pleadings or produced in accordance with Article 56, paragraphs 1 and 2, of the Rules of Court.
2. While the Court will determine, in the context of a particular case, whether a document referred to under Article 56, paragraph 4, of the Rules of Court, can be considered "part of a publication readily available", it wishes to make it clear to the parties that both of the following two criteria must be met whenever that provision is applied.
   i. First, the document should form "part of a publication", i.e. should be available in the public domain. The publication may be in any format (printed or electronic), form (physical or on-line, such as posted on the internet) or on any data medium (on paper, on digital or any other media).
   ii. Second, the requirement of a publication being "readily available" shall be assessed by reference to its accessibility to the Court as well as to the other party. Thus the publication or its relevant parts should be accessible in either of the official languages of the Court, and it should be possible to

consult the publication within a reasonably short period of time. This means that a party wishing to make reference during the oral proceedings to a new document emanating from a publication which is not accessible in one of the official languages of the Court should produce a translation of that document into one of these languages certified as accurate.

3. In order to demonstrate that a document is part of a publication readily available in conformity with paragraph 2 above and to ensure the proper administration of the judicial process, a party when referring to the contents of a document under Article 56, paragraph 4, of the Rules of Court, should give the necessary reference for the rapid consultation of the document, unless the source of the publication is well known (e.g. United Nations documents, collections of international treaties, major monographs on international law, established reference works, etc.).
4. If during the oral proceedings a party objects to the reference by the other party to a document under Article 56, paragraph 4, of the Rules of Court, the matter shall be settled by the Court.
5. If during the oral proceedings a party refers to a document which is part of a publication readily available, the other party shall have an opportunity of commenting upon it.'

See also Practice Directions IX *ter* (**Box 13.2**) and IX *quater* (**Box 13.1**).

Serious work goes into the preparation of the written stage of proceedings. The Rules of Court clearly set out that all the documentary evidence making up the case-file must be presented at this stage.[11] This means that all documents relied upon, including any affidavits and expert opinions, must be submitted along with the written pleadings. This is the phase of the case at which, in the nature of things, the bulk of the legal position of each party is asserted and put before the Court.

The number and order of rounds of written pleadings, especially in cases submitted by Application, depends both on strategy and on developments in the situation that gave rise to the proceedings. As a matter of strategy, an Applicant may want to frame its case in such a way that a second round may prove unnecessary. It may also be the case that the Respondent's first pleading (a Counter-Memorial) proves to be rather challenging, and tactically it may seem necessary to have a second round, or, as the case may be, there may be new developments relating to the subject-matter of the dispute that have taken place after the proceedings were set in motion, and a second round becomes necessary to address them. Although all decisions regarding the number and order of written pleadings rest with the Court, significant consideration is usually given to the preferences of the parties.

11 See Box 10.2.

10 PRACTICAL MATTERS: TRANSLATION OF ANNEXES—CHOICE OF PRINTER—PROOFING

These all seem to be inconsequential and obvious housekeeping chores. Yet, for the most part, they are not.

A party often finds that its domestic translators are not equipped with the skills necessary to translate very technical terminology, including international law

BOX 10.1. FORMAT OF PLEADINGS: GENERAL RULES AND PRACTICAL QUESTIONS

Article 52, paragraph 1 of the Rules of Court provides:

> 'The original of every pleading shall be signed by the agent and filed in the Registry. It shall be accompanied by a certified copy of the pleading, documents annexed, and any translations, for communication to the other party in accordance with Article 43, paragraph 4, of the Statute, and by the number of additional copies required by the Registry, but without prejudice to an increase in that number should the need arise later.'

According to established practice, the materials to be delivered with the Court's Registry when filing a pleading are the following:

- an original copy of the pleading, signed by the agent, to which is annexed a certified copy of any relevant document adduced in support of the contentions put forward;
- an English or French translation, certified by the agent to be accurate, of any part of a pleading or annexed document submitted in another language;
- a copy, certified by the agent, of the pleading and annexed documents, for communication to the other party;
- 125 further copies of the pleading and annexed documents (75 of which should be on paper, while 50 may be on USB stick);
- an electronic copy of any pleading;
- in the case of any document of which only parts are relevant and only necessary extracts have been annexed to the pleading, a copy of the whole document.[12]

In the official text of the Rules of Court Article 52 is accompanied with a footnote having the following text:

> 'The agents of the parties are requested to ascertain from the Registry the usual format of the pleadings.'

