Incidental Proceedings before the International Court of Justice: The Fine Line between “Litigation Strategy” and “Abuse of Process”

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Abstract

Scholars and State counsels have often pointed out the fact that incidental proceedings could be abused, especially when they serve as dilatory mechanisms. While the International Court of Justice has never followed up on such claims, the recent interest in the concept of abuse of process may bring this issue back into focus. The purpose of the present article is to examine whether the notion of abuse of process could actually be applied in such cases, at a time when many types of conduct seem to be loosely labelled as abusive. It highlights the difficulties to reach such a conclusion as well as the necessity for clarification from the Court on what may constitute an abuse of process.

Keywords

abuse of process – litigation strategy – incidental proceedings – provisional measures – objections – counterclaims – discontinuance – intervention

1 Introduction

Allegations of abuse of process have become regular in international litigation. This concept is derived from the international law principle of good faith and can be treated as a particular feature of the broader concept of “abuse of rights”.¹ The latter relates to the fact that rights cannot be considered as

¹ For an analysis of the concept of abuse of rights in international law, see: Nicolas Politis, “Le problème des limitations de la souveraineté et la théorie de l’abus des droits dans les

absolute. Even when acting within the defined limitations of a right, the owner of a right will be prevented from exercising it in certain ways. The doctrine of “abuse of rights” has been very controversial. Some scholars have questioned whether a right could be abused and emphasised the fact that speaking of an abuse of rights would be “an oxymoron”.² However, it has now found a place in international law as a general principle recognized by civilized nations under Article 38 of the Statute of the International Court of Justice (ICJ) and refers to the fact that a right is exercised for a purpose other than that for which it was granted.³ As of today, the ICJ has never provided any definition of what ought to be considered as an abuse of process, but it has often been defined in academic commentaries as “the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights are established, especially for a fraudulent, procrastinatory or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for purposes of pure propaganda”.⁴ While this definition is rather broad, it should be noted that the abuse of process doctrine can be addressed differently depending on the international adjudicative mechanism concerned, and that what is considered as an abuse of process by academics may not be regarded as such by international courts. As an example, contrary to the suggested definition, the European Court of Human Rights (ECtHR) found in its early jurisprudence that the fact that an applicant might be inspired to bring a petition by motives of publicity or political propaganda did

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- rapports internationaux”, 6 *Recueil des Cours de l'Académie de Droit International* (1925), 1; Harold C. Gutteridge, “Abuse of Rights”, 5 *Cambridge Law Journal* (1933), 22; Séléa Trifu, *La notion de l'abus de droit dans le droit international* (1940); Georg Schwarzenberger, “Uses and Abuses of the ‘Abuse of Rights’ in International Law”, 42 *Transactions of the Grotius Society* (1946), 146; Alexandre-Charles Kiss, *L'abus de droit en droit international* (1953); Jean-David Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (1958); Graham D.S. Taylor, “The Content of the Rule Against Abuse of Rights in International Law”, 46 *British Yearbook of International Law* (1972–73), 323; Babatunde O. Iluyomade, “The Scope and Content of a Complaint of Abuse of Right in International Law”, 16 *Harvard International Law Journal* (1975), 47; Vladimir Paul, “The Abuse of Rights and Bona Fides in International Law”, 28 *Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht* (1977), 107; Robert Kolb, *La bonne foi en droit international public* (2000), 429–487; Michael Byers, “Abuse of Rights: An Old Principle, A New Age”, 47 *McGill Law Journal* (2002), 389; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), 129.
- 2 Joseph M. Perillo, “Abuse of Rights: A Pervasive Legal Concept”, 27 *Pacific Law Journal* (1995), 47.
 - 3 Alexandre Kiss, “Abuse of Rights”, in *Max Planck Encyclopedia of Public International Law* (2006).
 - 4 Robert Kolb, “General Principles of Procedural Law”, in *The Statute of the International Court of Justice: A Commentary* (2019), 998.

not necessarily mean that the application was an abuse of the right of petition.⁵ In the same vein, the ICJ has often stated that “it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement”.⁶

Although there remains some ambiguity surrounding the concept of “abuse of process”, international courts and tribunals are frequently faced with allegations that a procedural right has been abused. In particular, it has found a wide diffusion in investment arbitration where tribunals have found some claims to be inadmissible on the basis that the conduct of one of the parties amounted to an abuse of process. The survey of the case law reveals that this concept covers a large variety of conduct. One of the situations which has frequently been targeted as an “abuse of process” is that of corporate restructuring (or “treaty planning”), when the creation of corporations in a foreign State is merely designed to gain access to international arbitration procedure.⁷ The “abuse of process” concept has also been used with regard to parallel proceedings when, in an attempt to maximize its chances of success, a party multiplies arbitral proceedings relating to the same investment and arising out of the same facts, under different investment treaties.⁸ As regards inter-State litigation, the

5 ECtHR, *Lawless v. Ireland*, Admissibility Decision of 30 August 1958, Application No. 332/57, *Yearbook of the Convention*, Vol. 2, 324.

6 *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1988, 91, para. 52. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (Iran v. United States of America)*, *Judgment of 6 February 2021*, para. 95.

7 Jorun Baumgartner, *Treaty Shopping in International Investment Law* (2016), 12; Utku Topcan, “Abuse of the Right to Access ICSID Arbitration”, 29 *ICSID Review* (2014), 632; Hervé Ascensio, “Abuse of Process in International Investment Arbitration”, 13 *Chinese Journal of International Law* (2014), 771–774; Eric de Brabandère, “‘Good Faith’, ‘Abuse of Process’ and the Initiation of Investment Treaty Claims”, 3 *Journal of International Dispute Settlement* (2012), 621–626; Yael Ripco Borman, “Treaty Shopping Through Corporate Restructuring of Investments: Legitimate Corporate Planning or Abuse of Rights?”, 24 *Hague Yearbook of International Law* (2011), 359. For some examples of an application of the abuse of process doctrine with regard to corporate restructuring, see: *Phoenix Action, LTD v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 144; *Venezuela Holdings BV and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, para. 190; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections of 1 June 2012, para. 2.42; *Philip Morris Asia Limited/The Commonwealth of Australia*, PCA Case/UNCITRAL, Award on Jurisdiction and Admissibility of 17 December 2015, para. 588.

8 Emmanuel Gaillard, “Parallel Proceedings: Investment Arbitration”, *Max Planck Encyclopedia of International Procedural Law* (2019); Giovanni Zarra, *Parallel Proceedings in Investment Arbitration* (2017). See, for example: *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction of 1 February 2016, para. 331 (where no abuse was found although the Tribunal theoretically admitted it);

concept of “abuse of process” has been invoked in several instances, even if international courts and tribunals seem quite reluctant to dismiss a claim on this ground. Yet, some of them can rely on a statutory provision which expressly empowers them to reject a claim that is found to be abusive. This is the case of the International Tribunal for the Law of the Sea (ITLOS), since Article 294(1) of the United Nations Convention on the Law of the Sea (UNCLOS) stipulates that “[a] court or tribunal provided for in Article 287 to which an application is made in respect of a dispute referred to in Article 297 shall determine at the request of a party, or may determine *proprio motu*, whether the claim constitutes an abuse of legal process or whether *prima facie* it is well founded [...]”. As regards the ICJ, although its Statute contains no provision that relates expressly to “abuse of process”, it has been confronted with such allegations since its earliest days.⁹ An overview of the ICJ’s case law from the past few years demonstrates that abuse of process has become a recurrent objection.¹⁰

Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria, ICSD Case No. ARB/12/35, Final Award of 31 May 2017, para. 545.

