Introduction

In 1958 Neill Alford Jr stated that the likelihood of a dispute as to the facts in any case before the International Court of Justice was fairly remote.[1] He argued that this was so due to the fact that generally neither State party to a case before the Court had sufficient evidence to question the factual assertions made by the other party.[2] However, a number of developments in the intervening fifty or so years have proved Alford wrong, as increasingly the Court has had to deal with cases in which the outcome of the case has turned not just on legal questions but also on factual determinations.[3] As Mosk has stated:

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

Crucially, such cases requiring a heavy focus on the facts have challenged the Court's traditional approach to the facts. In the past the Court was often able to decide the outcome of a case through reliance on undisputed facts. In essence, in such cases it was not so much the facts that

[1] N. H. Alford Jr, 'Fact Finding by the World Court' 4 *Villanova Law Review* 37, 57.
[2] Ibid.
[3] S. Halink, 'All Things Considered: How the International Court of Justice Delegated its Fact-Assessment to the United Nations in the Armed Activities Case' 40 *NYU Journal of International Law and Politics* 13, 13; K. J. Keith, 'The International Court of Justice and Criminal Justice' 59 *International and Comparative Law Quarterly* 895, 904; R. Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' 6 *The Law and Practice of International Courts and Tribunals* 119, 125.
[4] R. Mosk, 'The Role of Facts in International Dispute Resolution' 203 *Receuil des Cours – Collected Courses at the Hague Academy* 11, 19.

were disputed, but rather the legal conclusions that were to be drawn from them.[5] It has been remarked that '[i]n times past, courts and arbitrators dealt with situations that were not as complex as those today'.[6] Whether or not this is so (for cases such as *Corfu Channel and Nicaragua* could hardly be described as straightforward in terms of the facts),[7] what is certain is that the Court is increasingly deprived of the possibility of basing its decisions on undisputed facts.

In addition to the disputes coming before the Court being consistently complicated, these complex facts are being increasingly contested. States themselves have demonstrated a willingness to use 'ever more sophisticated forms of evidence to substantiate their claims'.[8] Such developments have led to criticism of the way the Court handles factually complex cases that come before it (as we will see in greater detail in the following

[5] Indeed, cases before the PCIJ primarily concerned the application of treaties and as such the Court 'was in a position to establish and rely on facts that were not in dispute between the parties, obviating, in most cases, the need for detailed rules of evidence'; see E. Valencia-Ospina, 'Evidence before the International Court of Justice' 1 *International Law Forum du droit international* 202, 202; see also Rosalyn Judge Higgins, 'Speech by H. E. Judge Rosalyn Higgins, President of the International Court of Justice at the 58th Session of the International Law Commission' *International Law Commission*; Shabtai Rosenne and Yaël Ronen, *The Law and Practice of the International Court, 1920–2005* (4th edn, Leiden, Boston: Martinus Nijhoff, 2006) 1040; with regard to the ICJ, as Judge Yusuf stated in the *Pulp Mills* case, 'on many occasions in the past the Court was able to resolve complex and contested factual issues without resorting to Article 50 of the Statute' or utilising its other fact-finding powers; *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Judgment (20 April 2010), Declaration of Judge Yusuf at 6.

[6] Mosk, 'The Role of Facts in International Dispute Resolution' 23.

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

[8] Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (London: British Institute of International and Comparative Law, 2009) 5; Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' 152; Jean D'Aspremont and Makane M. Mbengue, 'Strategies of Engagement with Scientific Fact-Finding in International Adjudication', Amsterdam Law School Research Paper No. 2013–20, stating that '[i]t is commonplace that the role of science and technologies is growingly infusing all the layers of the international legal system as a whole'; Anna Riddell, 'Scientific Evidence in the International Court of Justice – Problems and Possibilities' 20 *Finnish Yearbook of International Law* 229, 229; Daniel Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' 84 *British Yearbook of International Law* 271; Jacqueline Peel, 'Risk Regulation Under the WTO SPS Agreement: Science as an International Normative Yardstick?' Jean Monnet Working Paper 02/04.

chapters)[9] and have been one of the driving forces behind calls to move away from the Court's current approach to the facts.[10]

That is not to say that no such disputes where the facts are uncontroversial come before the Court today – even now the Court will occasionally be asked to deal with a case that turns almost exclusively on legal issues alone. For instance, in the *Arrest Warrant* case the Court only had to consider the legal issue of whether the arrest warrant issued by Belgium violated its international obligations to respect the immunity from criminal jurisdiction of the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo.[11]