12 Source: *ICJ Yearbook* (2012–2013) 39.

Implementing this regulation, when a case is begun the Registrar hands out to the representatives of the parties two documents containing valuable information of a practical nature, namely:

- 'Note for the parties concerning the preparation of pleadings' and
- 'Rules for the preparation of typed and printed texts.'

parlance, forcing it to look for translators elsewhere. These are of course cases in which the official language of one of the parties is not English or French.

A concerned State may thus find itself pressed with the fact that there may be thousands of pages to be translated, but also, perhaps, it has not budgeted for it. It seems obvious, but in the dead heat of an international dispute, this might not be exactly at the very top of the long list of things to consider.

Even something as simple as the choice of printer is relevant. For example, in one case it was decided to have the official national printer of the concerned State to print its written pleadings. That proved to be riddled with difficulties. Not just because everyone involved needed to know, and to understand—two different things—the Court's requirements as to format for the presentation of written pleadings, evidence and speeches; but also because, as it happened in that case, even the actual size of the paper turned out to be different from that used in The Hague and its environs.[13] Even when the concerned team managed to get the formatting right, after a good week of fighting the computers, the job of printing itself presented a challenge. Then there was the arduous task of reviewing every page of every volume of every set printed, to make sure for consistency, and to even make sure that the volumes were bound—meaning, glued—correctly. Once all that was done, a special courier had to be arranged to take the materials to the Netherlands, which was hired only a few days before the deadline. But as things go in these cases, during transit not only some boxes were damaged, Dutch customs started demanding custom payments, and therefore withheld that State's written pleadings in a warehouse near Schiphol airport. After some frantic diplomatic exchanges, the Dutch authorities were eventually persuaded that those were diplomatic documents, which were protected by both the Vienna Convention on Diplomatic Relations and the agreements between the Court and the Netherlands concerning the privileges and immunities of the ICJ, which allowed a just on time delivery of the precious documents.

Practice shows that even with experienced printers, the party must always check every document that is coming out. It is an engaging and time-consuming process. In most cases, a task force will have to be set up that would deal with it and to make sure that there is enough time to proof read and correct errors up to the very last minute.

And yes, the State concerned must take care of the security of its case. Most of the time the legal team deals with sensitive national security issues, and therefore the

13 According to the Registry, 'The format for the pleadings and annexes is 19 × 26 cm', ibid.

BOX 10.2. ANNEXES TO THE WRITTEN PLEADINGS: GENERAL RULES

Annexes are called in Article 43 of the Statute 'papers and documents in support'.
In the Rules of Court, annexes are governed by the following provisions:

'Article 50

1. There shall be annexed to the original of every pleading certified copies of any relevant documents adduced in support of the contentions contained in the pleading.
2. If only parts of a document are relevant, only such extracts as are necessary for the purpose of the pleading in question need be annexed. A copy of the whole document shall be deposited in the Registry, unless it has been published and is readily available.
3. A list of all documents annexed to a pleading shall be furnished at the time the pleading is filed.'

'Article 51

(. . .)

3. When a document annexed to a pleading is not in one of the official languages of the Court, it shall be accompanied by a translation into one of these languages certified by the party submitting it as accurate. The translation may be confined to part of an annex, or to extracts therefrom, but in this case it must be accompanied by an explanatory note indicating what passages are translated. The Court may however require a more extensive or a complete translation to be furnished.'

Also relevant are Practice Directions III and IV, providing as follows:

'Practice Direction III

The Court has noticed an excessive tendency towards the proliferation and protraction of annexes to written pleadings. It strongly urges parties to append to their pleadings only strictly selected documents.'
Practice Direction IV
(see **Box 6.1**).

high authorities of the State concerned would request that the team manages the information, discussions and documents with the utmost care and discretion, and as such, a security protocol must be set up.

