

Michigan Journal of International Law

Volume 42 | Issue 3

2021

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Recommended Citation

Juliette McIntyre, *Revisiting the International Court of Justice Procedure for the Revision of Judgments*, 42 MICH. J. INT'L L. 479 (2021).

Available at: <https://repository.law.umich.edu/mjil/vol42/iss3/3>

<https://doi.org/10.36642/mjil.42.3.revisiting>

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REVISITING THE INTERNATIONAL COURT OF JUSTICE PROCEDURE FOR THE REVISION OF JUDGMENTS

Juliette McIntyre*

I. INTRODUCTION

The International Court of Justice (“ICJ”) is a court of first and last instance.¹ Its decisions are “final and without appeal.”² At first blush, this seems uncontroversial; it is a simple restatement of the well-established principle of *res judicata*.³ But if the court makes a judicial pronouncement without all the facts to hand, can one say that the decision is legitimate and authoritative?⁴ Pursuant to article 61 of the ICJ’s Statute, the court does have the authority to revise a judgment in certain, limited circumstances.⁵ Revision is a remedy that enables the court, upon the application of a party, to reconsider an otherwise final and binding decision.⁶ An application for revision is admissible when a new fact is discovered that was unknown to the parties and the court during the proceedings, and which would have the effect of overturning or altering the court’s judgment.⁷

* BA LLB/LP Hons (Flin) LLM International Law (Cantab) PhDc (Melb). This work is derived from my PhD research, so I must give thanks to my supervisors Professor Hilary Charlesworth and Professor Margaret Young for their support.

1. Robert Jennings & Rosalyn Higgins, *General Introduction, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 7 (Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat, Christian Tams, Maral Kashgar & David Diehl eds., 2d ed. 2012). It is “a forum of first and last resort.” Jan Paulsson, *Jurisdiction and Admissibility, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION* 601, 603 (Gerald Askin ed., 2005).

2. Statute of the International Court of Justice art. 60, Oct. 24, 1945, U.N.T.S. 993 [hereinafter Statute ICJ]; see also Joan E. Donoghue, *The Role of the World Court Today*, 47 GA. L. REV. 181, 193 (2012); Jens Evensen, *The International Court of Justice Main Characteristics and Its Contribution to the Development of the Modern Law of Nations*, 57 NORDIC J. INT’L L. 3, 12 (1988).

3. See Derek W. Bowett, *Res Judicata and the Limits of Rectification of Decisions by International Tribunals*, 8 AFR. J. INT’L & COMP. L. 577 (1996); Andreas Kulick, *Article 60 ICJ Statute, Interpretation Proceedings, and the Competing Concepts of Res Judicata*, 28 LEIDEN J. INT’L L. 73 (2015).

4. As noted by Caron, “the legitimacy and authority of the Court ultimately rest on the quality of its judgments” in David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4, 26 (2000).

5. Statute ICJ, *supra* note 2, art. 61; Rules of Court, 6 I.C.J. Acts & Docs. 90, art. 99.

6. Statute ICJ, *supra* note 2, art. 60; Donoghue, *supra* note 2, at 192; Evensen, *supra* note 2, at 3.

7. The precise terms of art. 61 are discussed *infra* Part II.

Revision is described by Robin Geiß as “a rather neglected form of proceedings.”⁸ While the rule has domestic law analogues,⁹ and has existed in its essentials since 1899,¹⁰ it was not until 1984 that the court first received an application for revision of a judgment in the case of *Tunisia v. Libya*.¹¹ Since then, there have been five applications for revision, of which three have proceeded to a judgment on the question of admissibility.¹² To date, the court has not revised any of its judgments.

By way of example, the court is regularly called upon to delimit contested boundaries between states. The competing territorial claims may be justified, among other things, on the basis of geography, history, *effectivités*, or the doctrine of *uti possidetis*.¹³ The court will base its decision on the evidence presented in support of these justifications,¹⁴ which will bar the subsequent litigation of any part of the judgement.¹⁵ Indeed, this was precisely the situation in the *Case concerning the Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, in which a Chamber of the

8. Robin Geiß, *Revision Proceedings before the International Court of Justice*, 63 HEIDELBERG J. INT'L L. 167, 167 (2003).