9 Andrew D. Mitchell, Trina Malone, “Abuse of Process in Inter-State Dispute Resolution”, in *Max Planck Encyclopedia of International Procedural Law* (2018).

10 For abuse of process allegations before the ICJ in recent years, see, *inter alia*: *Jadhav (India v. Pakistan)*, Judgment of 17 July 2019, *I.C.J. Reports* 2019, paras. 40–50; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, *I.C.J. Reports* 2019, paras. 100–115; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, *I.C.J. Reports* 2018, paras. 139–142; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Oral proceedings, Verbatim record CR 2016/4, 21; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Counter-Memorial of Pakistan, 13; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Oral proceedings, Verbatim record CR 2015/26, 9. The abuse of process doctrine had already been invoked in past cases: *Ambatielos (Greece v. United Kingdom)*, Oral proceedings, *I.C.J. Pleadings* 1953, 433; *Right of passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment of 26 November 1957, *I.C.J. Reports* 1957, 130; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Written proceedings, Preliminary objections submitted by the Spanish government, 90; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, *I.C.J. Reports* 1991, 63, para. 27; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, *I.C.J. Reports* 1992, 255, para. 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, *I.C.J. Reports* 1996, 622, para. 46; *Legality of Use of Force (Yugoslavia v. Portugal)*, Provisional Measures, Order of 2 June 1999, *I.C.J. Reports* 1999, 663; *Aerial Incident of 10 August 1999 (Pakistan v. India)*, Jurisdiction of the Court, Judgment of 21 June 2000, *I.C.J. Reports* 2000, 30, para. 40; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Oral

However, up to now, the Court has never sustained an objection to admissibility based on an allegation of abuse of process, and it has not provided any definition of this concept. In the *Immunities and Criminal Proceedings* case, it merely stated that its case law had drawn a distinction between abuse of rights and abuse of process, and specified that “although the basic concept of an abuse may be the same, the consequences of an abuse of rights or an abuse of process may be different”.¹¹ Nevertheless, the abuse of process allegation was rejected. It stands from the Court’s case law that, even if it recognizes the potential applicability of this concept, it has never come to the conclusion that specific conduct amounted to an abuse of process. While judgments often emphasize the fact that the doctrine can only be applied in exceptional circumstances,¹² the argument turns to be more successful in front of other international courts or tribunals, especially in investor-State arbitration, where numerous investment tribunals have found that the abuse of process doctrine could be applied in order to avoid parallel proceedings or when a corporation was created for the sole purpose of gaining access to investment arbitration.

As regards the ICJ, abuse of process has often been alleged in relation to the use of incidental proceedings, but the alleged conduct has never been recognized as such. One may wonder whether this is linked to some sort of hesitancy from the Court, or whether the alleged conduct was simply not abusive. It is clear that parties have developed a large array of litigation tactics which, considered loosely, can often be labelled as being abusive. This is particularly the case with incidental proceedings, since they have a highly disruptive nature in the judicial process.¹³ The defendant may seek to invoke a multitude of preliminary objections or raise other incidental proceedings for the sole purpose of slowing down the ordinary course of the proceedings and delaying the resolution of a

proceedings, Verbatim record CR 2005/19, 16–18; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Mexico v. United States of America*), Oral proceedings, Verbatim record CR 2008/15, 9; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (*Cambodia v. Thailand*), Oral proceedings, Verbatim record CR 2011/14, 30; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Oral proceedings, Verbatim record CR 2013/29, 42–45.

- 11 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment of 6 June 2018*, I.C.J. Reports 2018, 335, para. 146.
- 12 See, for instance: *ibid.*, para. 150; *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award of 9 January 2015, para. 186; ECtHR, *Mirolubovs and others v. Latvia*, Judgment of 15 September 2009, Application No. 798/05, para. 62.
- 13 Jean-Marc Sorel, Florence Poirat, *Les procédures incidentes devant la Cour internationale de Justice : exercice ou abus de droits ?* (2001).

case that he did not initiate. In such case, it is not surprising that the opposing party argues that procedural devices are misused and raises the abuse of process argument. However, invoking an abuse of process objection may also be part of the litigation strategy itself. Indeed, as stated by Kolb, “the abuse of procedure argument is often used as a sort of last and additional item”.¹⁴ One may also argue that the “abuse of process” allegation is somewhat of a trend in ICJ proceedings. It is often used as a purely rhetorical formula and objections are made in passing, without the allegation being really serious. In other words, what a litigant State may label as “abusive” during the proceedings can rarely be considered as such from a strictly legal point of view. It may also be that, even if the Court acknowledges the fact that one’s exercise of a procedural right has a disruptive nature, it does not consider it so extreme as to find it abusive and render the application inadmissible. The ICJ has never clarified when exercising one’s right stops being regular and crosses the line into the realm of abuse. The Court’s vagueness regarding abuse of process may contribute to the fact that parties will often raise this objection, in order not to leave any argument aside.

Scholars have long emphasised that incidental proceedings may be used for other purposes than those for which they were instituted. Their extensive use has been criticized in former instances, among which the *Land and Maritime Boundary* case is a textbook example.¹⁵ While the strategic use of incidental proceedings is not a new issue, the notion of abuse of process has drawn more attention in recent years. The parties’ growing tendency to invoke abuse of process and the fact that the Court has recently devoted a few lines to it suggests that it is now more inclined to make use of this doctrine. However, in the author’s opinion, even if the use of incidental proceedings may sometimes reflect a strategic use, it is difficult to consider that such behaviour can be labelled as abuse of process. These hypotheses are rather tactical manoeuvres

14 Robert Kolb, *Good Faith in International Law* (2017), 221. See also: Freya Baetens, “Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?”, *EJIL: Talk!*, 15 October 2019, <<https://www.ejiltalk.org/abuse-of-process-and-abuse-of-rights-before-the-icj-ever-more-popular-ever-less-successful/>>.

