

ALL THINGS CONSIDERED: HOW THE INTERNATIONAL COURT OF JUSTICE DELEGATED ITS FACT-ASSESSMENT TO THE UNITED NATIONS IN THE *ARMED ACTIVITIES* CASE

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I. INTRODUCTION

The International Court of Justice’s docket increasingly includes fact-intensive cases in which the Court must focus on more than legal questions because the outcomes of the cases depend on a detailed assessment of the facts.<sup>1</sup> Examples of such cases include *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda) (the *Armed Activities* case) and the more recent judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro).<sup>2</sup>

In the *Armed Activities* case, the Court dealt with a wide range of complex, highly factual issues. These issues related, inter alia, to the Democratic Republic of Congo’s (DRC’s) assertions that Uganda violated the prohibition on the use of force and the principle of non-intervention by engaging in military and paramilitary activities against the DRC, occupying the DRC’s territory, and supporting irregular forces operating there. The DRC further claimed that, in violation of interna-

1. See Judge Rosalyn Higgins, Address at the 58th Session of the International Law Commission (July 25, 2006), available at <http://www.icj-cij.org/court/index.php?pr=1272&pt=3&p1=1&p2=3&p3=1>. Bothe points out that “claims about what ‘really happened’ often constitutes [sic] a substantial part of a dispute.” Michael Bothe, *Fact-Finding as a Means of Ensuring Respect for International Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 249, 249 (Wolff Heinstel von Heinegg & Volker Epping eds., 2007). Note that the ICJ has encountered fact-intensive cases in the past, but such cases have become more common in recent years and few have involved facts as detailed and contested as *Armed Activities*.

2. In this case, the main part of the judgment was devoted to assessing the evidence and making detailed findings of fact to determine if Serbia had committed the atrocities alleged by Bosnia and Herzegovina and, if so, whether there was specific intent on the part of the perpetrators to destroy a protected group (identified by the Court as the Bosnian Muslims) in whole or in part. Such a determination would engage the responsibility of Serbia under the Genocide Convention. See generally *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26) [hereinafter *Application of the Genocide Convention* 2007].

tional human rights and humanitarian law, Uganda had both committed acts of violence against the DRC's nationals and their property and failed to prevent such acts by people under its control. Finally, the DRC alleged that Uganda had violated rules governing respect for sovereignty over national resources and rules of occupation by looting, plundering, and illegally exploiting the DRC's assets and wealth.<sup>3</sup>

In highly fact-intensive cases such as these, the Court must untangle the exact sequence of events, identify the actors involved, and make factual and, ultimately, legal determinations.<sup>4</sup> For instance, in *Armed Activities* the Court had to assess whether Ugandan forces were in the DRC, under what mandate, and at what point in time. This task was further complicated in *Armed Activities* by the fact that the deliberations on the merits began before hostilities had concluded.<sup>5</sup> The character of these fact-intensive cases is fundamentally different from that of the Court's more traditional cases, such as territorial disputes, where legal issues are clear-cut and involve many of the same elements.<sup>6</sup> In these cases, "it is not so much the

3. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 24 (Dec. 19) [hereinafter *Armed Activities*] (laying out the arguments of the DRC).

4. See Higgins, *supra* note 1 (mentioning "the extreme complexity of the history of this conflict in the Great Lakes Region and . . . the difficulty in untangling the sequence of events and in identifying the numerous actors involved"). Judge Higgins has stated: "I cannot today recount all the legal and factual findings of the Court contained in the 171-page Judgment [in the *Application of the Genocide Convention* case], even in summary form." Judge Rosalyn Higgins, Address at the 59th Session of the International Law Commission 3 (July 10, 2007), available at <http://www.icj-cij.org/presscom/files/9/13919.pdf>.

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5. Higgins, *supra* note 1 ("This was by no means an easy or ordinary case for the Court, if only because when the deliberations on the merits started, the armed conflict was not entirely settled on the ground.").

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6. As Higgins points out: "Territorial disputes invariably involve many of the same elements, whatever the case. They concern an analysis of colonial instruments, the study of acts claimed as legal effectivities, and there is also frequently the question of *uti possidetis* to be factored in, which has a critical date function to play in the long history to independence and the long subsequent history." Higgins, *supra* note 1. One such example is *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, 2007 I.C.J. 120 (Oct. 8) [hereinafter *Territorial and Maritime Dispute Between Nicaragua and Honduras*].

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facts that are disputed as the conclusions to be drawn from them.”<sup>7</sup>

The Court considers itself well equipped to engage in complex factual determinations and has on occasion referred to its very specific and fact-based findings as being “noteworthy.”<sup>8</sup> A close reading of *Armed Activities* challenges this view, revealing that the Court fails to engage in independent fact-assessment.<sup>9</sup> Most strikingly, the Court accepts as proven facts that are drawn from secondary evidence, in particular from United Nations (UN) reports.<sup>10</sup> Furthermore, the Court does not articulate a clear standard of proof according to which it might weigh the evidence presented by the parties, making its factual findings difficult to disentangle from its legal conclusions.<sup>11</sup>

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7. 3 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920–2005*, at 1040 (4th ed. 2006).

8. Higgins, *supra* note 1.

9. Similarly to other court systems, the Court may accept fact finding by other parties. However, in my view, the Court may only do so if the processes through which facts are established (like the UN fact-finding mechanism) are transparent enough so that the Court can check these processes and determine the relevance of the facts in respect of the substantive international legal obligations. In this sense, I draw a distinction between “fact-finding”—the mere presentation/finding of facts—and “fact-assessment”—fitting the facts to a legal formula. In my view, this last task should be reserved for the Court.

10. In *Armed Activities*, the Court relies heavily on reports from the Porter Commission. The Court claimed that the Report of the Porter Commission deserved special notice because the Commission had obtained evidence “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.” *Armed Activities*, *supra* note 3, ¶ 61. In addition, neither party had challenged the Report’s credibility. *Id.* This Article does not elaborate on the Court’s reliance on the work of the Porter Commission. Instead, its focus is on the Court’s reliance on secondary evidence produced by the UN, because the problems associated with the delegation of fact-assessment to the UN are more likely to be repeated in future cases. Moreover, the suggestions made in Part IV of this Article allow the Court to deal with bodies like the Porter Commission as well as the UN more effectively and fairly.

11. Alvarez gives the same critique with regard to the Court’s 2007 *Application of the Genocide Convention* case. See José E. Alvarez, *Burden of Proof: Notes from the President*, AM. SOC’Y INT’L L. NEWSL. (Am. Soc’y Int’l L., Washington, D.C.), Spring 2007, at 1, available at <http://www.asil.org/newsletter/president/pres070625.html>.

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This Article addresses the Court's failure to engage in independent fact-assessment in *Armed Activities*. It questions whether the Court is capable of fulfilling the evidentiary framework established in its basic documents and in preceding cases in which the Court made extensive use of secondary evidence gathered by others. It also suggests changes for the Court's fact-evaluation that could be effectuated within the existing framework of the Statute of the International Court of Justice (the "Statute") and its Rules of Procedure (the "Rules").

The Article proceeds in five Parts. The second Part describes the evidentiary framework that the Court has developed to acquire and evaluate facts. The third Part analyzes the Court's assessment of the facts in *Armed Activities* and argues that the Court does not comply with its existing evidentiary framework. In particular, Part III addresses the Court's pervasive reliance on UN documents, arguing that such a practice implies delegation of fact-assessment to the UN. This delegation puts an essential judicial responsibility in jeopardy, undermining the Court's role as the ultimate adjudicator of both factual and legal issues. Part IV suggests four improvements to the Court's fact-evaluation within the structure of its existing powers. The first two proposals fall within the ambit of the Rules. One designs a UN fact-finding standard operating procedure, while the other suggests greater emphasis on a particularized approach to evidentiary rules and cooperation between States. Part IV also suggests that, if circumstances permit, the parties to the dispute should authorize the establishment of pre-trial chambers and the appointment of special masters.

## II. THE COURT'S POWERS AND PRACTICES IN TAKING AND EXAMINING FACTUAL EVIDENCE

This Part explains the Court's pre-existing evidentiary powers and practice in order to facilitate the evaluation of the Court's fact-assessment in *Armed Activities*. Section A discusses the Court's powers of taking evidence under the Statute and the Rules, while Section B discusses the Court's evaluation of evidence in its case law. In particular, Section B explores the weight attributed to particular types of evidence and the standard of proof against which this evidence is checked.

A. *The Basic Documents Provide the Court with Ample Power to Take Evidence*

As Santiago Torres Bernárdez notes, “[t]he Statute and Rules bestow upon the parties the primary role concerning the production of evidence.”<sup>12</sup> Since the Court cannot compel State parties to produce evidence, the factual framework of the case is determined by the facts the parties contest and the evidence they provide.<sup>13</sup> Nevertheless, the basic documents provide the Court with ample powers to gather evidence and manage fact-finding so that it can “guarantee the sound administration of international justice, while respecting the equality of the parties.”<sup>14</sup> The Court can request that the parties produce documents or supply information.<sup>15</sup> It can conduct site inspection<sup>16</sup> and entrust third persons with “the task of carrying out an enquiry or giving an expert opinion.”<sup>17</sup> Additionally, the Court may put questions to the agents, counsel, or advocates of the parties or ask them for explanations.<sup>18</sup> During a hearing, the Court may also call witnesses and experts on its own initiative,<sup>19</sup> in addition to hearing witnesses and experts called by the parties.<sup>20</sup> Finally, the Court can call on international organizations to provide information relevant to the case.<sup>21</sup>

Since all these evidentiary arrangements concern “the conduct of the case,” article 48 of the Statute prescribes that

12. Santiago Torres Bernárdez, *Article 48, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1081, 1096 (Andreas Zimmerman ed., 2006).