11 PREPARING FOR INCIDENTAL PROCEEDINGS

Possibly the most challenging of the procedural phases that a party might face is a request for the indication of provisional measures under Article 41 of the Statute. This incidental procedure, as is well known, deals with the protection of a party's rights in the face of irreparable damage. Obtaining provisional measures is not easy, as the standard that needs to be met is relatively high. Not only the requesting party needs to demonstrate that it has a right that is plausible and that there is a link between this right and the measures requested, but it also needs to show that if an interim measure is not accorded with the outmost urgency, the enjoyment of that right is likely to be lost, and, if lost, the prejudice resulting would be irreparable.

Preparation for incidental litigation concerning provisional measures of protection also entails that the party requesting the indication of these measures makes sure that the Court is satisfied that in granting them it will not be deciding the merits of the dispute, and that tactically and strategically the request is air-tight.

This demands vast amounts of man-hours that are needed in a very short period of time, as generally, a situation that entails protection might take place overnight. The time allowed for the collection and processing of evidence is extremely short, as the party might be forced to present its request—or to respond to a request made by the other party—within days of the incident that gave rise to the request. Also, there is no written stage and there is usually a very short time that the Court would allow between the presentation of the request and the oral hearings, and the hearings

BOX 11.1. INCIDENTAL PROCEEDINGS: GENERAL RULES

Section D of Part III of the Rules of Court deals with 'Incidental Proceedings'. The structure of this section is as follows:

- Subsection 1. Interim Protection (Articles 73–78)
- Subsection 2. Preliminary Objections (Article 79)
- Subsection 3. Counter-Claims (Article 80)
- Subsection 4. Intervention (Articles 81–86)
- Subsection 5. Special Reference to the Court (Article 87)
- Subsection 6. Discontinuance (Articles 88–89)

Also relevant with regard to certain types of incidental proceedings are the following Practice Directions:

Practice Direction V (Preliminary Objections)

> 'With the aim of accelerating proceedings on preliminary objections made by one party under Article 79, paragraph 1, of the Rules of Court, the time-limit for the presentation by the other party of a written statement of its observations and submissions under Article 79, paragraph 5, shall generally not exceed four months from the date of the filing of the preliminary objections.'

Practice Direction VI (Preliminary Objections)

Article 60, paragraph 1, of the Rules provides:

> 'The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party's contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.'

'The Court requires full compliance with these provisions and observation of the requisite degree of brevity. Where objections of lack of jurisdiction or of inadmissibility are being considered, oral proceedings are to be limited to statements on the objections.'

Practice Direction XI (Provisional Measures)

> 'In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.'

themselves are a veritable marathon, since very often the evidence is being submitted at a very late stage, and the situation on the ground may be developing.

Other incidental proceedings are not less important, although perhaps not as time stretched as these on provisional measures. Of note are proceedings on preliminary objections, counter-claims and requests for permission to intervene. Preliminary objections are, possibly, the most markedly tactical of all incidental proceedings, as the party making those objections would normally want to kill the proceedings or part of them before the merits are dealt with, and therefore it aims at limiting or stopping altogether the subject-matter of a dispute from being adjudicated at all. But, as the case may be, this can also backfire. The Court may be forced to make a determination on the scope of its jurisdiction at a very early stage in the proceedings, which may mark the definite outcome of that objection and the effect it may have on the merits of the dispute.

At any rate, incidental proceedings as such are of great importance and require a great deal of strategic planning, effort and resources.

12 PREPARING FOR THE ORAL HEARINGS ON THE MERITS

Regardless of whether the written stage of proceedings has been easy, or has proven to be a challenging tactical contest, the oral hearings on the merits are of monumental importance.

The years of work, and of thousands of hours of planning, and of thousands of pages of documents and evidentiary materials of all sorts of shapes and forms, all of it boils down to the oral hearing.