15 In this case, Nigeria introduced eight preliminary objections. Four months after the Court’s decision on jurisdiction and admissibility, Nigeria requested the interpretation of the judgment under Article 60 of the Statute. Thereafter, Nigeria also introduced counter-claims in its counter-memorial that were declared admissible by the Court. Nigeria’s strategy in this case has often been criticized. See, *inter alia*: John Graham Merrills and Malcolm D. Evans, “The Land and Maritime Boundary Case (Cameroon v. Nigeria), Preliminary Objections”, 48 *The International and Comparative Law Quarterly* (1999), 657; Alain Pellet, “Remarks on Proceedings Before the International Court of Justice”, 5 *The Law and Practice of International Courts and Tribunals* (2006), 165.

where the traditional criterion for abuse is rarely met. The purpose of this article is to shed some light on the applicability of the abuse of process doctrine before the ICJ with regard to the use of incidental proceedings. It will first consist of a review of various cases in which abuse of process has been alleged, calling each time into question whether the stated conduct can really be considered as abusive (2). Concerning methodology, the approach will focus on interim measures, preliminary objections, counter-claims, intervention and discontinuance, which are all listed under the heading “Incidental Proceedings” in Part III, Section D of the Rules of the Court. The “Special reference to the Court” procedure (Article 87) will be left aside for its incidental nature is debatable.¹⁶ The developments will mainly concern ICJ practice, although parallels may be drawn with other international courts and tribunals. Second, it will be demonstrated that, even in serious circumstances, several reasons may prevent the Court from making an abuse of process finding (3).

2 Abuse of Process Allegations with Respect to Incidental Proceedings

The situations in which the doctrine of abuse of process may be alleged are manifold. The entire procedure is amenable to abuse, especially in the form of incidental proceedings. The latter can be instrumentalized in various ways and may therefore be used as means – when they are used as strategic tools to maximize a litigant’s chances of winning the main suit – (2.1), or as ends – when the one who invokes them only seeks to benefit from the advantages they provide, without any interest in the main proceedings (2.2).

2.1 *Incidental Proceedings as Strategic Tools for the Main Proceedings*

As part of a strategic manoeuvre, the litigant may seek to slow down the proceedings as much as possible. In this case, incidental proceedings can become very useful tools since they often involve written pleadings and oral submissions in the course of which the proceedings on the merits of the main case can be temporarily suspended. Counter-claims can be used as such since they

¹⁶ It is worth noting that, in the *Land, Island and Maritime Frontier Dispute* case, the ICJ stated that “Incidental proceedings by definition must be those which are incidental to a case which is *already* before the Court or Chamber”, while the “Special reference to the Court” corresponds to the notion of appeals against decisions rendered by other tribunals: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, 134, para. 98 (emphasis added). See also: Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (2006), 579, note 175.

have the effect of widening the scope of the proceedings. Even though they are intended to “achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently”,¹⁷ in the short term, they lead to a slowdown in the proceedings and may therefore be used by respondents as a dilatory instrument. It is not the raising of the counter-claim *per se* that consumes a large amount of time,¹⁸ but it inevitably prolongs the proceedings at the merits stage when the counter-claim is found to be admissible. In the *Genocide* case, the initial claim was made by Bosnia and Herzegovina but several counter-claims were raised by Yugoslavia. The Court found these counter-claims admissible, but stated that “the admissibility of the counter-claims must necessarily relate to the aims thus pursued and be subject to conditions designed to prevent abuse”.¹⁹ In his separate opinion, Judge *ad hoc* Lauterpacht stressed “the immense additional complexity to which the treatment of the counter-claims simultaneously with the claims is bound to give rise”.²⁰ The Court outlined the importance not to “lose sight of the interest of the Applicant to have its claims decided within a reasonable time-period”,²¹ but it did not give any guidance as to the situations in which it might admit that the raising of a counter-claim would be abusive. In any event, it seems to the author that it would be very difficult to reach such a conclusion. First, given the procedural equality of the parties, one may consider that when the Court finds that it has jurisdiction

17 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, 257, para. 30.*

18 Regarding the ICJ, the presentation of counter-claims does not always imply oral hearings. According to Article 80(3) of the Rules, it is only where an objection is raised as to the admissibility of the counter-claim that oral hearings should be held. As stated by Judge Higgins in the *Oil Platforms* case, “oral submissions are neither required by the terms of Article 80, paragraph 3, nor excluded” (*Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, Separate opinion of Judge Higgins, 223*). On this topic, see: Constantine Antonopoulos, *Counterclaims before the International Court of Justice* (2011), 145, 149.

19 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, 257, para. 30.*

20 *Ibid.*, Separate opinion of Judge Lauterpacht, 284, para. 19. See also: *ibid.*, Dissenting opinion of Vice-President Weeramantry, 295: “if this Application should be allowed, it could open the door to parties who seek to delay proceedings against themselves to file, when the case is nearly ready for hearing, what is, in effect, another case against the applicant, with a view of delaying proceedings against itself”.

21 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, 260, para. 40.*

to entertain the claims, the defendant State must be able to defend itself and put forward its claims without being systematically accused of implementing a delaying strategy. Therefore, an abuse of process finding would require very specific (rather exceptional) circumstances. An abuse of process determination requires the proof that a right is used for a different purpose than that for which it exists. With regard to counter-claims, it would therefore be necessary to establish that the counter-claim was raised for the sole purpose of lengthening the procedure. This appears to be difficult to achieve since any counter-claim, even when legitimate, implies the slowing down of the main proceedings. The appropriate test for a finding of abuse of process would thus require making a distinction between “natural” and “undue” delay. Moreover, even in the event of an “undue” delay, the Court would still have to establish the defendant’s intention to delay the normal course of the proceedings, which seems particularly problematic. In this regard, it is important to keep in mind that the delaying of the proceedings may also be related to the technicality of the issues raised by the defendant, to the timing of the counter-claims, or to the court’s heavy caseload. The abusive nature of a counter-claim could also be detected on the basis of its loose connection with the primary claim. However, in this case, the Court will most likely regard it as inadmissible without referring to the abuse of process doctrine.

The defendant may also wish to raise objections as to the court’s or tribunal’s jurisdiction or the admissibility of the case. In principle, the defendant is free to raise as many objections as he wishes, provided that those objections do not abuse the due course of justice. Yet, it is clear that preliminary objections may also be used as dilatory devices since their evaluation implies an extension of time limits and can, in certain cases, have a suspensive effect on the main proceedings.²² This is the case with the ICJ since Article 79(5) of the Rules provides that “on receipt by the Registry of the document instituting the objection, the proceedings on the merits shall be suspended”. Abuse of process has been invoked on several occasions in this context, including in the *Genocide* case, in which Yugoslavia raised seven preliminary objections. During the oral phase, Bosnia and Herzegovina had stressed the fact that this conduct amounted to

22 In some cases, it is up to the judge to decide whether or not the proceedings will be suspended. As an example, Article 41(3) of the ICSID Arbitration Rules provides that “upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits”. It may also be that the raising of preliminary objections has no suspensive effect at all. This is the case before the Inter-American Court of Human Rights since Article 42(3) of the Rules states as follows: “the presentation of preliminary objections shall not suspend the proceedings on the merits, nor their respective deadlines”.