9. While space prevents me from going into detail, see 28 U.S.C. § 399 (2020); *Federal Court Rules 2011* (Cth) § 39.05, (Austl.); FED. R. CIV. P. 59; Code Civ. Procedure § 115 (India); Civ. Procedure Code § 115 (Bangl.); CODE DE PROCÉDURE CIVILE [C.P.C.] §§ 593–603 (Fr.). The German civil code provides for “revision” but functionally operates as appeal insofar as the decision of the *Bundesgerichtshof* to accept a motion for revision depends upon systemic factors such as whether the case raises a legal question of fundamental importance or a need to promote the development of the law. The decision then annuls the original judgment of the lower court and replaces it. See also Daniel Mitidiero, *The Ideal Court of Last Resort: A Court of Interpretation and Precedent*, 5 INT'L J. PROC. L. 201, 213 (2015); Pablo Bravo-Hurtado, *Two Ways to Uniformity: Recourse to the Supreme Court in the Civil Law and the Common Law World*, in NOBODY'S PERFECT – COMPARATIVE ESSAYS ON APPEALS AND OTHER MEANS OF RECOURSE AGAINST JUDICIAL DECISIONS IN CIVIL MATTERS 319 (A. Uzelac & C.H. van Rhee eds. 2014).

10. Convention for the Pacific Settlement of International Disputes art. 55, July 29, 1899, 1 Bevans 230.

11. See Application for Revision and Interpretation of Judgment, Continental Shelf (Tunis./Libya), Application, 1985 I.C.J. Rep. 192 (July 27).

12. Application for Revision and Interpretation of Judgment on Continental Shelf (Tunis./Libya), Judgment, 1985 I.C.J. Rep. 192, ¶ 192 (Dec. 10); Application for Revision of Judgment of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Judgment, 2003 I.C.J. Rep. 7 (Feb. 3); Application for Revision of Judgment of Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 2003 I.C.J. Rep. 392, ¶¶ 401–402 (Sept. 11); Application for Revision of Judgment of Sovereignty over Pedra Branca/Pulau Batu Peh, Middle Rocks and South Ledge (Malay. v. Sing.), Judgment, 2017 I.C.J. Rep. 3 (Feb. 2) (case was discontinued following a negotiated settlement); Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26); see also *infra* Part III.A.3.

13. Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, 53 DUKE L.J., 1779, 1781–92 (2004).

14. See Eduardo Valencia-Ospina, *Evidence before the International Court of Justice*, 1 INT'L L.F. DROIT INT'L, 202 (1999).

15. See Bowett, *supra* note 3, at 577; Kulick, *supra* note 3, at 73.

Court delimited part of the frontier line between the two states and settled the legal situation in respect of certain islands in the Gulf of Fonseca.¹⁶ But, nine years and 364 days after the judgment was delivered, El Salvador claimed that it had new evidence to prove the boundary had been incorrectly fixed and requested that the court revise its earlier decision, essentially a request to redraw the boundary delimited a decade previously.

While in this particular instance the court held that the new evidence, including a new copy of the 1794 map *Carta Esférica* did not require the court to overturn its original decision,¹⁷ there is the potential for a request to redraw a settled boundary to undermine international peace and security as tensions reignite over claims to territory.¹⁸ In particular, if the court makes a judicial pronouncement without all the facts on hand, this may reflect poorly on the substantive justice meted out by the court. A decision based on incomplete information may not be complied with,¹⁹ and may in turn undermine the court's already fragile legitimacy.²⁰

This article considers the court's procedural approach to revision.²¹ To begin, Part II will describe the historical development of the revision rule,

16. Land, Island, and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 1992 I.C.J. Rep. 351 ¶¶ 599–600 (Sept. 11). A five-member Chamber of the Court had been constituted under art. 26(2) of the Statute and art. 17 of the Rules of Court, at the parties' request. A new Chamber was constituted to hear the revision proceedings.

17. Application for Revision of Judgment on the Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 2003 I.C.J. Rep. 392, ¶¶ 410–411 (Dec. 18).