13. *Id.*; see Statute of the International Court of Justice art. 49, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute] (indicating that the Court’s only recourse against parties refusing to produce requested evidence is to take “[f]ormal note”).

14. Torres Bernárdez, *supra* note 12, at 1096.

15. I.C.J. Statute, *supra* note 13, art. 49; Rules of the International Court of Justice art. 62, 1978 I.C.J. Acts & Docs. 4 (as amended Apr. 14, 2005) [hereinafter I.C.J. Rules].

16. I.C.J. Statute, *supra* note 13, art. 44, ¶ 2; I.C.J. Rules, *supra* note 15, art. 66.

17. I.C.J. Statute, *supra* note 13, art. 50; I.C.J. Rules, *supra* note 15, art. 67.

18. I.C.J. Rules, *supra* note 15, art. 61.

19. I.C.J. Statute, *supra* note 13, art. 51; I.C.J. Rules, *supra* note 15, art. 62(2).

20. I.C.J. Rules, *supra* note 15, art. 65.

21. I.C.J. Statute, *supra* note 13, art. 34; I.C.J. Rules, *supra* note 15, art. 69.

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these arrangements be made by the Court in the form of an order.<sup>22</sup> Accordingly, the Court’s authority to make orders streamlining the evidentiary process is “part of the Court’s . . . inherent jurisdiction to control the proceedings themselves.”<sup>23</sup> Article 48 thus ensures the sound administration of justice and the equality of the parties while simultaneously indicating that ascertaining facts is a core responsibility of the Court.

Based on the foregoing provisions, the Court has adequate powers to secure evidence<sup>24</sup> and to guide the parties in their fact-finding efforts. The Court’s most significant impediment is that, as a consequence of its character as an adjudicator of sovereign states, it cannot compel the parties to produce evidence. Yet article 49 of the Statute provides the Court with a tool to counteract this obstacle. According to this provision, the Court can take “formal note” of any refusal of the parties to turn over the requested materials, e.g. by drawing adverse inferences from a refusal to provide requested documents.<sup>25</sup> Such inaction on the part of a state could thus have serious consequences for the burden of proof placed on it by the Court.

However, a party can only “refuse” to hand over evidence if the Court demands such action. Neither the Statute nor the Rules indicate when the Court should “call upon agents to produce any documents or to supply any explanations,”<sup>26</sup> leaving it within the Court’s judgment. Afraid of losing its impartiality, the Court has avoided such a proactive stance towards gathering information in the past. Only on a few occasions has it asked a state to produce documents, and it has not

22. I.C.J. Statute, *supra* note 13, art. 48.

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23. Bernárdez, *supra* note 12, at 1082.

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24. See Thomas M. Franck, *Fact-Finding Before the International Court of Justice*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 21, 32 (Richard B. Lillich ed., 1992).

25. I.C.J. Statute, *supra* note 13, art. 49; I.C.J. Rules, *supra* note 15, art. 62(1); see also *Application of the Genocide Convention 2007*, *supra* note 2, ¶ 205; Ruth Teitelbaum, *Recent Fact-Finding Developments at the International Court of Justice*, 6 *L. & PRAC. INT’L CTS. & TRIBUNALS* 119, 130-31 (2007) (discussing how the Court drew “conclusions” from but did not take formal note of Serbia and Montenegro’s failure to produce documents in the *Application of the Genocide Convention 2007* case).

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26. I.C.J. Statute, *supra* note 13, art. 49; I.C.J. Rules, *supra* note 15, art. 62(1).

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drawn any adverse inferences from the State's failure to do so.<sup>27</sup>

Judge Owada argues that this concern about impartiality backfires on the Court. In his analysis, article 49 is in fact a means by which the Court could remedy asymmetry in access to information, safeguarding the equality of parties before it. In factually complex cases, one party often has exclusive access to some information, thereby exercising indirect control over the fact-finding process. As Judge Owada reasoned in his separate opinion to *Oil Platforms*:

Accepting as given [the] inherent asymmetry that comes into the process of discharging the burden of proof, it . . . seems to me that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion. It 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 in the present case.<sup>28</sup>

Thus, the taking "formal note" provision of article 49 could be used not only to offset the Court's dependency on the willingness of the parties to produce evidence but also as a necessary tool to safeguard the equality of the parties and the fair administration of justice.

The Statute and the Rules attribute broad evidentiary powers to the Court. Traditionally, however, the Court has been reluctant to exercise these powers to seek factual information from the parties and to guide them through the pro-

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27. See Teitelbaum, *supra* note 25, at 129.

28. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 321 (Nov. 6) (dissenting opinion of Judge Owada). Drawing inferences from the parties' inaction would be one way for the Court to remedy such asymmetry in access to information.

cess of gathering evidence.<sup>29</sup> While in the Court’s earlier years the straight-forward character of many of the cases might have justified such an attitude, today the increase in the Court’s workload and the factual character of many disputes compel it to change its working methods. For this reason, “it can be expected that future panels of judges will become more actively involved in proceedings.”<sup>30</sup> Part IV of this Article suggests ways in which judges may effectively achieve this.

B. *The Practice of the Court Shows a Reluctance to Develop Rules on Evidence*

This Section examines (1) the Court’s appraisal of secondary evidence and (2) the Court’s standard of proof as established by its case law. According to its precedent, the Court will “identify the documents relied on and make its *own* clear assessment of their *weight, reliability* and *value*.”<sup>31</sup> While the parties decide what evidence to present based on the facts they claim<sup>32</sup> and contest,<sup>33</sup> it is up to the Court to articulate a clear standard of proof and to weigh the evidentiary materials presented to it. Since these issues are not spelled out in the Statute or the Rules, the observer must rely on the Court’s practice. A study of the case law reveals that although the Court gives some indications of how it appraises particular types of evidence, it generally applies a very open-ended, discretionary evidentiary standard. This makes the Court’s fact-assessment process hard to monitor, creating much doubt about what weight is given to certain types of evidence; what

29. See Christian J. Tams, *Article 49, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 12, at 1099, 1108.

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30. *Id.*

31. Armed Activities, *supra* note 3, ¶¶ 58-59 (emphasis added). The Court refers to Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 50 (June 27) [hereinafter Military and Paramilitary Activities]. In *Armed Activities*, the Court also refers to the practice followed in United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24) [hereinafter U.S. Diplomatic and Consular Staff in Tehran].

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32. As indicated in *Armed Activities*, the Court “will examine the facts relevant to each of the component elements of the claims advanced by the Parties.” *Armed Activities*, *supra* note 3, ¶¶ 58-59 (citing to Military and Paramilitary Activities, *supra* note 31, at 50); see also U.S. Diplomatic and Consular Staff in Tehran, *supra* note 31.

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33. See *Armed Activities*, *supra* note 3, ¶ 59; *Application of the Genocide Convention 2007*, *supra* note 2, ¶ 212.

evidence the Court considers determinative for establishing the facts; what these facts are; and what standard of proof these facts need to meet in order to amount to violations of international law.

1. *The Court’s Appraisal of Secondary Evidence in Practice*

With regard to the weight, reliability and value of secondary evidence, the following guidelines can be gleaned from the Court’s case law.

Evidentiary materials specially prepared for the particular case in question and materials emanating from a single source are treated with caution.<sup>34</sup> As emphasized by the Court in the *Oil Platforms* case, “[w]idespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such cases have no greater value as evidence than the original source.”<sup>35</sup>

The Court strongly favors contemporaneous evidence from persons with direct knowledge and will give particular attention to reliable evidence stemming from these sources.<sup>36</sup> Reliable evidence acknowledging facts or conduct unfavorable to the state represented by the person offering the evidence also receives particular attention.<sup>37</sup> In *Armed Activities*, the Court further indicated that it will “give weight to evidence that has not [even before the case was brought before it] been challenged by impartial persons for correctness that it contains.”<sup>38</sup>

Moreover, the Court noted that it gives special attention to “evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in experience in assessing large amounts of factual in-

34. *Military and Paramilitary Activities*, *supra* note 31, at 41; *see also* *Armed Activities*, *supra* note 3, ¶ 61.

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35. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 190 [hereinafter *Oil Platforms*] (quoting *Military and Paramilitary Activities*, *supra* note 31, at 41).

36. *Military and Paramilitary Activities*, *supra* note 31, at 41; *see also* *Armed Activities*, *supra* note 3, ¶ 61.

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37. *See* *Military and Paramilitary Activities*, *supra* note 31, at 41; *see also* *Armed Activities*, *supra* note 3, ¶ 61 (citing *Military and Paramilitary Activities*).

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38. *Armed Activities*, *supra* note 3, ¶ 61; *see also id.* ¶¶ 78-79, 114, 237-42; *Application of the Genocide Convention 2007*, *supra* note 2, ¶ 213.