an abuse of process in so far as Yugoslavia sought to delay the main proceedings. Although the Court rejected the objections, it made it clear that it did “not consider that Yugoslavia had, in presenting those objections, abused its right to do so under Article 36, paragraph 6, of the Statute of the Court and Article 79 of the Rules of Court”.²³ It also specified that preliminary objections may be useful to clarify the legal situation and that the ones presented by Yugoslavia had served that purpose.²⁴ In the *Land and Maritime Boundary* case, not only did Nigeria raise eight preliminary objections, but it also requested an interpretation of the first Judgment and introduced several counter-claims in its counter-memorial. As a consequence, the Judgment of 10 October 2002 was rendered more than eight years and six months after Cameroon’s application.²⁵ Other international courts have been faced with parties making use of preliminary objections primarily as a delaying tactic. In the *Neira Alegria* case, the Inter-American Court of Human Rights rejected several groundless objections that had been raised by Peru. Nevertheless, Peru also requested a revision and an interpretation of the Court’s dismissal of those objections.²⁶ Although the Court did not find any abuse of process, Judge Buergenthal labelled it as such in a declaration appended to the Court’s order. He deplored the State’s conduct and outlined the fact that a government “may not interpose manifestly ill-founded and trivial motions whose sole purpose can only be to disrupt and delay the orderly and timely completion of the proceedings”.²⁷

23 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996, 622, para. 46.*

24 *Ibid.*

25 Alain Pellet, “Remarks on Proceedings Before the International Court of Justice”, 5 *The Law and Practice of International Courts and Tribunals* (2006), 165.

26 Despite their relation to the original proceedings, revision or interpretation proceedings are entirely new cases and are usually not considered as incidental proceedings since they only arise after a final decision on the merits has been made. However, their strategic use in this instance was directly related to the preliminary objections, which may give them an incidental nature. Indeed, derivative proceedings such as revision and interpretation “may also at the same time become incidental proceedings if they relate to a judgment that was given in an incidental phase of the original case, *in specie* a judgment on preliminary objections”: Shabtai Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards* (2007), 191.

27 *Neira Alegria et al. v. Peru* (Request for Revision and Interpretation), Annual Report of the Inter-American Court of Human Rights 1992, 85 (OAS/Ser.L/V/III.27). See: Jo M. Pasqualucci, “Preliminary Objections before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics”, 40 *Virginia Journal of International Law* (1999), 13–15.

As can be seen from the reviewed cases, the mere fact that a significant number of preliminary objections (or any other incidental proceedings) have been raised would not be sufficient for a finding of abuse of process. Generally speaking, it appears that the determination of abuse of process is not based on the number of incidental proceedings raised, but rather on the way in which they are employed. According to the Court's words in the *Genocide* case, raising preliminary objections could only become abusive when it is solely designed to delay the normal course of the proceedings, without clarifying the legal situation in question. However, these guidelines do not really help to draw the line between an abuse of process and a regular use of incidental proceedings. First, the "clarification" test would exclude a finding of abuse of process whenever the case at hand raises arduous issues, since this complexity will always justify the raising of a substantial number of preliminary objections. Secondly, determining whether or not the defendant is attempting to obstruct the proceedings seems vain, since the willingness to obstruct the continuation of the case is inherent to the raising of preliminary objections.²⁸ Some authors have stressed the fact that these proceedings are "the most markedly tactical of all incidental proceedings, as the party making those objections would normally want to kill the proceedings or part of them before the merits are dealt with".²⁹ As a consequence, it seems very difficult to make a finding of abuse on the grounds that raising the objections obstructs the proceedings. Only in the most extreme cases will it be possible to establish that these procedural devices are used for other purposes than those for which they were instituted.

It follows from the aforesaid that, even though incidental procedures are used for their dilatory effect, it is very unlikely that their utilisation will be considered as abusive. While raising an avalanche of preliminary objections may be seen as a tactic to lengthen the proceedings and afford more time to the defendant, it can also be seen as a legitimate strategy to try all means to win the case. As stated by Robert Kolb, "the most determined (even fierce) exercise of one's procedural rights is not itself enough to constitute an abuse".³⁰ Since the verdict of a case is always uncertain, a State may wish to take all the chances on its side and raise multiple objections even though it assumes that they will be rejected. As long as the strategy does not constitute a violation of the Statute or the Rules, it is difficult to deny a party's right to make use

28 As Robert Kolb puts it very clearly, "the objective of a preliminary objection is to prevent the Court from examining the substantive issues, either from the time being, or at all": Robert Kolb, *The International Court of Justice* (2013), 224–225.

29 Sergio Ugalde, José Juan Quintana, "Managing Litigation before the International Court of Justice", 9 *Journal of International Dispute Settlement* (2018), 26.

30 Kolb, *supra* note 28, 947.

of every procedural means at its disposal to protect its interests and prevent its opponents from achieving its goals.³¹ In the event of the raising of multiple objections, it is highly probable that the judges would adopt the same attitude as they do towards counter-claims:³² although deploring the slowing down of the procedure, they do not find any abuse and proceed to the examination of the objections raised. This is all the more likely since the Court considers that the respondent's right to raise preliminary objections is a "fundamental procedural right".³³

A State's litigation strategy is not only about making use of procedural incidents in order to lengthen the duration of the proceedings. Beyond their dilatory nature, incidental proceedings may also be used for the tactical advantages they will bring in the main proceedings. For instance, if the defendant State raises preliminary objections, the applicant will be compelled to "at least partially 'show his hands'".³⁴ Some incidental proceedings will have the effect of partly unveiling the other party's arguments, and enable the opponent to make adjustments in its own submissions. This has been pointed out, in particular, in cases where the proceedings were discontinued. In these cases, criticisms do not so much touch upon the discontinuance of the proceedings itself, but on the fact that the applicant reintroduces his claim after withdrawing it. This conduct may be seen as a strategic manoeuvre in order to obtain an advantage, such as gaining some information about the respondent's claim, before reintroducing the same arguments. This issue was discussed in the *Barcelona Traction* case, where after discontinuing the proceedings, Belgium reintroduced the original claim after the friendly settlement negotiations broke down. Spain argued that Belgium's conduct ran contrary to the principle of good faith and that its discontinuance disentitled it from bringing the same claim to the Court. However, the ICJ found that it was not called upon to enquire into the motives of the discontinuing and that a discontinuing State was not invariably debarred from renewing that application. Indeed, according to Article 69 of the Rules, parties have no obligation to give reasons for their wish

31 Terry D. Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute* (1989), 75.

32 See, for instance: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017, Joint opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet, 329, in which it was pointed out that the counter-claim brought by Colombia would further extend the length of the proceedings, even though Colombia had already raised preliminary objections.

33 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, I.C.J. Reports 2010, 658, para. 44.