BOX 12.1. THE ORAL STAGE: GENERAL RULES

Section C of the Rules of Court deals with 'Proceedings before the Court'. Subsection 3, entitled 'The Oral Proceedings' contains the following provisions:

- Article 54—Fixing of date for the opening of the oral stage
- Article 55—Holding proceedings at a place other than the seat of the Court
- Article 56—New documents
- Article 57—Production of evidence
- Article 58—Handling of evidence—conduction of hearing
- Article 59—Public and private hearings
- Article 60—Oral statements—submissions
- Article 61—Questions for the parties and requests for explanations
- Article 62—Powers of the Court with regard to the production of evidence
- Article 63—Witnesses or experts called by parties
- Article 64—Solemn declaration by experts or witnesses
- Article 65—Examination of experts and witnesses
- Article 66—Obtaining of evidence by the Court
- Article 67—Enquiry or expert opinion commissioned by the Court
- Article 68—Payment of experts and witnesses
- Article 69—Information furnished by international organizations
- Article 70—Use of languages
- Article 71—Verbatim record—corrections—minutes
- Article 72—Written replies to questions—reopening of oral stage of proceedings
- Also of interest in this regard is Practice Direction VI (see **Box 11.1**).

It is here, at this very short period of time of the proceedings—which, as recent Court practice shows, may be comprised of less than a dozen hours per side—where the parties make their last stand, and where, to a significant degree, a case may be lost or won.

And it is relevant because it is the highpoint to proceedings, when the parties will have the Court's attention in full. This is an extraordinary opportunity to engage, through direct eye contact, with the members of the Court, and to bring about the main issues at stake in the case. Here too, and of late, the Court is much more engaged and has shown itself more prone to posing questions to the parties.

And even when a hearing is generally composed of maybe long, and in some cases, boring speeches, the truth is that it matters. The Court is able to sense here the depth of an argument and the value of the evidence. It is obvious that some counsel may be drawn to put on some theatrics and showmanship in their quest to be persuasive: a mere observation. All the same, this stage of the litigation is about convincing the adjudicator about the merits of the concerned State's case, or, as it may be, the lack of merit of its opponent's case. Generally, advocates do both, and in doing so, they go into a great degree of preparation.

The teams take some time before the hearing to discuss and prepare the party's case and to evaluate the opponents' position. The preparation entails also the fine tuning of the strategy, the selection of the most relevant evidence and the interpretation the party makes of it. The advocate needs to be brief but complete, that is, he or she cannot disregard the details, but does not have much time to dwell at length either. If a party does not address a detail, the opponent may go at it, and the Court may notice. So being economical but complete is critical, which is not easy to achieve.

If witnesses or expert witnesses are to be examined or cross-examined, it also requires a good deal of preparation, as the concerned State may wish to make only the most relevant points that the witness is able to address. This does not mean that the parties go about 'coaching' the witnesses, which under most jurisdictions is not only unethical, it is unlawful. Rather, the preparation is focused on trying to get out of the evidence the strongest points in each party's case.

13 CERTAIN PRACTICAL MATTERS: 'CONCENTRATION' OF TEAM IN THE HAGUE—PREPARATION OF JUDGE'S FOLDERS—PREPARING FOR A SECOND ROUND AND FOR JUDGES' QUESTIONS

The preparation in this critical phase requires careful planning. Depending on the complexity of the case, the party ought to have the right amount of support personnel at hand. It also needs to choose the right premises for its 'war room'.

The war room is essential, as it is the physical space where the last stand is planned for. Members of the team need to feel relaxed and able to reach their accommodation with some ease. If someone is tired or feeling sick, it is not right to have

BOX 13.1. PRESENTATION OF EVIDENCE: GENERAL RULES

Evidence is only mentioned briefly in the Statute in Articles 44, 48 and 52.

As for the Rules of Court, the most important provision concerning the presentation of evidence is Article 57, which reads:

> 'Without prejudice to the provisions of the Rules concerning the production of documents, each party shall communicate to the

> Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce 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.'
>
> Also relevant is Practice Direction IX *quarter*, adopted in April 2013, and concerning 'audio-visual or photographic material' to be presented by a party at the hearings. It reads:
>
> '1. Having regard to Article 56 of the Rules of Court, any party wishing to present audio-visual or photographic material at the hearings which was not previously included in the case file of the written proceedings shall submit a request to that effect sufficiently in advance of the date on which that party wishes to present that material to permit the Court to take its decision after having obtained the views of the other party.
> 2. The party in question shall explain in its request why it wishes to present the audio-visual or photographic material at the hearings.
> 3. A party's request to present audio-visual or photographic material must be accompanied by information as to the source of the material, the circumstances and date of its making and the extent to which it is available to the public. The party in question must also specify, wherever relevant, the geographic co-ordinates at which that material was taken.
> 4. The audio-visual or photographic material which the party in question is seeking to present shall be filed in the Registry in five copies. The Registrar shall communicate a copy to the other party and inform the Court accordingly.
> 5. It shall be for the Court to decide on the request, after considering any views expressed by the other party and taking account of any question relating to the sound administration of justice which might be raised by that request.'

them too far away from their quarters. It also helps when work is required around the clock, since everything is done in the one place.

Given the intensity of the work, it is also essential to have a number of highly motivated and qualified individuals clerking, and therefore able to withstand heavy work through the night. Some teams would have a person exclusively in charge of judges' folders.

BOX 13.2. THE JUDGES' FOLDERS: GENERAL RULES

Practice Direction IX*ter*, adopted in 2006, provides:

> *Practice Direction IX*ter
>
> The Court has noted the practice by the parties of preparing folders of documents for the convenience of the judges during the oral proceedings. The Court invites parties to exercise restraint in this regard and recalls that the documents included in a judge's folder should be produced in accordance with Article 43 of the Statute or Article 56, paragraphs 1 and 2, of the Rules of Court: No other documents may be included in the folder except for any document which is part of a publication readily available in conformity with Practice Direction IX *bis* and under the conditions specified therein. In addition, parties should indicate from which annex to the written pleadings or which document produced under Article 56, paragraphs 1 and 2, of the Rules, the documents included in a judge's folder originate.

The judges' folders are of great importance because they constitute the only printed material the judges are guaranteed to look at during the hearings. Here a party would include only the most relevant material that it wants the judges to have before them throughout the hearing. The preparation of these materials, particularly for the second round of oral hearings, requires careful planning under a great deal of pressure.

A team needs to prepare carefully for every possible incident, including having a spare printer ready to go in case its main printer gives up at 3 am, as it happened once.

Just when the parties think that they are done with the hearing, and both parties have closed and presented their final submissions, the President might let them know that members of the Court wish to put questions to them. This means that the oral hearings are not yet officially closed. If questions are queried, usually the Court gives the parties a week or so to respond in writing, and an extra week to comment on the other party's response. However, there have been cases in which the Court requested an immediate reply, giving the parties only half an hour to prepare the response, which goes on to show that a case is not finished until it is truly finished, and that up to the last minute the teams need to remain prepared and available.

BOX 13.3. QUESTIONS TO THE PARTIES: GENERAL RULES

Articles 61, 62 and 72 of the Rules of Court provide:

'*Article 61*

1. The Court may at any time prior to or during the hearing indicate any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument.
2. The Court may, during the hearing, put questions to the agents, counsel and advocates, and may ask them for explanations.
3. Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President, who is made responsible by Article 45 of the Statute for the control of the hearing.
4. The agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President.

Article 62

1. 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.
2. The Court may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings.

Article 72

Any written reply by a party to a question put under Article 61, or any evidence or explanation supplied by a party under Article 62 of these Rules, received by the Court after the closure of the oral proceedings, shall be communicated to the other party, which shall be given the opportunity of commenting upon it. If necessary the oral proceedings may be reopened for that purpose.'

14 PREPARING FOR THE JUDGMENT: MANAGING EXPECTATIONS AND PUBLIC OPINION

The parties are done with the case and are sitting tight waiting for the delivery of the judgment. Generally, after the Court has declared the proceedings closed and gathers

BOX 14.1. THE JUDGMENT: GENERAL RULES

Section F of the Rules of Court deals with 'Judgments, Interpretation and Revision'. Subsection 1, entitled 'Judgments' contains the following provisions:

- Article 94—Reading of the Judgment
- Article 95—Contents of the Judgment—Individual opinions—Copies
- Article 96—Authoritative text
- Article 97—Costs

for deliberation, a judgment would be delivered in about 6 months after the proceedings have been closed. Sometimes, for a variety of reasons, this may take longer.