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formation, some of it of a special nature.”<sup>39</sup> In this line, in its recent *Application of the Genocide Convention* judgment, the Court decided that because of the rigor and professionalism of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Court “should in principle accept as highly persuasive findings of fact made by [that Tribunal] at trial, unless of course they have been upset on appeal.”<sup>40</sup>

In the *Application of the Genocide Convention* decision, the Court also made an important observation on the significance of reports from official or independent bodies that give accounts of relevant facts. The Court stated that the value of these documents depends on three variable factors. First, the Court examines the *source* of the evidence for partiality.<sup>41</sup> For example, in *Armed Activities*, the Court often found press and radio reports unreliable.<sup>42</sup> Second, the Court considers the *process* by which the evidence has been gathered.<sup>43</sup> For example, the Court generally gives greater weight to a report that is the product of a careful, judicial-like process—such as the judgments from the ICTY or the Porter Commission—than to anonymous reports.<sup>44</sup> Finally, the Court evaluates the *quality* or the *character* of the evidence.<sup>45</sup> On this point, the Court regards statements against interest and uncontested facts as particularly valuable.<sup>46</sup> Ultimately, the Court evaluates all three of these elements together to determine the authority of a particular document in proving certain facts.<sup>47</sup> The Court’s observation regarding the significance of reports from official or independent bodies is accurate and, if applied consistently, would greatly improve the quality of the Court’s fact-assessment.

39. *Armed Activities*, *supra* note 3, ¶ 61.

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40. *Application of the Genocide Convention 2007*, *supra* note 2, ¶ 223.

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41. *See id.* ¶ 227.

42. *See Armed Activities*, *supra* note 3, ¶ 159.

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43. *See Application of the Genocide Convention 2007*, *supra* note 2, ¶ 227.

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44. *See id.*

45. *Id.*

46. *Id.*

47. *See, e.g., id.* ¶ 230 (noting that “comprehensive sources and the independence of those responsible for [the] preparation [of a report] lend considerable authority to it”).

2. *The Standard of Proof*

The facts established by the evidence will need to fulfill a standard of proof articulated by the Court. The Statute and Rules remain silent on this point; and as the commentary to the Statute explains, the practice of the Court merely indicates the impossibility of setting a standard, since “all depends on the norms at stake.”<sup>48</sup> The most that can be said is that the Court requires proof at a “level of certainty appropriate to the seriousness of the allegation.”<sup>49</sup> As a result, the Court has developed a sliding scale for the standard of proof. At one end of the scale, “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive.”<sup>50</sup> For less severe allegations, however, the Court has often been satisfied with a lower and more flexible standard of proof: “preponderance of evidence.”<sup>51</sup>

In cases concerning state responsibility, the Court requires a high degree of certainty. One such example is the *Military and Paramilitary Activities* case, where the question of whether to attribute the acts of the Contras to the United States gave rise to the restrictive theory of effective control.<sup>52</sup> A more relaxed standard of proof can be found in cases relating to territorial claims. Robert Kolb notes that, “[i]n the context of the establishment of the *uti possidetis* line, the Court recognized that it is often extremely difficult to produce all the (often quite old) titles . . . . It has satisfied itself with some

48. See Robert Kolb, *General Principles of Procedural Law*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 12, at 793, 829; ROSENNE, *supra* note 7, at 1039.

49. Application of the Genocide Convention 2007, *supra* note 2, ¶ 210.

50. The same standard applies to the proof of attribution of such acts. *Id.* ¶ 209. This standard is in conformity with the Court’s earlier practice. In the *Corfu Channel* case, for example, the Court rejected evidence “falling short of conclusive evidence” and instead required a “high degree of certainty.” *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 17 (Apr. 9). Though not clearly articulated, a strict standard was also applied in *Military and Paramilitary Activities*, where the question of attribution of acts to the United States—a legal question—gave rise to the restrictive concept of effective control. *Military and Paramilitary Activities*, *supra* note 31, at 64.

51. MOJTABA KAZAZI, *BURDEN OF PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 348 (1996).

52. *Military and Paramilitary Activities*, *supra* note 31, at 64; see also Kolb, *supra* note 48, at 829.

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credible evidence as to their existence.”<sup>53</sup> In between these two extremes is the convincing proof standard that the Court applied in the *Oil Platforms* case. There, the Court held that the United States provided insufficient evidence in support of its contention that Iran bore responsibility for the missile attack on the tanker *Sea Isle City*.<sup>54</sup>

Precedent shows that the Court determines the standard of proof on an ad hoc basis and that the standard is “only revealed at the end of the process when the Court delivers its judgment.”<sup>55</sup> To make the practice of the Court more transparent, Ruth Teitelbaum suggests that the Court, at the start of the proceedings, “should ask the parties to meet a specific burden of proof for certain claims.”<sup>56</sup> Of course, the parties themselves can also request such guidance. By special agreement, they could ask the Court “to issue an order on the relevancy of certain evidence and the standard of proof required for certain allegations prior to the submission of written pleadings.”<sup>57</sup> Teitelbaum points out that increased clarity about the level of proof at an early stage of the procedure may help the parties focus on the core issues.<sup>58</sup> Although this would not solve difficulties concerning matters of evidence and standard of proof that arise during later stages of the proceedings, it would give parties at least some point of reference.<sup>59</sup>

In sum, the Court’s basic documents do not indicate how the Court will weigh evidence or what standard of proof the parties need to satisfy in order to establish their claims.<sup>60</sup> The Court’s precedent suggests a very open-ended, discretionary evidentiary framework. This discretion is problematic in any case before the Court, as it leaves the parties with little guidance in the process of ascertaining the facts and therefore results in inefficient proceedings. Because it often remains unclear what evidentiary standards the Court applies, it is difficult for parties to challenge the Court’s factual conclusions and the legal conclusions based thereon. This leaves room for

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53. Kolb, *supra* note 48, at 830.

54. *Oil Platforms*, *supra* note 35, at 190.

55. Teitelbaum, *supra* note 25, at 124.

56. *Id.* at 128.

57. *Id.* at 129.

58. *Id.* at 128.

59. *Id.* at 129.

60. *Id.* at 124.

unsound legal conclusions. Furthermore, as Part III suggests, the Court in *Armed Activities* did not even adhere to the very minimal evidentiary framework it has articulated in its case law, suggesting that this framework is particularly unsuited to the more fact-intensive cases now on the Court's docket.

### III. AN ANALYSIS OF THE COURT'S FACT-ASSESSMENT IN *ARMED ACTIVITIES*

In light of the Court's evidentiary framework set out in Part II, this Part argues that the Court in *Armed Activities* made only limited use of the instruments it has to assess factual evidence and that, by relying heavily on secondary evidence, the Court did not respect the evidentiary framework laid out in its basic documents and precedent. Section A argues that the Court attributes greater weight to UN materials than to other secondary evidence such as NGO reports and press statements.<sup>61</sup> Section B argues that the Court's heavy reliance on UN documents is incompatible with the evidentiary framework laid out in Part II, undermining the Court's judicial responsibilities.

#### A. *An Examination of the Court's Assessment of Evidence Reveals Extensive Reliance on UN Fact-Finding*

The Court's assessment of most of the secondary evidence in *Armed Activities* is unsatisfactory. Essentially, the Court, without giving reasons for such an approach, is more lenient when evaluating evidence produced by the UN than it is with respect to evidence stemming from other sources. In effect, this results in a delegation of the Court's fact-assessment task to the UN.

The Court does not give much weight to most of the secondary evidence offered by the parties in *Armed Activities*,<sup>62</sup> rejecting it as unreliable, imprecise, or unrelated to the disputed issues. For example, when the Court considers whether Uganda used force against the DRC, the Court claims that

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61. *Id.* at 146.

62. *See, e.g.*, *Armed Activities*, *supra* note 3, ¶¶ 64-65; *see also id.* ¶¶ 72-91 (evaluating proffered facts relating to military actions in the east of the DRC), 106-147 (doing the same with regard to Uganda's claim of self-defense). For an enumeration of the documents brought forward by the parties, *see id.* ¶ 60.

“[it] has not relied on various . . . items offered as evidence . . . 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 in some cases partisan.”<sup>63</sup> The Court then enumerates the evidence that it dismisses, but fails to indicate what standard it is applying.

In stark contrast, the Court accepts evidence derived from UN reports as virtually conclusive. This is illustrated in the Court’s examination of the DRC’s claim that Uganda violated human rights law and humanitarian law.<sup>64</sup> In this case, the Court grounds its conclusions entirely on facts presented in the January 18, 2000 Report of the Special Rapporteur of the Commission on Human Rights, the Third Report on the United Nations Mission in the Democratic Republic of Congo (MONUC), Security Council Resolution 1304 (2000), the February 1, 2001 Report of the Special Rapporteur of the Commission on Human Rights, and the January 2000–December 2000 Special Report by MONUC.<sup>65</sup>

Another instance in which the Court relies heavily on UN reports is in adjudicating the DRC’s allegations regarding the exploitations of its natural resources by Uganda. The Court observes that it

[has] already expressed its view with regard to the evidentiary rule 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, plundering and illegal exploitation of DRC’s resources.<sup>66</sup>

The Court develops its case almost entirely around findings by the Porter Commission (whose mission was to investigate earlier UN reports<sup>67</sup>) without making its own factual assessment,<sup>68</sup>

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63. Armed Activities, *supra* note 3, ¶ 159.

64. *Id.* ¶ 206.

65. *Id.* ¶¶ 206-07.

66. *Id.* ¶ 237.

67. Rejoinder Submitted by the Republic of Uganda, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), ¶ 91 n.28 (Dec. 6, 2002), *available at* <http://www.icj-cij.org/docket/files/116/8314.pdf>.

and uses UN reports “in general” to establish the facts.<sup>69</sup> With only this broad reference, the particular relevance of specific UN reports and the facts presented therein remains unclear.