34 Terry D. Gill, *supra* note 31, at 74.

to discontinue the proceedings and may do so “for any reason”.³⁵ This question was also at hand in the *Armed Activities* case, where after introducing several claims in 1999, the Democratic Republic of the Congo (DRC) informed the Court in 2001 that it intended to discontinue the proceedings instituted against Burundi and Rwanda. These cases were thus removed from the Court’s list. In 2002, the DRC reintroduced the claim against Rwanda, who argued that this new application was an abuse of process since the DRC was bringing exactly the same allegations forward again.³⁶ In that case, however, it should be noted that, when it discontinued the proceedings in 2001, the DRC had explicitly stated that it reserved the right to invoke subsequently new grounds of jurisdiction of the Court. Discontinuance is thus seen as a purely procedural matter and the relevant provisions of the Rules are “concerned solely with the ‘how’, not the ‘why’ of the matter”.³⁷ It should be no bar to further action, unless the contrary has clearly been established. The Court’s statements in the *Barcelona Traction* case demonstrate that discontinuance may legitimately have a strategic purpose and be designed to cure a defect in the claim or to remove an obstacle before renewing the suit. As a consequence, it is very doubtful that the Court would ever consider that discontinuance amounts to an abuse of process. In any case, it seems very difficult to prove that a discontinuing State exercised its procedural right for an improper purpose, since “there are few limits to the motives that might inspire a discontinuance”.³⁸

2.2 *Incidental Proceedings as the Real Objective of the Proceedings*

The allegation of abuse of process is sometimes related to the fact that the applicant is making use of some procedural devices for the sole benefits they will provide, without there being any real interest in the main proceedings and the resolution of the dispute at hand. In some cases, one may have the feeling that the request for provisional measures becomes the primary focus of the applicant, while the institution of proceedings is only seen as a “legally necessary prerequisite”.³⁹ Such assertions have been made regarding the *Lockerbie*

35 *Barcelona Traction Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Preliminary Objections, Judgment of 24 July 1964, *I.C.J. Reports* 1964, 20.

36 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Oral proceedings, Verbatim record CR 2005/19, 21–23.

37 *Barcelona Traction Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Preliminary Objections, Judgment of 24 July 1964, *I.C.J. Reports* 1964, 19.

38 *Ibid.*

39 Tullio Treves, “The Political Use of Unilateral Applications and Provisional Measures Proceedings”, in Jochen A. Frowein et al. (eds.), *Negotiating for peace: Liber Amicorum Tono Eitel* (2003), 466. See also: Hugh Thirlway, “The Indication of Provisional Measures by the

case, where Libya submitted a request for the indication of provisional measures only a few hours after the submission of its application. Once the Court had rejected its application, Libya sought to prolong the proceedings on the merits and showed no haste in achieving the settlement of the dispute.⁴⁰ This may also happen in some time-sensitive situations where an individual is in custody and risking the death penalty, as was the case in the *Avena* dispute.⁴¹ During the oral phase of the *Request for Interpretation of the Judgment of 31 March 2004*, the United States argued that “the Application for interpretation [was] in reality no more than a vehicle for a request that the Court issues orders which will not interpret the Judgment – as to whose meaning there is no dispute or doubt whatsoever – but will be directed solely to increasing pressure on the United States to comply with the *Avena* Judgment”.⁴² In his dissenting opinion, Judge Skonitkov also pointed out the fact that “the real issue is compliance with the Judgment rather than its interpretation”.⁴³ Suspicions were also raised as to the real purpose of the proceedings in the case concerning the *Temple of Preah Vihear*. Cambodia filed an application requesting interpretation of the judgment the Court had rendered in 1962 and asked simultaneously for the indication of provisional measures. Some suspected that the request for interpretation was only introduced in order to request provisional measures at the same time.⁴⁴ Provisional measures can also be requested by an applicant who seeks to restrain the defendant’s freedom of action for a certain period of time.⁴⁵ In the *Certain Activities Carried Out by Nicaragua in the Border Area* case, Judge Koroma pointed out the fact that a clear standard was needed to evaluate the legitimacy of an applicant’s claims at the provisional measures stage. In his view, it would “help ensure that parties do not abuse the provisional measures process. Specifically, it would dissuade parties from bringing patently meritless claims with the goal of obtaining provisional measures

International Court of Justice”, in Rudolf Bernhardt (ed.), *Interim Measures Indicated by International Courts* (1994), 27.

40 Guillaume Le Floch, *L'urgence devant les juridictions internationales* (2008), 270.

41 Cameron Miles, *Provisional Measures Before International Courts and Tribunals* (2017), 459.

42 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals* (Mexico v. United States of America) (*Mexico v. United States of America*), Oral proceedings, Verbatim record CR 2008/15, 46–47.

43 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals* (Mexico v. United States of America) (*Mexico v. United States of America*), *Provisional Measures, Order of 16 July 2008*, I.C.J. Reports 2008, Dissenting opinion of Judge Skotnikov, 351, para. 11.

44 Marie Ghantous, “Les mesures conservatoires indiquées par la Cour internationale de Justice dans le cadre de conflits territoriaux et frontaliers. Développements récents”, *The Canadian Yearbook of International Law* (2012), 78.

45 Cameron Miles, *Provisional Measures Before International Courts and Tribunals* (2017), 459.

that would prevent the other party from taking further action until the Court decides the merits of the case".⁴⁶ As illustrated by the above cases, it may often seem that the introduction of a case was only made to leverage the benefits of the provisional measures the Court could possibly indicate.⁴⁷

In recent decades, not only has there been an increasing recourse to international courts and tribunals, but there is also an increasing tendency of parties to request the indication of provisional measures.⁴⁸ As regards the ICJ, although this development may be linked to the landmark decision in the *LaGrand* case,⁴⁹ one may also assume that the high number of requests for the granting of interim measures is related to the benefits they provide to the party who seeks them. There is no doubt that provisional measures may be sought for purposes other than maintaining the *status quo* or preventing irreparable harm *pendente lite*. For instance, provisional measures may be used to assess the strength of a case and its possible outcome. Although the Court only makes a *prima facie* assessment as to its jurisdiction and the possible injury to the rights claimed, the indication of provisional measures can be interpreted as a sign in favour of the applicant since the Court will not easily decide to reverse such a decision and deny its jurisdiction at a later stage.⁵⁰ Therefore, interim measures are deemed to confer a psychological advantage.⁵¹

Even though these purposes cannot be recognized as the legitimate ends of provisional measures, at present, there is no international court or tribunal which has ever considered that one of these situations constituted an abuse of process. It appears that it would be rather difficult to come to such a conclusion. First, when the real objective of the initiated proceedings is to file a request for the indication of provisional measures, it is wrong to consider that the latter constitutes an abuse of process. Technically speaking, the request

46 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2001, I.C.J. Reports 2001, Separate opinion of Judge Koroma, 32–33, para. 13.

47 Marie Ghantous, *supra* note 44.

48 Karin Oellers-Frahm, "Uses and Abuses of Interim Protection Before International Courts and Tribunals", in *Coexistence, cooperation and solidarity: Liber Amicorum Rüdiger Wolfrum* (2012), 1685.

49 *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, 466.

50 See, however: *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and other Mexican Nationals*, where the Court indicated some provisional measures before deciding a few months later that it did not have jurisdiction to decide on the merits of the case.