Although all cases are important, cases related to sovereignty or national security are particularly relevant in the domestic plane, both, legally and politically. As such, these cases garner a great deal of national and international interest. Obviously, the parties to a dispute would always appear in triumph and optimistic. Yet, it is particularly the job of the Agent and senior counsel to break into the State's upper echelons of Government their assessment of how the case might do. This is important because it allows the political decision-makers to prepare their public opinion. While it is not advisable to ever create expectations, it is recognized that it is impossible to escape from them.

The crafting of the public message depends very much on the importance of the case and the immediate interest of the public. On the one hand, there is the responsibility to be truthful, but on the other, there is the risk to show uncertainty, which could be very damaging to a country's legal position. Therefore, it is advisable to be prudent and to state that a great effort has been made, and that the concerned State trust fully on the good judgment of the Court.

However, at a time when that might be the public message, the parties must also prepare their institutions to deal with the judgment, particularly if it is felt that the concerned State may not obtain the best of results. This is essential in order to prepare the ground for institutional action, if such comes to be required.

15 DEALING WITH THE AFTERMATH OF THE JUDGMENT

The judgment is handed down, and often both parties claim that they have won the case. Sometimes, it must be admitted, that is the case. Most of the time, however, it is not.

If the judgment recognizes that the concerned State was mostly right, the public opinion of that State will be mostly satisfied, and there would be a feeling that justice has been served. If the judgment is clearly against that State or even if it is perceived as such, there could be serious political and legal implications, and the immediate

effect would be to hold the Agent or the Ambassador in The Hague accountable. In triumph, however, many would appear as the victors.

And when all has been said and done, as it appears sometimes, the parties find that they just finished one dispute only to start a fresh one. That could be the case when a judgment requires implementation. A judgment requires implementation when the Court orders that a given situation of fact and/or law needs to be remedied. That is, where the declaration itself is not enough and action from the losing side, or even from both sides, is required, in order to fulfill the terms of the *dispositif*.

Reparation might entail, chiefly, satisfaction, which in turn may require the amendment or enactment of domestic laws and/or the signing of new international instruments. It may also entail restitution, if restitution is possible, compensation or guarantees of non-repetition. As to compensation, the Court's consistent practice is to instruct the parties to negotiate between them the amount and form in which the compensation must be attained. In the *Certain Activities* Case, eg the Court gave Costa Rica and Nicaragua one year to do so.[14] In that case no agreement was possible, and Costa Rica requested the Court to make a final and binding settlement, which it did on 2 February 2018.[15]

16 CLOSING REMARKS

As this article has endeavored to show, litigation at the ICJ is a complex operation that requires extensive preparation with regard to both, substance and procedure. Several factors are at play when the litigation process is activated, and actual practice shows that the things that might go wrong exceed by far those that can be taken for granted.

A particularly important aspect has to do with the main actors representing States in the drama that may play out at the Peace Palace in The Hague. The diversity and complexity of the legal aspects involved would seem to require that the person or persons who will be tasked with the daunting job of defending a State in proceedings before the Court, possess a fair knowledge of public international law and a degree of familiarity with the Court's practices and processes. For the same reasons, a sound legal training is always advisable.

But this is not the end of the story because all issues at stake between sovereign States tend to become highly political. Thus, the person or persons involved must also be able to maneuver with swiftness in the political sphere, both domestically and in the international arena.

Last but not least, a modicum of managerial skills is of the essence when a State's defense case is going to be prepared and mounted in order to present a solid stance before international judges.

14 See *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*), Judgment of 16 December 2015 <http://www.icj-cij.org/files/case-related/150/150-201512F16-JUD-01-00-EN.pdf> accessed 10 July 2018.

15 See *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*), Judgment on the Compensation owed by the Republic of Nicaragua to the Republic of Costa Rica, 2 February 2018 <http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf> accessed 10 July 2018.

Being an Agent or Co-Agent, or Counsel and Advocate of a State before the ICJ is one of the highest honours that anyone may aspire to in the field of international law, but it also entails a heavy burden and formidable challenges. Those aspiring to occupy these positions would do well in getting acquainted with the myriad or practical issues that are the subject of the present article.