18. See generally KAIYAN HOMI KAIKOBAD, INTERPRETATION AND REVISION OF INTERNATIONAL BOUNDARY DECISIONS (2012).

19. See Thomas Franck, *Fairness in the International Legal and Institutional System*, 240 RECUEIL DES COURS 22, 303 (1993).

20. Filippo Fontanelli & Paolo Busco, *The Function of Procedural Justice in International Adjudication*, L. & PRAC. INT'L CTS. & TRIBS., 1, 21 (2016); Caron, *supra* note 4, at 26 (noting, "the legitimacy and authority of the Court ultimately rest on the quality of its judgments."); see also LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman, Harlan Grant Cohen, Andreas Follesdal & Geir Ulfstein eds., 2018); INTERNATIONAL COURT AUTHORITY (Karen J. Alter, Laurence R. Helfer & Mikael Rask Masden eds., Oxford Univ. Press 2018); Karen J. Alter, Laurence R. Helfer & Mikael Madsen, *International Court Authority* (iCourts Working Paper Series, No. 112, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3096930; Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 112 (2009) (defining a legitimate international court as "one whose authority is perceived as justified.").

21. The individual elements required under article 61 of the Court's Statute to permit revision have been studied in depth by others, e.g., the problem of accurately defining the 'facts' that must be considered. JUAN JOSÉ QUINTANA, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE 1025–56 (2015); see also WILLIAM MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 425 (1971) [hereinafter REISMAN, NULLITY AND REVISION]; WILLIAM MICHAEL REISMAN, THE SUPERVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE: INTERNATIONAL ARBITRATION AND INTERNATIONAL ADJUDICATION (1997); SHABTAI ROSENNE, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS (2017); Robin Geiß & Andreas Zimmermann, *Article 61*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1651 (Andreas

inspired by Viñuales' call to make connections between the past and the present in matters of institutional design.²² The drafting history of revision explains why the procedure takes the form that it does, as well as its ambitions and its limitations. In particular, Part II identifies that revision has often conceptually been conflated with annulment. But these remedies are quite different in scope and purpose, and the distinction has impacts on the court's practice today. Part III then proceeds to identify and critically analyze procedural problems that have arisen, or which have the potential to arise, in light of the court's jurisprudence. This Part will show that revision is a procedure that has remained essentially unchanged from its nineteenth century iteration, giving rise to a series of procedural problems. In particular, the court's practice of treating a revision application as a new case and permitting the revision of incidental proceedings gives rise to potentially illogical outcomes, such as a binding decision on the merits that was issued *ultra vires*. Part IV offers some proposals to rectify the current flaws in the court's approach to revising its judgements. Here it is suggested that the court may, by making small adjustments to its revision procedure, continue to rely on the revision procedure as an instrument of substantive justice without the risks associated with its current approach. Part V concludes.

II. THE HISTORY OF REVISION: FROM FINALITY TO JUSTICE

The revision procedure has domestic law antecedents. While Del Vecchi claims that "no juridical institution is to be regarded as a prototype of others,"²³ the generally accepted view is that analogies taken from national law were, and remain, "a key factor in determining the nature of an international court of justice, and in filling in its constituent statute."²⁴ Indeed, Judge Shahabuddeen has observed that "[t]he history of the creation of the Permanent Court makes it clear that the concept of a court of justice to which the Court was intended to conform was that of a court of justice as generally understood in municipal law."²⁵ This Part begins with domestic

Zimmermann, Christian J. Tams, Karin Oellers-Frahm & Christian Tomuschat eds., 3d ed. 2019); KAIKOBAD, *supra* note 18.

22. Jorge E. Viñuales, *Experiments in International Adjudication Past and Present*, in EXPERIMENTS IN INTERNATIONAL ADJUDICATION: HISTORICAL ACCOUNTS 29 (Ignacio de la Rasilla & Jorge E. Viñuales eds., 2019).

23. Giorgio Del Vecchio, *Universal Comparative Law*, in 3 EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS: FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 63 (A. Kocourek & J.H. Wigmore eds., 1918).

24. Ole Spiermann, *Who Attempts Too Much Does Nothing Well: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice*, 73 BRIT. Y.B. INT'L L. 187, 259 (2002).