51 Alain Pellet, Tessa Barsac, "Litigation Strategy", in *Max Planck Encyclopedia of International Procedural Law* (2019), para. 66.

for the indication of provisional measures is in accordance with its purpose and really aims to safeguard the rights of the parties and the object of the litigation in question. If there was any misuse of a procedural instrument, it would come from the original claim, which has not been introduced for the purpose of obtaining a decision on the merits. Second, even when the initial claim is motivated by ulterior purposes, it might be difficult to decide that such a procedural tactic is abusive if the situation at hand requires urgent protection.

The use of procedural incidents may also be seen as abusive when they are primarily designed to give the applicant a public forum for its claim. This has been highlighted with regards to provisional measures, since the sole request for the indication of provisional measures will give the applicant an opportunity to express publicly its opinions, even if the Court finds that it does not have *prima facie* jurisdiction. The Court may thus be used for political aims rather than for pursuing justice. On this matter, scholars have heavily criticized the instrumentalisation of the Court in the *Legality of Use of Force* cases,⁵² where Yugoslavia had the opportunity to bring its allegation to the international community although the Court denied its competence in eight cases.⁵³ Intervention may also be mentioned since third States who are granted the possibility to intervene in ongoing proceedings may, however, seek to intervene in a case for the sole purpose of having a podium to voice their claims and opinions. Up to now, the ICJ has never found a request for intervention to be abusive. Nevertheless, it can be argued that the procedure is such that even such a finding would not really prevent a State from using the Court as a public forum to make its claims. As a matter of fact, according to the Court's procedural rules, oral hearings can be held even if the intervention request is rejected in the end.⁵⁴

The aforesaid leads to the conclusion that, although a State may be deemed to exercise incidental proceedings abusively, in most of the aforementioned instances, it is very difficult to consider that such conduct amounts to an abuse of process. Strategical considerations are often acute in international

52 Guillaume Le Floch, *supra* note 40, at 289; Karin Oellers-Frahm, *supra* note 48, at 1688.

53 Ten claims were introduced by Yugoslavia against NATO States. In the cases against Spain and the United States, the Court found that there was no basis for jurisdiction and struck them out of the list. During the oral phase of the proceedings, some States pointed out the fact that this constituted an abuse of process (*Legality of Use of Force (Yugoslavia v. United Kingdom)*, Oral proceedings, Verbatim record CR 99/23; *Legality of Use of Force (Yugoslavia v. Spain)*, Oral proceedings, Verbatim record CR 99/22).

54 According to Article 84(2) of the Rules, if "an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding".

litigation, but using all the possible means and pulling all the strings does not *per se* match the definition of abuse of process. In any case, it seems difficult to rely solely on the number of incidental proceedings raised by a party to uphold the abuse of process argument, even if it stands clear that these are used as a delaying strategy. The argument may, however, be more successful in other circumstances. For example, some courts have considered that an abuse of process is constituted when the plaintiff relies on fraudulent evidence⁵⁵ or in case of repeated and manifestly unfounded claims.⁵⁶ Notwithstanding the hurdles that the Court may be faced with and which will be further developed in the following section, it could take inspiration from these precedents and strike out claims in similar circumstances or order the party who is abusing its process to pay all of the other party's costs.⁵⁷

3 Impediments to the Admission of an Abuse of Process Allegation

The scarcity of “abuse of process” findings is also related to the fact that several legal and extra-legal issues act as impediments to the admission of such an objection by the Court. These issues concern the power of the Court to remedy an abuse of process (3.1), the required evidentiary threshold (3.2), the gravity of an abuse of process allegation (3.3), and the Court's jurisdictional policy (3.4).

3.1 *Power of the Court to Remedy an Abuse of Process*

An international court's or tribunal's power to dismiss an abusive claim can be mentioned in its constituent instruments, as is the case with ITLOS or the European Court of Human Rights.⁵⁸ As regards the ICJ, its Statute does not

55 ECtHR (GC), *Gross v. Switzerland*, Judgment of 30 September 2014, Application No. 67810/10. See also: ECtHR, *Kerechashvili v. Georgia*, Judgment of 2 June 2006, Application No. 5667/02; ECtHR, *Al-Nashif v. Bulgaria*, Judgment of 20 June 2002, Application No. 50963/99.

56 ECtHR, *Petrovic v. Serbia*, Judgment of 18 October 2011, Applications No. 56551/11 and following.

57 However, with regard to the second scenario, one should note that, in the case of the *Construction of a Road in Costa Rica along the San Juan River*, the Court refused to order Nicaragua to pay all of the costs and expenses of the proceedings and did not uphold the abuse claim while Costa Rica had argued that it was “the fourth or fifth time that Nicaragua had requested these measures, in different forms”: *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Oral proceedings, Verbatim record CR 2013/29, 42–45.

58 According to Article 35(3) of the European Convention on Human Rights (ECHR), “The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention

expressly confer a power to dismiss an application where the Court considers it to amount to an abuse of process. However, scholars usually consider that “[t]he power to apply some such principle as that embodied in the prohibition of abuse of rights must exist in the background of any system of administration of justice in which courts are not purely mechanical agencies”.⁵⁹ This argument has also been invoked by litigant States and this issue was discussed before the ICJ in the *Request for Interpretation of the Judgment in the Avena* case, where the United States argued that Mexico’s request amounted to an abuse of process since it was not – in its eyes – intended to obtain an interpretation of the 2004 Judgment. During the oral proceedings, Vaughan Lowe stated that the power to dismiss an abusive application was an inherent power of any court or tribunal, even if it was not expressly conferred by its constituent instrument.⁶⁰ This allegation rested on two arguments. First, this power is corollary to the Court’s duty to safeguard its own procedure. As stated in the *Northern Cameroons* case, the Court is “the guardian of [its] judicial integrity”⁶¹ and must therefore regulate its own proceedings in the interests of justice. Second, this power is based on the fact that the parties “are bound by a general commitment of loyalty among themselves and towards the Court”.⁶² As a consequence, they are barred from abusing its process and the Court must be empowered to prevent any inappropriate use. One may look for guidance to the practice of investment tribunals, which has provided evidence that it lies within the inherent power of an arbitral tribunal to declare a claim inadmissible because it amounts to an abuse of process, even without an express power to do so. In any event, the issue as to whether the ICJ can dismiss an abusive claim has now been resolved. In practice, the Court has considered

or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application [...]”.

59 Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), 164.

60 *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Mexico v. United States of America*), Oral proceedings, Verbatim record CR 2008/15, 50.

61 *Northern Cameroons (Cameroon v. United Kingdom)*, *Preliminary Objections, Judgment of 2 December 1963*, I.C.J. Reports 1963, 29. See also: the Court’s statements in the *Nuclear Tests* cases where it stated that it possesses power: “enabling it to take such action as may be required, [...] to provide for the orderly settlement of all matters in dispute, to ensure the observance of the ‘inherent limitations on the exercise of the judicial function’ of the Court, and to ‘maintain its judicial character’” (*Nuclear Tests (Australia v. France)*, *Judgment of 20 December 1974*, I.C.J. Reports 1974, 259, para. 23 and *Nuclear Tests (New Zealand v. France)*, *Judgment of 20 December 1974*, I.C.J. Reports 1974, 463, para. 23).