However, there is no doubt that today disputes in which the resolution of factual determinations is critical to the resolution of the legal issues in the dispute are commonplace.[12] Domestic courts with procedures for discovery or explicit powers to compel the production of evidence often have to guard against so-called 'fishing expeditions' whereby one party

[9] S. Mathias et al., 'The International Court of Justice at 60: Performance and Prospects' Proceedings of the Annual Meeting – American Society of International Law, Vol 100, Annual 2006, 398; Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' 120; Stephen M. Schwebel, *Three Cases of Fact-Finding by the International Court of Justice in International Law* (Cambridge University Press, 1994) 2; Thomas Franck, 'Fact-finding in the I.C.J.' in R. B. Lillich (ed), *Fact-finding before International Tribunals: Eleventh Sokol Colloquium* (Ardsley-on-Hudson, NY: Transnational Publishers, 1992) 21; John Crook, 'The Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda) and its Implications for the Rules on the Use of Force' (American Society of International Law Briefing at Tillar House).

[10] C. J. Tams, 'Article 49' in A. Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) 1107. As Tams has stated, '[g]iven the increasing number of cases brought before the Court, and the considerable length of proceedings, it is not surprising that the Court's cautious approach just described has come under strain. Especially in recent years, there has been talk about the need to "modernize the conduct of the Court's business"'; see also Caroline E. Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' 5 *Journal of International Dispute Settlement* 139.

[11] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002* 3.

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

submits often speculative requests for the disclosure of information in the possession of the other party. However, this is not a problem the ICJ has ever faced. Indeed, its reactive approach to the facts results in the 'opposite extreme'– namely the danger that the parties overwhelm the Court with thousands of pages of written submissions, annexes and reports. Whether this practice has arisen as a result of the fact that the parties are unclear as to what kind of information the Court will find probative or not, the end result is that the Court struggles to deal with the vast amounts of evidence.[13] The fear of 'documentary overload'[14] prompted the Court to adopt its Practice Directions II and III urging the parties to submit only documentary evidence that was absolutely necessary to support their case.[15]

Despite these Practice Directions the Court itself has in recent times referred to 'mass[es] of scientific and technological information',[16] 'vast

[13] Teitelbaum suggests that the Court is partly to blame for this: 'the Court's failure to give some guidance to the parties in terms of the burden of proof required, *prior* to the rendering of its decision, may contribute to the excessive annexes and lack of focus in the written pleadings on the part of counsel'; see Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' 123.

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

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

[16] *Gabčikovo-Nagymaros Project (Hungary/Slovakia), Judgment, ICJ Reports 1997* 7 para 2 (25 September) Dissenting Opinion of Judge Skubiszewski; Judge Schwebel has also described the more than 5,000 pages of pleadings and documentary annexes as having placed a 'considerable burden on the Court's tiny translation services and on its budget'; see Stephen M. Schwebel, 'Speech of the President of the International Court of Justice to the General Assembly' A/52/PV36, 27 October 1997.

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

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

A further example is the *Pulp Mills* case, which was described by two judges of the Court itself as being one of the 'exceptionally fact-intensive'

[17] *Pulp Mills Case* para 229.
[18] Ibid., Joint Dissenting Opinion of Al-Khasawneh and Simma, para 11.
[19] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996 66 para 15.
[20] Ibid., Dissenting Opinion of Judge Weeramantry 451.
[21] Please note that the terms 'evidentiary' and 'evidential' are used interchangeably throughout, owing to their synonymous nature and reflecting the common use of both terms in practice. 'Evidential' is historically the older term and is more prominent in British English, with 'evidentiary' (invented by J. Bentham in his 'Elements of the Art of Packing. . .' in 1821 or J. Mill in his 'History of British India, Volume III' according to the Oxford English Dictionary) being used more often in American English.
[22] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005* 168, 239, 116 para 24.
[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007* 43, 91.
[24] *Whaling in the Antarctic* (*Australia v. Japan: New Zealand intervening*), Judgment, 31 March 2014, at para 67.