The disproportionate weight the Court gives to UN documents is at odds with the Court’s claim that it “will take into consideration evidence contained in certain UN documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.”<sup>70</sup> This statement clearly expresses some doubt with regard to the evidentiary weight that should be given to UN documents.<sup>71</sup> This doubt is reaffirmed by paragraph 159, where the Court rejects “passages from the Secretary-General’s report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged).”<sup>72</sup> The Court thus acknowledges that UN documents might contain serious flaws. However, this awareness does not push the Court to scrutinize all the UN documents that it relies on in a similar fashion.<sup>73</sup> As Teitelbaum notes:

That the MONUC Report mentioned its reliance on second-hand reports does not mean that other UN documents did not rely on second-hand reports, it could be that all of the UN Reports relied on by the Court involved second-hand reports as opposed to direct, eye-witness testimony.<sup>74</sup>

68. The Court explains that “in reaching its decision on DRC’s claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged.” *Armed Activities*, *supra* note 3, ¶ 237.

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69. *Id.*

70. For an example of an instance when a UN document was corroborated by another credible source, see *Armed Activities*, *supra* note 3, ¶ 70 (considering the February 1999 Report of the Special Rapporteur of the Commission on Human Rights as well as a press conference given at the United Nations Headquarters in New York merely as a confirmation of other evidence brought before the Court). Also, in handling the DRC’s claim concerning the illegal exploitation of its natural resources, the Court takes into account a variety of documents including the Porter Commission Report, UN Panel Reports, reports of national organs, reports of non-governmental organizations other than the UN, and reports by independent experts. *See id.* ¶¶ 237-50.

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71. Teitelbaum, *supra* note 25, at 147.

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72. *Armed Activities*, *supra* note 3, ¶ 159.

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73. *E.g.*, *Armed Activities*, *supra* note 3, ¶ 207 (noting simply that facts were established based on “the coincidence of reports from credible sources,” most of which stemmed from the UN).

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74. Teitelbaum, *supra* note 25, at 147.

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Christine Van den Wyngaert also comments on this, adding that “[i]t would be interesting to see what the result in [*Armed Activities*] would have 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>75</sup>

Moreover, *Armed Activities* shows that the Court does not question the methods of UN fact-finding or the standard of proof that UN missions apply; the Court merely refers to the credibility and reliability of evidentiary sources from the UN without explaining why these documents deserve their credit.<sup>76</sup> This treatment is different from that of non-UN sources, for which the Court does verify reliability.<sup>77</sup> For instance, in paragraph 136, the Court rejects a bundle of news reports presented by Uganda because they are of variable reliability and “go no further than to say that unconfirmed reports had been received that the Sudan was flying military supplies to Juba and Dingu.”<sup>78</sup> The Court also rejects certain internal intelligence documents “which lack explanations as to how the information was obtained.”<sup>79</sup> In contrast, the Court at no point assesses how the UN reports obtained their information.

The Court’s uncritical approach towards UN fact-finding methods, combined with its acceptance of the UN’s assessment of these facts, contradicts the Court’s own requirement that it “must make its own determinations of the facts.”<sup>80</sup> To use the words of José E. Alvarez:

While there is nothing wrong in itself with reliance on fact-finding by others, a convincing judicial opinion that purports to apply facts to a novel legal dispute that has not been resolved or addressed any-

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75. Christine Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts be Avoided?*, 100 AM. SOC’Y INT’L L. PROC. 63, 67 (2006).

76. See, e.g., *Armed Activities*, *supra* note 3, ¶¶ 207-09 (referencing “reports from credible sources,” “sufficient evidence of a reliable quality,” and “persuasive evidence” without explaining why any of the sources involved deserve such deference).

77. See, e.g., *id.* ¶ 134 (dismissing evidence as “internal documents, often with no authenticating features, and containing unsigned, unauthenticated and sometimes illegible witness statements”).

78. *Id.* ¶ 136.

79. *Id.* ¶ 137.

80. *Id.* ¶ 57; see also Application of the Genocide Convention 2007, *supra* note 2, ¶ 212.

where else . . . demands more. It demands active engagement with official reports written for other purposes or with . . . decisions driven by other imperatives, not a timid readiness to accept these accounts and go no further.<sup>81</sup>

Accordingly, the Court’s present readiness to accept the UN’s construction of the facts conflicts with the standard articulated by the Court that it “will identify the documents relied on and make its own clear assessment of their weight, reliability and value.”<sup>82</sup> As a consequence, the Court does not conclusively answer the question of the value of submitted evidence and the facts it attempts to prove. This approach jeopardizes the principle of proper administration of justice and thereby undermines the legitimacy of the Court. The Court must therefore develop better means of adjudicating fact-intensive cases.

It is important to note, however, that the parties also contribute to the treatment that UN documents receive.<sup>83</sup> If parties rely heavily on UN documents in their presentation of the facts, the Court is forced to adopt a similar focus. This underlines the significance of the role that parties play in presenting and contesting evidence. Hence, it would be helpful for the parties, as well as efficient for the work of the Court, if the Court gave the parties more guidance in terms of its evidentiary standards.<sup>84</sup> This possibility will be further discussed in Part IV.

*Armed Activities* demonstrates an uncritical approach by the Court towards UN documents. In fact, it seems that the Court is substituting findings by the UN for its own assessment of the facts. The following Section shows that this approach is undesirable because it conflicts with the evidentiary framework as laid out in the Court’s Statute, Rules, and precedent while also avoiding the core judicial responsibilities of the Court.

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81. Alvarez, *supra* note 11, at 2. R  
82. *Armed Activities*, *supra* note 3, ¶ 59; *Military and Paramilitary Activities*, *supra* note 31, at 50. R  
83. For an example of heavy reliance by the Parties on UN Documents, see *Armed Activities*, *supra* note 3, ¶¶ 182-90. R  
84. See Teitelbaum, *supra* note 25, at 157. R

B. *The De Facto Delegation of Fact-Assessment to the UN Conflicts with the Responsibilities of the Court*

Though the Court's basic documents leave the evaluation of evidence to the Court's discretion based, inter alia, on the nature of the claim, the Court also has ample powers to arrange the fact-finding process of parties.<sup>85</sup> This Section argues that through the delegation of fact-assessment to the UN, the Court has abdicated its responsibility to ascertain the facts according to its own judgment. The fact that the factual underpinnings of the case are not supported by the Court's own assessment of the evidence, but instead by those of the UN, undermines the persuasiveness of the legal conclusions it builds thereon.

The Court's uncritical acceptance of the UN's presentation of facts is problematic in light of the Court's judicial responsibilities. First, delegation of fact-assessment to UN agencies and Special Rapporteurs obscures the Court's core task of weighing the evidence and ascertaining the facts accordingly. The law on evidence determines if presented information can be used as facts to adjudicate the charges.<sup>86</sup> As Bert Swart points out, the purpose of the law of evidence is to guide judges in their endeavor to arrive at the truth while preventing them from effecting miscarriages of justice.<sup>87</sup> Fact-assessment is thus of fundamental importance for the entire development of the case and should not be exercised by non-judicial institutions such as UN agencies and Special Rapporteurs.

Delegation of fact-assessment is at variance with the methodology of the Court and raises the question of whether UN agencies are competent to fulfill this task.<sup>88</sup> UN agencies lack the judicial skills and experience that the Court considers cru-

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85. See *supra* Part II (discussing the Court's power to request evidence from parties).

86. See Bert Swart, *International Courts and the Admissibility of Evidence*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY 135, 136 (Ramesh & Peter Malcontent eds., 2004).

87. *Id.*

88. As Uganda noted, "it is evident that in reaching its conclusions about the law the Security Council has not acted in a way that would normally be recognized as judicial. The Security Council's emphasis is on political adhesion rather than impartial conclusions based on unbiased considerations of facts and the objective examination of the law." Counter-Memorial of the Republic of Uganda, Armed Activities on Territory of the Congo (Dem. Rep.

cial in evaluating evidence and establishing the facts.<sup>89</sup> Furthermore, UN fact-finding missions are generally not tailored to the dispute before the Court; they may view the relevant issues through a different lens.<sup>90</sup> The Eritrea-Ethiopia Claims Commission took on this argument when it was confronted with the reports of outside observers, including UN bodies. The Commission noted “the potential pitfalls and limitations of uncritical reliance on such materials,” including ambiguities concerning time frames, degrees of generalization, third-party interference, and the fact that reports may reflect the interests or agendas of the reporters or those who provided them with information.<sup>91</sup>

Analogously, the UN uses fact-finding in various contexts as part of its activities (such as monitoring compliance and confidence building) geared toward the maintenance of international peace and security.<sup>92</sup> Thus, the UN is likely to have very different motivations than the Court, whose goal is to achieve “a legally binding statement of what the law is in a given situation.”<sup>93</sup> The UN’s fact-finding efforts are not oriented to a statement of what the law is. Instead, its use of fact-finding is tied to more political goals. For example, UN statements may contain condemnations based on law that can entail legal consequences but aim at different results, such as a cessation of hostilities on the ground. Since the UN and the Court use fact-finding and evaluation as the means to different ends,<sup>94</sup> the Court may compromise its own judicial process by adopting the outcome of UN procedures.

Congo v. Uganda), 2001 I.C.J. ¶ 191 (Apr. 21) [hereinafter Counter-Memorial].

89. See Armed Activities, *supra* note 3, ¶¶ 61, 78; see also Application of the Genocide Convention 2007, *supra* note 2, ¶¶ 214-24.

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90. See, e.g., Counter-Memorial, *supra* note 88, ¶ 194 (“[T]he findings of fact contained in resolutions and the like must have probative value specifically in relation to the issue of imputability.” (emphasis omitted)).