62 Andreas Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd edition, 2006), 830.

several pleas of abuse of process without ever questioning the applicability of this doctrine, nor feeling compelled to mention its inherent power to do so.

3.2 *Evidentiary Difficulties*

Like most international courts and tribunals, the ICJ sets down the principle that the burden of proof lies on the party seeking to assert a certain fact. The doctrine of abuse of process (or abuse of rights) makes no exception to this. In its first judgment in which it referred to abuse of rights, the Permanent Court of International Justice (PCIJ) recalled this principle and stated that “it rests with the party who states that there has been such misuse to prove his statement”.⁶³ Arbitral awards have also recalled that “a claimant is not required to prove that its claim is asserted in a non-abusive manner; it is for the respondent to raise and prove an abuse as a defense”.⁶⁴ Therefore, the abuse of process doctrine is not specific at all as regards the burden of proof. Particularities stem from the required standard of proof. International courts and tribunals have repeatedly stressed that the threshold for finding an abuse of process is high and that it cannot be accepted too easily. In the *Immunities and Criminal Proceedings* case, the Court made it clear that it was only in exceptional circumstances that a claim based on a valid title of jurisdiction would be rejected on the ground of abuse of process.⁶⁵ In her dissenting opinion, Judge Donoghue mentioned the fact that “heightened standards of proof” were required.⁶⁶ Thus, it stands clear that, due to the gravity of this allegation, it is rather difficult to establish the existence of an abuse of process. As stated by Judge Higgins in her separate opinion in the *Oil Platforms* case, “the graver the charge the more confidence must there be in the evidence relied on”.⁶⁷

Not only is the standard of proof quite high, but the evidentiary difficulties are also related to the fact that one will not easily produce convincing evidence that an abuse of process has occurred. Even if it is acknowledged that the notion of abuse does not imply a showing of bad faith, the reviewing court must often probe into the litigant's motivations and mental processes when it

63 *Case concerning certain German Interests in Polish Upper Silesia (The Merits)*, Judgment of 25 May 1926, P.C.I.J., Series A, No. 7, p. 30.

64 *Chevron Corporation & Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case/UNCITRAL, Interim Award of 1 December 2008, para. 143. See also: *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections of 1 June 2012, para. 2.14.

65 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, I.C.J. Reports 2018, 336, para. 150.

66 *Ibid.*, Dissenting opinion of Judge Donoghue, 387, para. 18.

67 *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, I.C.J. Reports 2003, Separate opinion of Judge Higgins, 234, para. 33.

is confronted with an abuse of process objection. As regards incidental proceedings, abuse of process can only be found if one brings the evidence that a State is making use of its procedural right in order to lengthen the proceedings or for another improper purpose. However, the parties' motivations are often manifold, which makes it even more difficult to prove that a State is acting improperly when exercising a procedural right. For instance, as concerns provisional measures, even though one may suspect an alternative purpose to the request, it is very difficult to prove it since an improper purpose is often "ancillary to a desire to actually obtain the measures".⁶⁸ In such a case, the Court would probably have a similar reasoning to the one followed by domestic courts, according to which the illegitimate motive must constitute the predominant element in the motivation of the person against whom the "abuse of rights" charge is brought.⁶⁹ This can be inferred from the Court's judgment in the *Whaling* case, where it had to determine if the JARPA II programme was indeed implemented for purposes of scientific research. In its judgment, it stated that "whether [there may be] motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII".⁷⁰ One can thus assume that, if a State's conduct is driven by multifarious motivations, it will be even more complex to prove that an abuse of process has occurred.

Evidentiary difficulties are also related to the fact that the allegation of abuse of process is most of the time raised in the preliminary phase of the proceedings.⁷¹ As a consequence, the one who alleges that an abuse of process has occurred may not rely on elements that are related to the merits stage. This issue arose before the ICJ in the *Immunities and Criminal Proceedings* case, where France objected to Equatorial Guinea's claims by referring both

68 Cameron Miles, *Provisional Measures Before International Courts and Tribunals* (2017), 469.

69 Louis Josserand, *De l'esprit des droits et de leur relativité : théorie dite de l'abus des droits* (re-ed., 2006), 376–378.

70 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014 I.C.J. Reports 2014, 260, para. 97.

71 Although it is often asserted that abuse of process only comes into play as a preliminary objection, there are some instances in which international courts or tribunals have stated that the question as to whether the claim amounted to an abuse of process could only be dealt with at the merits stage. As an example, in the *Lawless* case, the European Commission of Human Rights stated that "the question as to whether the present Application constitutes an abuse of the right of petition depends upon the outcome of the issue whether or not the Applicant has been the victim of a fundamental breach of the Convention, which issue essentially belongs to the merits and cannot be decided at this stage of the proceedings": *Lawless v. Ireland*, Admissibility Decision of 30 August 1958, Application No. 332/57, *Report of the Commission*, 46.

to abuse of process and abuse of rights in its third preliminary objection. The Court found that “abuse of rights cannot be invoked as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits”.⁷² In other words, the Court decided to isolate each of these concepts from the other, and it is only on the ground of an abuse of process that the claim could be dismissed at the preliminary stage of the proceedings, if “clear evidence” was presented.⁷³ However, by making such a sharp separation between abuse of process and abuse of rights, the Court reinforced the standard of proof with regard to abuse of process since the party raising this objection was prevented from taking into account elements relating to the merits of the case. In her dissenting opinion, Judge Donoghue echoed Alain Pellet’s words according to which it was only when the elements brought by France were “taken as a whole” that they could establish that Equatorial Guinea was abusing the Court’s process.⁷⁴ While the introduction of the claim itself could not be considered as being abusive, the individual elements brought to the Court’s attention by France could only be considered to amount to an abuse of process if the surrounding circumstances of the case were taken into account. This statement highlights one of the difficulties that can arise when attempting to prove that a State is abusing the Court’s process when making use of incidental proceedings. It may be that the abusive nature of a State’s conduct will only be revealed when looking at the proceedings as a whole. It is often not the use of an incidental proceeding, considered in isolation, that constitutes an abuse of process. However, the overall conduct of a State throughout the whole case can reflect a dilatory strategy and may amount to an abuse of process. As demonstrated above, when a State introduces a claim for the sole purpose of being able to request provisional measures, the fact that this claim was introduced for a wrong purpose will only appear to the Court retrospectively, when the State will not show much interest in the resolution of the dispute on the merits. The question as to whether the Court would be willing to consider that such conduct amounts to an abuse of process remains uncertain, but it stands clear that it is only in the most blatant cases that an abuse of the Court’s process could be found at a preliminary stage.