cases that have become commonplace in recent times.[25] The factually complicated nature of the *Pulp Mills* case was summed up well in the Dissenting Opinion of Judge Cançado Trindade, who stated that 'by and large, conflicting evidence seems to make the paradise of lawyers and practitioners, at national and international levels. It seems to make, likewise, the purgatory of judges and fact-finders, at national and international levels.' However, Judge Cançado Trindade went on to say that '[c]onsideration of this issue cannot be avoided'[26] and there is no doubt that this is so. Whilst the factually complex nature of cases regularly coming before the Court might be akin to purgatory for it, it is clear that such issues can no longer be avoided. In fact, if current trends are to continue, as former President of the Court Judge Rosalyn Higgins stated in her address to the Sixth Committee of the General Assembly in 2007, such 'fact-heavy' cases are likely to be a constant feature of the Court's work in the future.[27]

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

It can be anticipated that the consistently factually complex nature of contemporary international litigation will not be universally accepted as presenting any meaningful challenges for the Court and for international law as a whole. For instance, one may argue that the establishment of the

[25] *Pulp Mills Case*, Dissenting Opinion of Judges Al-Khasawneh and Simma at para 3.
[26] Ibid., Dissenting Opinion of Judge Cançado Trindade at para 148.
[27] Judge Higgins stated that '[t]he judicial determination of relevant facts will be an ever more important task for the Court' and cited the *Case Concerning Land Reclamation by Singapore in and around the Straights of Johor (Malaysia v. Singapore) Provisional Measures, International Tribunal for the Law of the Sea, Order of 8 October 2003*, in which 4,000 pages of annexes were put before the Court; see Higgins, 'Speech by H. E. Judge Rosalyn Higgins, President of the International Court of Justice to the Sixth Committee of the General Assembly'.
[28] In the words of Rosenne, '[t]here is no question that modern international relations, and hence modern diplomacy and modern international litigation, is daily becoming increasingly concerned with scientific and technological facts'; see 'Fact-Finding before the International Court of Justice' in S. Rosenne, *Essays on International Law and Practice* (The Hague: Martinus Nijhoff, 2007); Makane Moïse Mbengue, 'Scientific Fact-finding by International Courts and Tribunals' 3 *Journal of International Dispute Settlement* 509, 512; *Nuclear Tests (New Zealand v. France), Judgment, ICJ Reports 1974* 457 para 30.

facts is a secondary concern in inter-State adjudication where the primary task of the tribunal is to settle the dispute before it.[29] As one commentator has stated, 'it can be argued that the ultimate purpose of international adjudication is not establishing the facts, or truths, even, The Truth, but rather to settle the dispute'.[30] This is a position that has carried great weight over the years and is one which is supported by the historical preference of the Court to decide cases on questions of law rather than the facts.

In the past it has been argued that well-reasoned judgments based in the law rather than decided on technical issues of fact have traditionally been perceived as being of a higher prestige and consequently somehow less offensive to the State party on the wrong end of the judgment.[31] This argument in some way ties in with the deference shown to States as a result of their sovereign nature (a point to be examined in greater detail in Section 1.3.3. below) and the belief that in international litigation, with often so much at stake, 'technicalities are taboo'.[32] In addition, international judges, educated in one particular legal system, often hail from domestic appellate courts which in general do not deal with complex factual issues, these having been determined by the lower trial courts.[33]

[29] The situation being somewhat different in relation to international criminal law, see N. A. Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010); R. Mackenzie et al., *The Manual on International Courts and Tribunals* (2nd edn, Oxford University Press, 2010); Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press, 2009).

[30] C. Romano, 'The Role of Experts in International Adjudication' (2009) Société Française Pour le droit International.

[31] A number of reasons have been cited as potential explanations for the Court's traditional predilection for questions of law over questions of fact such as a reluctance or inability to conduct independent fact-finding and the domestic judicial experience of the judges of the Court. See R. R. Bilder, 'The Fact/Law Distinction in International Adjudication' in R. B. Lillich (ed), *Fact-finding before International Tribunals* (Irvington-on-Hudson, NY: Transnational, 1992) 97; Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' 28.

[32] D. V. Sandifer, *Evidence Before International Tribunals*, Vol 13 (University Press of Virginia, 1975) 22; it could be argued that technical or more nuanced judgments allow both sides to claim a victory of sorts, as in the case of the *Bosnian Genocide* case; see www.nytimes.com/2007/02/26/world/europe/26cnd-hague.html.