91. See Partial Award, Civilian Claims–Eritrea’s Claims 15, 16, 23 & 27-32 (Eth. v. Eri.), ¶¶ 33-34 (Eri. Eth. Claims Comm’n, Perm. Ct. Arb. 2004). Other outside bodies named were the ICRC, the British Home Office, the United States Department of State, and non-governmental organizations. See *id.*

92. Bothe, *supra* note 1, at 258.

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93. *Id.* at 256.

94. See M. Cherif Bassiouni, *Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. & POL’Y 35, 45 (2001).

In addition, the heavy reliance placed by the Court on evidence produced by the UN contradicts the Court’s principle that evidence should not emanate from a single source.<sup>95</sup> Although the evidence considered originates from different bodies within the UN, they all operate within the same apparatus. For example, in paragraph 209 of *Armed Activities*, the Court bases its conclusion that Uganda engaged in the training of child soldiers exclusively on different MONUC reports.<sup>96</sup> This raises serious issues concerning 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>97</sup>

While the Court’s delegation of fact-assessment is problematic, even more so is the fact that a close study of *Armed Activities* suggests that the Court also adopts the UN’s legal opinions. For example, the Court cites the conclusion of the UN Secretary-General’s Report that Rwandan and Ugandan armed forces “should be held *accountable* for the loss of life and the property damage they inflicted on the civilian population of Kisangani.”<sup>98</sup> In the given context, it is highly uncertain both what “accountable” means and what standard of proof the Secretary-General applied to come to this conclusion. If the Court is to accept the legal findings of UN bodies, there is a risk that UN bodies will set the judicial matrix of the Court. Since UN procedures are geared towards a different result, the UN applies different processes and standards. Moreover, the standard of proof the Court applies is dependent on the norms at stake. If the Court uncritically relies on legal conclusions of the UN, it disregards the duty—articu-

95. “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.” *Military and Paramilitary Activities*, *supra* note 31, at 40-41.

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96. In this regard, the findings relating to the training of child soldiers in *Armed Activities* are particularly interesting. *See* *Armed Activities*, *supra* note 3, ¶ 210 (basing Court conclusions exclusively on MONUC reports). This is the opposite of paragraph 209, where the Court points to other sources that corroborate the UN’s presentation of facts. *See id.* ¶ 209. Note however that paragraphs 205-22 are some of the only points where the Court talks about corroboration of UN documents with sources outside the UN apparatus. *See id.* ¶¶ 205-22.

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97. Bassiouni, *supra* note 94, at 41.

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98. *Armed Activities*, *supra* note 3, ¶ 206 (emphasis added).

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lated by the Statute, the Rules, and the Court’s own precedent—to ascertain the facts according to its own standards. More importantly, the Court might accept conclusions that it would not have drawn had it applied its own evidentiary methods. Adopting the legal conclusions of the UN therefore seriously undermines the Court’s legitimacy.

The foregoing criticism should not be read to mean that the Court’s use of public international organizations such as the UN to gather information relevant to the proceedings is, at least in theory, inconsistent with the Court’s basic documents and precedent. Article 34(2) of the Statute gives the Court the power to request relevant information from public international organizations, indicating that:

The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.<sup>99</sup>

Rosenne even suggests that this provision creates an obligation for UN agencies to render assistance to the Court:

[Article 34, paragraph 2 of the Statute] is not limited to the specialized agencies which . . . by virtue of their relationship agreements concluded between them and the United Nations are *obliged* to render appropriate assistance to the International Court.<sup>100</sup>

99. I.C.J. Statute, *supra* note 13, art. 34. Rosenne notes that “Art. 69, paragraph 4, of the current Rules of the Court specifies that for the purposes of the application of Art. 34 of the Statute the term *public international organization* denotes an international organization of States.” ROSENNE, *supra* note 7, at 624. The International Law Commission’s draft articles on the law of treaties made clear that this definition excluded NGOs. For more information on what type of information international courts will receive as fact, see for example Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 18, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] and Rome Statute of the International Criminal Court art. 15(2), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (allowing information obtained from ‘reliable’ sources). The ICTY Statute even makes an explicit reference to information obtained from intergovernmental organizations. See ICTY Statute, *supra*, art. 18.

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100. Shabtai Rosenne, *Fact-Finding before the International Court of Justice*, in INTERNATIONAL LAW AND THE HAGUE’S 750TH ANNIVERSARY 45, 48 (W.P. Heere ed., 1999) [hereinafter Rosenne, *Fact-Finding*] (emphasis added).

Indeed, it is understandable that the Court would rely on UN documents in ascertaining the facts. Since the UN works with professional fact-finding mechanisms,<sup>101</sup> its reports appear to be based on solid and objective fact-finding.<sup>102</sup> Additionally, the UN has access to information, time, professionals, knowledge, and resources that the Court lacks. Although the Court enjoys broad investigative authority, it lacks the necessary technical and personnel means. Well-managed and well-resourced expert UN missions can collect and store testimony to be interfaced with the data requirements of the Court,<sup>103</sup> partly compensating for the Court's shortcomings.

Besides, it is important to remember that the Court's evidentiary rules need not comply with the standards required in cases of individual criminal responsibility.<sup>104</sup> As a result, the Court "can base its findings on documentary evidence *only*, without hearing the witnesses through which these documents have been tendered and without the evidence being tested through cross-examination."<sup>105</sup> This may lead to a more "liberal" acceptance of evidence.<sup>106</sup> As the DRC pointed out in its oral pleadings, the Court is not addressed "[a]s a criminal tribunal, asking it to pass judgment on each of the tens of thousands of crimes committed in the territories occupied by Uganda."<sup>107</sup> Instead, "Congo is asking for the Ugandan *State* to be held responsible."<sup>108</sup> In this regard, "it suffices to show that agents of the Ugandan State, whatever their identity or position, have committed or tolerated violations."<sup>109</sup> Because the Court does not have to make an adjudication of individual

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101. See, e.g., MANUAL OF THE UNITED NATIONS HUMAN RIGHTS SPECIAL PROCEDURES (Draft) (2006), available at [http://www2.ohchr.org/english/bodies/chr/special/docs/Manual\\_English\\_23jan.pdf](http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_English_23jan.pdf) [hereinafter UN HUMAN RIGHTS MANUAL].

102. Teitelbaum, *supra* note 25, at 146.

103. Hugh Griffiths, *Evidence Gathering: The Role of NGOs*, CRIMES OF WAR MAG., May 2001, [http://www.crimesofwar.org/tribun-mag/relate\\_ngo\\_print.html](http://www.crimesofwar.org/tribun-mag/relate_ngo_print.html).

104. Van den Wyngaert, *supra* note 75, at 67.

105. *Id.* (emphasis added).

106. Van den Wyngaert, *supra* note 75, at 67.

107. Oral Proceedings, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Doc. No. CR 2005/04, at 44 (Apr. 13, 2005), available at <http://www.icj-cij.org/docket/files/116/4293.pdf>.

108. *Id.*

109. *Id.*

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criminal guilt, it is not required to respect many of the evidentiary standards required of domestic courts and international criminal tribunals. It is, therefore, acceptable for the Court to premise State responsibility on a pattern of evidence, for which the findings of fact in UN documents could be helpful.

Finally, the public character of most UN reports means that the major part of the sources used can be checked.<sup>110</sup> This allows the Court and the parties to contest the UN's fact-finding.<sup>111</sup>

Selective reliance on UN reports, however, does not necessarily require that the Court suspend its authority to exercise discretion in weighing the evidence and establishing the facts according to its own mechanisms and standards. The Court can use UN reports and still remain the ultimate assessor of the truth. In sum, it is not the reliance on UN fact-finding that is inconsistent with the Court's legal framework, but the way in which the Court currently accepts UN documents presenting facts as conclusive without any independent evaluation. The inactive, non-investigatory approach of the Court in *Armed Activities*, combined with the fact that the Court has significant power to take and evaluate evidence,<sup>112</sup> suggests that the Court's efforts to ascertain the facts can be improved and that this can be done within the existing legal framework. If the Court neglects these responsibilities, it undermines the foundation of its legal conclusions and thus its own authority in the world of international law.

#### IV. SERIOUS EFFORTS TO ASSESS AND ASCERTAIN THE FACTS

The Court can overcome the problems identified in Part III by making better use of the evidentiary rules enshrined in its basic documents. In essence, the Court needs to take a more active stance to guide the parties through the evidentiary process. This Part makes four suggestions as to how the Court should change its approach in order to ensure the fair administration of justice as well as its own greater efficiency.

The difficulty of suggesting improvements to the Court's evidentiary procedures lies in part in the diversity of cases

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110. See Rosenne, *Fact-Finding*, *supra* note 100, at 48.

111. *See id.*

112. *See supra* Part II (discussing the Court's power to take and evaluate evidence).

before the Court.<sup>113</sup> For instance, what might be appropriate for cases related to issues of diplomatic protection might not be appropriate for highly technical and complex cases that involve the use of force. An additional complication is that the parties to the Court are sovereign states that, when presenting evidence, focus on the political impact of their case just as much as on its judicial impact.<sup>114</sup> Procedural changes that chip away the political function of Court proceedings might make it less interesting for states to bring their cases before the Court. Given all these variables, rigid rules cannot be formulated.

Against this background, this Part suggests four changes to the Court's procedure that are adaptable to the circumstances of each case and that could take place within the present framework of the Court's Statute and Rules. First, the Court should develop a UN fact-finding standard operating procedure. Second, when possible, the Court should encourage a particularized approach to evidentiary rules with an emphasis on co-operation between parties. Third, the Court should establish a pre-trial chamber. Finally, the Court should appoint a special master.