Finally, even though parties are free to introduce whatever evidence to support an abuse of process allegation, the Tribunal’s findings in the *Chagos Marine Protected Area* arbitration suggests that the Court might be more

72 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, *I.C.J. Reports* 2018, 337, para. 151.

73 *Ibid.*, 336, para. 150.

74 *Ibid.*, Dissenting opinion of Judge Donoghue, 382, para. 5.

exacting when assessing the admissibility of the evidentiary material put forward as regards abuse of process (or abuse of rights). In that case, Mauritius' submissions were primarily based on a document purported to be the reproduced text of a cable from the U.S. Embassy. This record cast serious doubt on the purposes behind the proclamation of the Marine Protected Area by the United Kingdom. Nevertheless, the Tribunal considered it inappropriate "to place weight on a record of such provenance".⁷⁵ While it is not surprising that such a document is given a low probative value, one must not forget that proving the existence of abusive conduct may often implicate confidential documents. The existence of an improper purpose does not usually appear *ex facie* and may require a thorough examination of the State's conduct. Obviously, a State acting in a strategic way and exercising its right for an improper purpose will never state loud and clear its reasons for doing so. It may thus be difficult for the party alleging abuse of process to provide conclusive evidence that a right has been exercised for an improper purpose.

3.3 *Gravity of the Allegation*

Abuse of process is a serious allegation. It is often perceived as offensive since it relates to the notion of bad faith and calls the honour of States into question. States may thus be reluctant to raise the "abuse of process" argument for diplomatic concerns. As Belgium put it in the *Legality of Use of Force* case, "to allege bad faith or abuse of right in the course of legal proceedings is not a step to be taken lightly".⁷⁶ However, what held true yesterday may be reconsidered today. As stated previously, in recent years, the abuse of process allegation seems to be more frequent before the ICJ. In some instances, abuse of process is simply alleged in response to the adversary State raising the "abuse" argument, even if it stands clear that the constituent elements of the notion of abuse are not fulfilled. Abuse of process is thus used extensively and sometimes seen as an ultimate option for counsel when one is floundering. Nevertheless, as regards the Court, it remains reluctant to accuse a State of abusing its procedure. The "abuse of process" doctrine carries a pejorative connotation and should be used cautiously.⁷⁷ Even in exceptional circumstances, when the threshold for abuse seems to have been reached, the Court has circumvented the doctrine of abuse of process and dismissed the claim without referring to it. As

75 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA, Final Award of 18 March 2015, 212, para. 542.

76 *Legality of Use of Force (Yugoslavia v. Belgium)*, Written proceedings, Preliminary objections raised by Belgium, para. 480.

77 Cameron Miles, *supra* note 68, at 468.

an example, in two of the *Legality of Use of Force* cases, Yugoslavia requested provisional measures although the Court manifestly lacked jurisdiction to adjudicate the dispute. Instead of simply denying the requested provisional measures like it usually does, the Court reacted by striking both cases off the list.⁷⁸ One may wonder what prevented the Court from referring to the abuse of process doctrine in these instances, if not the gravity of such a finding.

3.4 *Jurisdictional Policy*

The Court's willingness to use the abuse of process doctrine sparingly is also related to the fact that, as most international courts and tribunals, it seeks to open itself as widely as possible to States that are willing to use it to settle a legal dispute. The Court's jurisdiction depends on the will of the parties. States might be reluctant to submit their disputes to the Court if the latter would apply the abuse of process doctrine in an overzealous manner.⁷⁹ Although the number of cases on the Court's docket remains very high, most States are reluctant to entrust their legal disputes to the Court, as evidenced by the low number of declarations of acceptance of the compulsory jurisdiction of the Court. One of the main reasons for this reluctance is the fact that States do not wish to risk a loss of prestige in the event they lose their cases. The more widely the doctrine of abuse of process is applied, the more hesitant States may be to use the Court. It is therefore not surprising that the ICJ has found that "it is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process".⁸⁰

This reluctance has also been noticed as regards ICSID tribunals, even though the abuse of process doctrine is applied more frequently in investment arbitration. In *Tokios Tokelés v. Ukraine*, the claimant was a Lithuanian company which was ninety-nine percent owned by Ukrainian shareholders. The respondent argued that the claimant could not be considered as an investor under the ICSID Convention and requested the tribunal to pierce the corporate veil of the company, which was rejected. In his dissenting opinion, the chairman strongly criticized the tribunal's approach. He argued that it could put ICSID's success at risk and "might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for

78 The claims against Spain and the United States were both dismissed *in limine* for it was clear that the Court had no jurisdiction. Both States had made reservations to Article IX of the Genocide Convention which was the title of jurisdiction upon which Yugoslavia sought to rely.

79 Hersch Lauterpacht, *supra* note 59, 84.

80 *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, I.C.J. Reports 2018, 336, para. 150.

ICSID arbitration in their future BITs or investment contracts”.⁸¹ In *Rompetrol v. Romania*, the tribunal discussed the doctrine of abuse of process in its decision on jurisdiction. It expressed its concern with the consequences such a finding would have and seemed willing to avoid depriving the parties of their procedural rights. Indeed, an abuse of process finding “would entail an ICSID tribunal, after having determined conclusively (or at least *prima facie*) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear their dispute, deciding nevertheless not to entertain the application to hear the dispute [...]”.⁸² The foregoing cases demonstrate the fact that tribunals are shilly-shallying: on the one hand, they need to preserve their integrity and preclude claimants from gaining jurisdiction in an abusive manner, and on the other hand, they are concerned about not dissuading States from having recourse to international adjudication to settle their disputes. Abuse of process findings are thus made with utmost cautiousness.

4 Conclusion

At a time when abuse of process has become a frequent allegation before the ICJ, two conclusions can be drawn from the aforesaid. First, although “abuse of process” has often been alleged with regards to the use of incidental proceedings, after reviewing, it seems that in nearly all cases, it did not appear that the party was exercising its procedural right for an improper purpose, even though its conduct may have been perceived as inappropriate at first glance. It is often difficult to establish a straightforward distinction between what can be considered as amounting to abuse of process, and what is a “harsh but justified use” of a procedural right, which should rather be labelled as litigation strategy.⁸³ Second, as regards the few cases that reach the abuse threshold, several hurdles make it difficult for the Court to explicitly state that an abuse of process has occurred. Some may take the view that judges could be stricter in some instances. While severity may sometimes seem necessary in order to protect the Court’s judicial integrity, such cases remain rare. The fact that abuse of process is invoked more frequently should not lead the Court to give in too easily to litigants’ claims. Nevertheless, the recurrence of these claims underlines

81 *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, Dissenting opinion of Prosper Weil, para. 30.

82 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction of 18 April 2008, para. 115.

83 Michael Byers, *supra* note 1, at 412.

the fact that clarification is needed and that State parties should be given directions on what may constitute an abuse of process. Considering that some international courts have clarified the concept,⁸⁴ it would appear that there is no reason why the ICJ could not do the same.

84 See the ECtHR's *Practical Guide on Admissibility Criteria*, which provides further details on what may constitute an "abuse of the right of application".