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

As such, it is not difficult to imagine that this attitude towards facts – that, having already been dealt with by lower courts, they require no further attention – could easily be carried over to the International Court (even if only subconsciously).[34]

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

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

In addition, Article 36(2)(c) of the Court's Statute gives the Court jurisdiction over disputes concerning 'the existence of any fact which, if established, would constitute a breach of an international obligation'. Although this provision deals specifically with cases brought under the optional clause, it also gives a good indication of what would be considered a 'legal dispute' under Article 36(1) of the Statute, establishing the Court's jurisdiction.[39] Such provisions, at the heart of the operation of

[34] This argument has been made by Lauterpacht, who in the context of the influence on the law of evidence of the majority of judges coming from what he terms 'the Roman law systems of law' has argued that 'the probability is that they would tend to apply the rules of evidence obtaining in their own legal systems and disregard those applied by Common Law courts.' See H. Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law' 12 *British Yearbook of International Law* 31, 37.

[35] Under Article 43 of the Statute and 45 of the Rules of the Court.

[36] Article 49(1) and 49(2) of the Rules of the Court.

[37] Rosenne, *Essays on International Law and Practice* 235.

[38] Article 38(1) of the Rules of the Court.

[39] Highet, 'Evidence, the Court, and the Nicaragua Case' 5.

the Court since 1920, highlight the centrality of facts in the Court's work. The Court cannot change the general procedural rules set out in its Statute pertaining to evidence. As the Court stated in the *Nicaragua* case, it is 'bound by the relevant provisions of its Statute and Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties'.[40] Alternatively, in the words of Georg Schwarzenberger, 'individual parties to cases before the Court have but a limited choice: they may take the Statute as they find it or leave it'.[41]

Whilst a former President of the Court once remarked that international lawyers tend to think a lot about the law and perhaps too little about procedure and the finding of facts, there is no doubt that the Court itself considers the establishment of a sound factual basis as an essential part of the judicial function.[42] Ensuring that the Court's decisions are 'founded on a sure foundation of fact'[43] has been very much a central part of the international judicial function and this can be evidenced by the time and effort dedicated to this process in each and every case before the Court.[44] The Court itself has stated that it sees the establishment of the facts as a prerequisite in any case that comes before it: '[the Court] will first make its own determination of the facts and then apply the relevant rules of international law to the facts which it has found to have existed'.[45]

The Court is one of both first and last instance meaning that unlike certain domestic Constitutional Courts, the establishment of the facts is

[40] See *Nicaragua Case* 39 at 59 ; I. Scobbie, 'Discontinuance in the International Court: The Enigma of the Nuclear Tests Cases' 41 *International and Comparative Law Quarterly* 808, 810; Scobbie states that the Court is bound by its rules of procedure for a good reason – to provide an element of predictability for States before the Court and to prevent ad hoc or arbitrary modifications that deny any guarantee of consistency (ibid.), 'International Court of Justice: Resolution Concerning the Internal Judical Practice of the Court' [American Society of International Law] 70 *The American Journal of International Law* 905; see further Robert Kolb, *The International Court of Justice* (Oxford: Hart, 2013) 942.

[41] Georg Schwarzenberger, *International Law – As Applied by International Courts and Tribunals* (London: Stevens & Sons, 1968) 413.

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

[43] See Lord Justice Bingham in *Air Canada and Others Appellants v. Secretary of State for Trade and Another Respondents* (1983) 2 W.L.R. 494; A. L. Marriott, 'Evidence in International Arbitration' 5 *Arbitration International* 280, 281.

[44] Higgins, 'Introductory Remarks by Rosalyn Higgins' 229.

[45] See *Armed Activities Case* 200 para 57.

an essential part of the Court's function.[46] As the Court stated in *Pulp Mills:*

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

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

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

Additionally, with a number of high-profile cases currently before the Court such as the joined cases between Costa Rica and Nicaragua[51] and

[46] K. Highet, 'Evidence and Proof of Facts' in Lori F. Damrosch (ed), *The International Court of Justice at a Crossroads* (Dobbs Ferry, NY: Transnational, 1987) 355; Franck, 'Fact-finding in the I.C.J.' 21; C. J. Tams, 'Article 51' in A. Zimmermann (ed), *The Staute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) 1301; however see section 2.1.4. for some critical comments on how the Court often relies on fact-finding commissions in order to establish the facts and a discussion as to whether this is a delegation of the Court's judicial function.

[47] *Pulp Mills Case* para 162; see also paras 163 and 168.

[48] *Pleadings, Namibia Advisory Opinion*, Vol. 1, 143 para 45.

[49] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971* 16, 27 para 40.

[50] Kolb, *The International Court of Justice* 928.

[51] *Cases concerning Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*; *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua).*