A. *Suggestions Within the Existing Framework of the Court's Basic Documents*

Article 30(1) of the Statute reads: "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure."<sup>115</sup> The Court has indicated its approach to the function of laying down rules in the *Military and Paramilitary Activities* case. It found that it was 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 the most in conformity

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113. Stefan Talmon, *Article 43, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 12, at 977, 1037.

114. *Id.* at 1038.

115. I.C.J. Statute, *supra* note 13, art. 30(1). According to Hugh Thirlway, "the effect of Art. 30 in this context is to confer on the Court the power to enact what might be called subsidiary legislation, in the form of rules of procedure, which are equally binding upon States parties by virtue of their consent to art. 30 as contained in the Statute." Hugh Thirlway, *Article 30, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 12, at 481, 482-483.

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with the fundamental principles of international law.”<sup>116</sup> The Court has in practice exercised this power in adopting the Rules of the Court,<sup>117</sup> the Instructions for the Registry,<sup>118</sup> and the Practice Directions.<sup>119</sup> Section 1 explores whether this function can be exercised on a permanent basis by establishing a standard operating procedure for evidence derived from UN fact-finding missions. I subsequently discuss whether the Statute and Rules leave room for a particularized approach towards the rules of evidence in individual cases.

1. *Developing a Standard Operating Procedure for UN Fact-Finding*

If the Court wishes to make use of the knowledge and resources of the UN in its fact-finding process, it needs to clearly lay out its terms and conditions for fact-finding. This would allow the UN to exercise fact-finding in conformity with these guidelines and enable the Court to check UN documents accordingly.

As discussed in Part III, UN fact-finding in its present form raises fundamental issues in light of the Court’s judicial responsibilities. The current lack of standardized methods, particularly as to empirical research, standard of proof, and field investigation, means that there is no means by which the Court can test the validity of the UN’s research in order to assess the plausibility of the UN’s conclusions.<sup>120</sup> There are further uncertainties regarding the scope and character of the mandates of fact-finding missions.<sup>121</sup>

In order to rely on UN fact-finding, the Court must make better use of its powers to check this fact-finding and improve its review of such operations. To do this, the Court needs to develop a standard operating procedure under article 30(1) of the Statute. Admittedly, any such procedure needs to be tai-

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116. Territorial and Maritime Dispute Between Nicaragua and Honduras, *supra* note 6, ¶ 38 (citing Mavrommatis Palestine Concessions, 1924 P.C.I.J., (ser. A), No. 2, at 16 (Aug. 30)).

117. I.C.J. Rules, *supra* note 15.

118. *Id.* art. 28(3).

119. International Court of Justice Practice Directions (Order of Oct. 2001) (Amended on Dec. 6, 2006), *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> (last visited Jan. 31, 2008).

120. Bassiouni, *supra* note 94, at 41.

121. *See supra* Part II.B.

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lored to the circumstances of each case.<sup>122</sup> However, the uniqueness of the cases before the Court does not mean that it cannot develop a manual that describes the fundamental aspects of fact-finding.<sup>123</sup> At a minimum, such a handbook should cover methods of standardized organization, planning, documentation, and the use of sources and reporting, leaving ample room to adapt the procedure to the particular circumstances of each case.<sup>124</sup>

In addition to establishing a standard operating procedure, the Court should draw a clear distinction between fact-finding exercised by the UN and the Court’s assessment of these facts. To the extent that the Court makes use of UN fact-finding, it should be very explicit and detailed about what findings of facts by the UN it considers established, including what UN documents that determination was based on, the reasons why, and the way in which the Court bases its legal findings on these facts.

The Court should also distance itself from the agenda of the UN. Fact-finding missions are often in effect political missions undertaken in a laudable effort to reduce tensions, cause violence to abate, or help restore and preserve peace.<sup>125</sup> In reviewing the outcomes of such missions, the Court should therefore consider the context of the particular operation by taking different factors into account.<sup>126</sup> The Court needs to identify the UN organ, body, or agency that established the mission and determine the mission’s subject matter, scope, political authority, and bureaucratic influence.<sup>127</sup> The Court should then determine in what ways such a mission does or does not correspond to the Court’s agenda and select useful information accordingly.

122. Bassiouni, *supra* note 94, at 40.

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123. For an example of such a manual, see UN HUMAN RIGHTS MANUAL, *supra* note 101. To guarantee the reliability and transparency of fact-finding missions, the Court should develop guidelines for fact-finding and focus on issues like organization, planning, documentation, and reporting of these operations.

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124. Bassiouni, *supra* note 94, at 40.

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125. *Id.* at 45.

126. Bassiouni notes that “[w]hile these factors are not necessarily present in all cases and certainly vary in degree and mixture with respect to each mission, they are determinative of the outcome of these missions.” *Id.* at 38-39.

127. *Id.*

Likewise, the Court must ensure that findings of fact and findings of accountability remain strictly separated, enabling judges to arrive at their own legal conclusions.<sup>128</sup> Under no circumstances should the Court reproduce legal findings made by UN missions. The Court should decide what facts are relevant to the claims of the parties, formulate the standard of proof, and finally determine whether this standard has been fulfilled.

To conclude, if the Court determines the conditions under which fact-finding has to take place, it will be able to make use of UN fact-finding in an efficient and judicially sound manner by placing itself at the center of the process.

2. *A Particularized Approach to the Rules of Evidence, Emphasizing Cooperation Between the Parties*

The basic documents give the Court the option to tailor evidentiary rules to a particular dispute.<sup>129</sup> The Court may make arrangements connected with the taking of evidence and supplement the existing rules. However, since the role of the Court is accessory in nature and characterized by judicial propriety, the Court is dependent on the assistance of the parties in this process. By emphasizing the duty of parties to cooperate in presenting the evidence and by promoting communication between the parties, the Court can encourage parties' participation in setting up special evidentiary procedures.

Since no general amendments of the Rules can be imposed upon parties to a pending case, it follows that the Court cannot vary its rules solely for that case, except with the consent of the parties involved.<sup>130</sup> Article 101 of the Rules provides that in proceedings before the Court, the parties to the case may jointly propose modifications or additions to the relevant rules,<sup>131</sup> although such a proposal cannot be inconsistent with the Statute.<sup>132</sup>

128. David Collins, *Institutionalized Fact-Finding at the WTO*, 27 U. PA. J. INT'L ECON. L. 367, 377 (2006).

129. I.C.J. Statute, *supra* note 13, arts. 30, 48; I.C.J. Rules, *supra* note 15, art. 101.

130. *See* Thirlway, *supra* note 115, at 486-87.

131. I.C.J. Rules, *supra* note 15, art. 101.

132. Thirlway, *supra* note 115, at 487.

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The Statute and Rules of the Court thus suggest that, if the parties approve, the Court has the power to tailor evidentiary rules to individual cases.<sup>133</sup> This proposal is consistent with the significant measure of discretion that the Court enjoys to fulfill its duty of ensuring the orderly and effective administration of justice.<sup>134</sup> In pursuance of this duty, the Court and the parties should in each case negotiate—within the ambit of the Rules—a procedure tailored to the dispute at hand. The Court and the parties should agree upon issues such as time limits for submitting the documents, the temporal scope of contested events, which facts are considered crucial to establish the case, and the relevancy and weight of certain evidence.<sup>135</sup>

The risk inherent in this sort of pre-trial phase on evidentiary matters is that such a process will embroil the Court and the parties in an extra round of proceedings that would lengthen the entire process. It is up to the Court to moderate this process and ensure that issues discussed at this stage expedite the proceedings. If certain issues lead to too much disagreement between the parties, the Court should defer the resolution of such matters until trial. Still, it is likely that the parties and the Court will be able to agree on the basic evidentiary framework of the process, enabling the parties to submit more focused pleadings.<sup>136</sup>

The commentary to the Statute stresses that “there is . . . a general principle requiring the parties to cooperate in presenting the evidence.”<sup>137</sup> Because of the factual complexi-

133. *Id.* at 486-87.

134. Thirlway, *supra* note 115, at 487 (citing Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Counter-Claims, 1997 I.C.J. 243 (separate opinion of Judge ad hoc Lauterpacht)).

135. *See, e.g.*, Teitelbaum, *supra* note 25, at 129 (suggesting that the “parties, by special agreement, could ask the Court to issue an order on relevancy of certain evidence and the standard of proof required for certain allegations prior to the submission of written pleadings” and noting that “some guidance to the parties in terms of evidentiary requirements would be of assistance to the parties”).

136. *Id.* at 129.

137. Kolb, *supra* note 48, at 828; *see also* Kazazi, *supra* note 51, at 372 (“The duty of parties to co-operate in placing material evidence before international tribunals is emphasized, inter alia, in the Hague Conventions of 1899 and 1907 and in the Rules prepared by the International Law Commission.

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ties and long time frames of the cases and the sensitivity and political character of international matters, the parties “are expected to help the Court in the task of a proper administration of justice and to provide the Court with adequate information—at least, to a minimum extent.”<sup>138</sup> The Court should stress this duty by creating a pre-trial stage in which the parties, with the assistance of a special judge (see Part IV.B, *infra*), settle in detail which facts are (un)contested, what evidence is accepted by the parties, and which issues need further clarification. Without taking away the strategic advantages of the parties, this negotiating process would create a point of reference for them in developing their cases.

Cooperation by the parties is crucial because the Court’s role in establishing a special procedure is limited by judicial propriety.<sup>139</sup> Besides the fact that the Court’s legal framework requires the consent of the parties to establish a special procedure,<sup>140</sup> a strong preference of the Court for a particular procedure might negatively affect the Court’s impartiality and the equality of the parties.<sup>141</sup> The Statute and the Rules safeguard equal opportunities for the parties within the proceedings and progressively neutralize any disadvantages a party might face—the Court is only allowed to interfere when one of the parties is seriously disadvantaged or unable to produce evidence.<sup>142</sup>

The Court’s legal framework leaves room to develop rules of evidence specially designed for particular cases. However, due to the constraints of the basic documents and concerns of judicial propriety, the parties will need to take a leading role in this process. The Court’s role is to create an environment that encourages them to do so.

This duty has also been reflected in the decisions of international tribunals.”).

138. Kolb, *supra* note 48, at 829.

139. See Kazazi, *supra* note 51, at 374.

140. Thirlway, *supra* note 115, at 487.

141. These principles are inherent in the principle of proper administration of justice. Military and Paramilitary Activities, *supra* note 31, at 25.

142. See Kolb, *supra* note 48, at 802.

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B. *The Establishment of Pre-Trial Chambers Specializing in Evidentiary Matters*

According to article 26 of the Statute, “the Court may from time to time form one or more chambers . . . for dealing with particular categories of cases” or with a “particular case.”<sup>143</sup> This provision provides the Court with a tool to develop a special expertise in relation to disputes arising in specific fields of international law.<sup>144</sup> In this Section, I argue that the Court should employ this power to establish a pre-trial chamber specializing in evidentiary matters.

Until recently, the Court did not make much use of its power to establish chambers. Prior to 1982, there were only two cases brought before the chambers of the Permanent Court of International Justice (in fact only one, since the second concerned the interpretation of the first decision).<sup>145</sup> Since 1982, four cases have been brought before the Court’s chambers.<sup>146</sup> In 1993, the Court established a permanent chamber for environmental issues, although so far no case has been submitted to it.<sup>147</sup> The establishment of the environmental chamber is an outgrowth of two parallel developments: the proliferation of international tribunals and the growing consensus that “special fields” of international law exist.<sup>148</sup> These developments support the general argument of this Article: that some cases—in particular fact-intensive cases—require additional expertise.

There are three types of Chambers. According to article 29 of the Statute, the Court must annually form a Chamber of

143. I.C.J. Statute, *supra* note 13, art. 26.

144. Paolo Palchetti, *Article 26, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 12, at 439, 455.

145. Rudolf Ostrihansky, *Chambers of the International Court of Justice*, 37 INT’L & COMP. L.Q. 30 (1988) (citing Treaty of Neuilly, Art. 179, Annex § 4, P.C.I.J. (ser. A) No. 3, and Interpretation of Judgment No. 3, P.C.I.J. (ser. A) No. 4).

146. These four cases are the following: Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.) 1984 I.C.J. 246 (Oct. 12); Frontier Dispute (Burk. Faso v. Mali) 1986 I.C.J. Rep. 554 (Dec. 22); Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy) 1987 I.C.J. 4 (Mar. 2); Island and Maritime Frontier (El Sal. v. Hond.) 1987 I.C.J. 10 (May 8).

147. Int’l Court of Justice, Chambers and Committees, <http://www.icj-cij.org/court/index.php?p1=1&p2=4> (last visited Jan. 31, 2008) [hereinafter ICJ, Chambers and Committees].

148. Palchetti, *supra* note 144, at 455.

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Summary Procedure.<sup>149</sup> This Chamber is comprised of five judges and promotes the speedy dispatch of business.<sup>150</sup> Under article 26 of the Statute, the Court can also form two other types of chambers: chambers dealing with particular categories of cases and chambers dealing with a particular case—a distinction of permanent versus ad hoc.<sup>151</sup> This Section focuses on these last two types of chambers, arguing that a broad interpretation of article 26 befitting the freedom that the Court and the parties have to tailor procedures creates the opportunity for the Court to establish a chamber dealing with preliminary matters regarding evidence.<sup>152</sup> The Court could do this on a permanent or ad hoc basis. Such a chamber would resemble a court sitting in a pre-trial setting, much like in some municipal legal systems or in the International Criminal Court.<sup>153</sup>

The task of the pre-trial chamber would be to confirm the relevance and weight of the evidence and request the parties for additional evidence if necessary. Since, in general, the powers of the chambers are the same as those of the Court,<sup>154</sup> the powers described in Part II.A can similarly be employed by the chamber. For example, the chamber could manage requests for evidence by the parties, hear witnesses and experts, provide for the preservation of evidence, and ensure the protection of national security information. The pre-trial chamber should also determine whether the criterion of reasonable proof for the claims made is met so that the Court itself can concentrate on factual issues that are determinative to the legal questions. For example, in *Armed Activities*, the DRC argued in support of its claim that Uganda engaged in the unlawful use of force that “from September 1998 onward,

149. I.C.J. Statute, *supra* note 13, art. 29.

150. *Id.*; *see also* ICJ, Chambers and Committees, *supra* note 147 (noting that chambers may be used “with a view to the speedy despatch of business”).

151. I.C.J. Statute, *supra* note 13, art. 26; Palchetti, *supra* note 144, at 441.

152. *See* I.C.J. Rules, *supra* note 15, art. 101 (“The parties to a case may jointly propose particular modifications or additions to the rules contained in the present part [Part III: Proceedings in Contentious Cases] (with the exception of arts. 93 to 97 inclusive [concerning judgment, interpretation and revision]), which may be applied by the Court or by a chamber if the Court or the chamber considers them appropriate in the circumstances of the case.”).

153. *See* Ostrihansky, *supra* note 145, at 48.

154. Palchetti, *supra* note 44, at 442.

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Uganda both created and controlled the MLC rebel group led by Mr. Bemba.”<sup>155</sup> The documents the DRC put forward in support of its claim were dismissed by the Court because the Court “found them uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say by DRC, or even in some cases partisan.”<sup>156</sup> This sort of assessment could be left to a pre-trial chamber, leaving the Court with more time and resources to focus on events crucial to the resolution of the legal issues. Additionally, developing a step-by-step approach—ascertaining facts before putting them into a legal matrix—would substantially structure and unify proceedings before the Court.

To ensure the expediency and impartiality of the proceedings, the number of judges on the bench in the pre-trial chamber should be limited. According to article 25(1) of the Statute, the Court generally discharges its functions as a full Court—a quorum of nine judges, excluding judges ad hoc.<sup>157</sup> Due to this rule, it is impossible to prevent the judges sitting in the pre-trial chamber from sitting on the main trial. Therefore, the impartiality of the bench in the main trial would be best preserved if the chambers consisted of three judges, one permanent and two ad hoc.<sup>158</sup>

The Court (with the consent of the parties) is entitled under article 26 of the Statute to regulate the composition of the chambers.<sup>159</sup> This would allow the Court to appoint judges with expert knowledge and thus to ensure the chamber’s expertise.<sup>160</sup> The proficiency of a chamber could be fur-

155. Armed Activities, *supra* note 3, ¶ 155.

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156. *Id.* ¶ 159.

157. See I.C.J. Statute, *supra* note 13, art. 25(1); ICJ, Chambers and Committees, *supra* note 147.

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158. Palchetti, *supra* note 144, at 457 (“Art. 26, paragraph 1 provides that a special chamber is to be composed of three or more judges as the Court may determine. Since it is not specified whether the reference to three judges should mean that a minimum of three judges of the Court should always sit, it might be possible for a case to be decided by a special chamber composed of the Court and two judges *ad hoc*.”).

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159. I.C.J. Statute, *supra* note 13, art. 26.

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160. In elections to an ad hoc chamber, the President of the Court, by virtue of I.C.J. Rules article 17(2), must ascertain the views of the parties regarding the composition of the chambers. The powers of the parties to affect the composition of the chamber are therefore stronger in case of the

ther enhanced through the appointment of assessors.<sup>161</sup> An assessor combines the features of both judge and expert. As Rudolf Ostrihansky explains:

Being a specialist, [an assessor] may give his opinion not simply during presentation of the evidence, but during the entire proceeding including the deliberations before delivering judgment. Making use of assessors would broaden the traditional concepts of evidence and would to an extent resemble a commission of inquiry.<sup>162</sup>

Including eminent specialists on evidentiary matters or on the subject of the dispute would enable the chamber to make a better evaluation of the evidence and arguments of the parties.<sup>163</sup> Additionally, appointment of assessors who meet the wishes of the parties will certainly increase the attractiveness of the pre-trial chamber as a method of settling evidentiary matters.<sup>164</sup>

Pre-trial chambers also have the important advantage that, based on articles 22 and 28 of the Statute, they can be located away from the Court. Because of their size and character—dealing with disputes of a technical and often regional character<sup>165</sup>—the chambers should operate on location. The improvement in quality and quantity of the evidence that would result from access to immediate and first-hand information is the most obvious advantage of settling the disputes on location.<sup>166</sup> Because a chamber is smaller in size, it is more suited to that end than the full Court.<sup>167</sup>

Despite these benefits, the functioning of the pre-trial chamber faces an important obstacle: According to article 26(3) of the Statute, chambers based on this article can deal with a case only “if parties so request.”<sup>168</sup> Although this requirement limits the potential of pre-trial chambers in some

establishment of an ad hoc chamber than in case of a permanent chamber. Ostrihansky, *supra* note 145, at 42.

161. I.C.J. Statute, *supra* note 13, art. 30(2).

162. Ostrihansky, *supra* note 145, at 46.

163. *Id.*

164. *Id.* at 46-47.

165. Palchetti, *supra* note 144, at 465.

166. *See* Ostrihansky, *supra* note 145, at 36.

167. *Id.*

168. Palchetti, *supra* note 144, at 442.

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respects, it does not bar the Court from making such chambers available to the parties. Considering the advantages that this procedure would bring to the parties, the Court should be more assertive in suggesting and utilizing this option. A pre-trial chamber is likely to improve the efficiency of the Court's proceedings, which could have important advantages for the parties. This is especially true with respect to the possibility for chambers to operate in a location away from the Court, since the siting of a chamber closer to the locus of the dispute could both increase the quality of the evidence gathered and reduce the costs of litigation born by the parties.

Palchetti argues that the fact that the parties' must consent in order to permit the use of chambers implies that the chambers should not be employed to guarantee an efficient distribution of the Court's work.<sup>169</sup> Instead, according to Palchetti, "chambers are an instrument put at the disposal of States, which they can use to their advantage."<sup>170</sup> This cannot be right. Nothing in the Statute or the Rules—except for the requirement of parties' consent—prohibits States or the Court from improving the efficiency and quality of the proceedings. In fact, this proposal is consistent with the freedom given to the parties to modify the rules of procedure and their duty to assist the Court in the proper administration of justice by providing the Court with adequate information to resolve the dispute.<sup>171</sup>

The pre-trial chamber could establish the basic evidentiary framework of the case to come before the full Court at a later stage. A pre-trial chamber focusing on evidentiary matters could apply expertise to these highly factual cases and improve the expediency and lower the costs of the proceedings by establishing points of reference for both the parties and the Court. Both of these contributions could significantly improve the quality of the Court's judgments.

C. *The Appointment of a Special Master to Deal with Managerial Difficulties Underlying Factual Determinations*

The foregoing discussion indicated that the Court's fact-assessment process is hampered by various limitations includ-

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169. *Id.*

170. *Id.* at 442-43.

171. *See supra* Part IV.A.

ing time constraints, the requirements of judicial propriety, and lack of expertise in technologically sophisticated evidentiary matters.<sup>172</sup> Further constraints include the Court's lack of skill in certain roles, such as the facilitation of dispute settlement negotiations, insufficient resources to deal with managerial difficulties underlying the cases, and formalism.<sup>173</sup> These problems require a solution beyond legal technicalities, and such a solution can be found in the appointment of special masters.

The special master brings together the advantages of the particularized approach and the special chamber. With the consent of the parties, the Court could appoint a special master for the administration of complex cases. The special master could take charge of tasks including streamlining the pleading and discovery practice and setting time schedules for all major aspects of case preparation.<sup>174</sup>

By gathering facts, the special master could draw the evidentiary framework of the case to assist both the parties and the Court in the pursuance of their aims. Brazil notes that:

Courts might use masters to coordinate an exchange of fact narratives and, ultimately, statements of contention of proof. The first narratives would be used to identify the factual disputes and to guide discovery. Using the narratives, the masters and parties could try to isolate the legally significant facts, in order that initial discovery could focus on disputed or unknown facts. . . . As discovery unearths new data, the parties could edit narratives. This process could continue until the parties had enough information to begin exchanging statements of contention and proof.<sup>175</sup>

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172. Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHIC. L. REV. 394, 395 (1986).

173. The adjudicatory system is often hampered by formalism, a problem that is stirred by the distrust and self-interest of parties. Brazil rightly states that "preoccupation with form and fear of loss often displaces substantive communication, common sense, and good faith." *Id.*

174. *Id.* at 399.

175. *Id.* at 407.

Special masters can provide the Court and the parties with essential services without tapping into Court resources.<sup>176</sup> As the Academy for Court-Appointed Masters points out:

Masters can act as mediators and settle cases . . . away from the courthouse; they can monitor discovery and resolve time-consuming disputes; they can be assigned trial duties; they can testify as expert-witnesses, especially in cases involving technical and specialized issues; they can help coordinate multi-party . . . cases; they can administer settlement claims and they can monitor compliance with a court order or settlement agreement.<sup>177</sup>

By improving communication, a special master can encourage cooperation between the parties, increasing the likelihood that the parties will agree on the establishment of a particularized approach or a pre-trial chamber. In this sense, the use of special masters would significantly contribute to conserving the Court's judicial resources.<sup>178</sup>

Special masters should be persons possessing expertise in the relevant areas and strong managerial skill—potentially judges of the Court, ad hoc judges, or experts from outside the Court such as law professors. Parties might actually be more comfortable working with external professionals rather than with an assigned judge, and such an assignment would also avoid the risk of judges forming premature opinions about the merits of the case.<sup>179</sup>

The appointment of special masters by the Court in cooperation with the parties<sup>180</sup> opens the door to sophisticated case management, the coordination and exchange of fact narratives, and the facilitation of negotiation between the parties. It will thus enhance a fair and expedient administration of justice before the Court.

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176. ACADEMY OF COURT-APPOINTED MASTERS, ACAM BENCH BOOK 2 (2006), available at <http://www.courtappointedmasters.org/ACAM%20Benchbook%20Master%20FINAL%20combined.pdf>.

177. *Id.* at 8.

178. See Brazil, *supra* note 172, at 396.

179. *Id.* at 407.

180. I.C.J. Rules, *supra* note 15, art. 101.

## V. CONCLUSION

*Armed Activities* illustrates the shift in the Court's load toward increasingly fact-intensive cases. The Statute and the Rules provide the Court with the tools to deal with questions of high factual complexity and to acquire all the information necessary to decide upon the allegations of the parties. Unfortunately, the Court has not fully used this evidentiary scheme, and *Armed Activities* reveals that the Court has been reluctant to interfere in order to assist the parties in their fact-finding efforts. Even more disturbingly, the Court has failed to scrutinize UN documents in the same way that it does other sources of secondary evidence. These practices lead to great inefficiencies in the taking of evidence, possible inequalities between the parties, and, most importantly, a deviation from the evidentiary framework that the Court has set out for itself. Given all this, the Court must develop better means of adjudicating fact-intensive cases.

As a general rule, the scope of the Court's judicial fact-assessment task is determined by the facts that parties submit for assessment and, in particular, the facts that parties contest. It is the Court's task to identify the evidence "relied on by the parties and make its *own* clear assessment of their *weight, reliability* and *value*."<sup>181</sup> Next, the Court determines whether the established facts fulfill the standard of proof that the Court requires for the alleged violations of international law.

The basic documents and precedent provide the Court with a broad range of instruments to take and produce evidence. Among other things, the Court can instruct the parties to provide certain documents and hear witnesses and experts. Yet the Court's basic documents do not indicate how the Court will weigh the evidence or what standard of proof parties need to satisfy in order to succeed on their claims. The Court's rules merely suggest a very open-ended, discretionary evidentiary framework. This is problematic in any case before the Court because it leaves the parties with little guidance in the process of ascertaining the facts, which may lead to unsound results and inefficient procedures. Through promoting

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181. *Armed Activities*, *supra* note 3, ¶¶ 58-59 (citing *Military and Paramilitary Activities*, *supra* note 31, at 50) (emphasis added). For an example of this practice, see also U.S. Diplomatic and Consular Staff in Tehran, *supra* note 31.

cooperation of parties and developing guidelines on evidentiary procedures in specific situations, the Court can facilitate the fact-finding efforts of the parties and improve the efficiency and quality of the evidentiary process.

A second fault in the Court's treatment of fact-intensive cases is the manner in which it assesses the evidence presented by the parties. The Court grants UN documents a preferential status compared to other categories of evidence. This practice conflicts with the rules for fact-evaluation that the Court has articulated in its Rules and precedent and leads to a procedural advantage for the party that can support its claims with UN documents. Furthermore, the Court tends to accept the conclusions of UN agents without giving due consideration to the fact-finding procedures that the UN employs. The Court disregards the fact that UN missions do not have a mandate tailored to the specific cases before the Court and that the missions might more generally have a different agenda than the Court. Also, UN missions do not have standardized methods for fact-finding, and they lack the judicial expertise that the Court deems crucial for an assessment of the factual underpinnings of the dispute. Given the obscurity of the UN's fact-finding proceedings and the potential pitfalls and limitations, the Court should apply greater scrutiny in evaluating UN fact-finding.

These deficiencies in the Court's evidentiary procedure seriously risk compromising the legitimacy of the Court's work. The basic documents provide the Court with sufficient power to address these imperfections and to develop an evidentiary process suited for fact-intensive cases such as *Armed Activities*. This Article makes four suggestions to that effect, focusing on improving the Court's efforts to assess facts and facilitating the fact-finding enterprises of the parties.

To make use of UN fact-finding in an acceptable manner, the Court needs to design a standard operating procedure for fact-finding against which it can check UN efforts. In particular cases, the Court could advise the parties to adopt evidentiary rules tailored to the dispute and the wishes of the parties. In addition, the Court could establish a pre-trial chamber specialized in evidentiary matters. This chamber could establish the basic evidentiary framework to come before the Court at a later stage. Additionally, the chamber could employ expert knowledge on particular evidentiary issues and establish points

of reference for the parties and the Court, thus improving the expediency of the procedure and contributing significantly to the quality of the Court's judgment. Finally, the Court could also appoint special masters for the administration of the evidentiary aspects of a case. The special master's tasks would include the coordination and exchange of fact narratives and the facilitation of negotiations between the parties. Sophisticated case management by a special master would enhance the fair and expedient administration of justice before the Court.

The Court's mandate requires that it ascertain the facts relevant to the claims made by the parties, and this mandate provides the Court with sufficient powers to execute its functions. If the Court fails to make a serious effort to fulfill this task and does not employ its discretionary powers to develop better means of adjudicating fact-intensive cases, it stands to lose legitimacy and relevance.