25. Land, Island, and Maritime Frontier Dispute (El Sal./Hond.), Order, 1990 I.C.J. Rep. 3, 18 (Feb. 28) (Shahabuddeen, J., dissenting). *But see* Mathilde Cohen, *The Continuing Impact of French Legal Culture on the International Court of Justice*, in COMPARATIVE

law antecedents and analogies of judicial revision, moving to address early international law scholarship, emphasizing the drafting history of article 61 of the Statute of the International Court of Justice. A close reading of the drafting history reveals the limits of revision as a procedural function. In particular, a distinction can and must be drawn between the judicial purposes of appeal, nullification, and revision. This will in turn inform the discussion of the court's present current practice in Part III.

The current procedure for the revision of judgments is articulated in article 61 of the court's Statute. It states:

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
4. The application for revision must be made at latest within six months of the discovery of the new fact.
5. No application for revision may be made after the lapse of ten years from the date of the judgment.²⁶

This procedure is supplemented by articles 99 and 100 of the Rules of Court. These require that a request for the revision of a judgment is made by an application and state that the court will rule on the question of the admissibility of that application before proceeding to the act of revision.²⁷ Upon the discovery of a previously unknown fact, a party can make an application for revision, and the revision proceedings have to be (by convention) entered in the General List as formally distinct proceedings from the initial case.²⁸ However, the court must be convinced of the need to revise its judgment; it is not a procedure accessible to the parties by right. Not only must

INTERNATIONAL LAW 181, 198 (Anthea Roberts, Paul B. Stephan, Pierre-Hughes Verdier & Mila Versteeg eds., 2018) (the “[f]ramers of the ICJ and its predecessor courts were not so much looking toward national high courts as their inspiration, but rather toward international arbitral tribunals”).

26. Statute ICJ, *supra* note 2, art. 61.

27. Rules of Court, 6 I.C.J. Acts & Docs. 90, arts. 99, 100.

28. For a description of this process, see Juan J. Quintana, *Procedures Before the ICJ: A Note on the Opening (or Not) of New Cases*, 9 L. & PRAC. INT'L TRIBS. 115, 117 (2010). For more on the General List, see SHABTAI ROSENNE, *The General List of the International Court of Justice*, in *ESSAYS ON INTERNATIONAL LAW AND PRACTICE* 197, 197–98 (2007).

“new” facts have come to light, but those facts must also be “decisive.” The facts must be of such a nature that knowledge of their existence would have “changed the decision of the Court.”²⁹

A. Domestic Analogies

To make a decision that is not subject to further scrutiny is an “attribute of ultimate ‘sovereignty.’”³⁰ As the decision-making function of the sovereign was delegated to subordinate persons and institutions, there would inevitably arise decisions that the sovereign did not agree with, and desired to change, amend, or revise.³¹ The letters of Hammurabi show that he “investigated the suits of his poorest subjects, and did not hesitate to reverse the decisions of his governors.”³² Procedures for the reconsideration of judgments are evident in major domestic legal systems and international law. Both common and civil law jurisdictions have long known forms of appeal. Although there are exceptions, French procedure provides for review of judgments in first instance by way of *appel*.³³ Since 1790, the French judiciary has adopted a two-level appellate structure. The *Cours d’appel* hear appeals as of right, an invention of the civil law.³⁴ Above the *Cours d’appel* sits the *Cour de cassation*, a body to which a *pourvoi en cassation* can be brought to quash the decisions of lower courts for errors of law. The matter is then usually remitted to the lower court for a decision on the merits in light of the ruling on the law.³⁵ Similarly, the German model provides for “revision” but

29. Application for Revision and Interpretation of Continental Shelf Judgment (Tunis/Libya), Judgment, 1985 I.C.J. Rep. 192, 246 (Dec. 10) (Schwebel, J., writing separately).

30. Martin Shapiro, *Appeal*, 14 L. & SOC’Y REV. 629, 635 (1980).

31. Lord Justice Atkin, *Appeal in English Law*, 3 CAMBRIDGE L.J. 1, 1 (1927); see also Peter F.W. Burns, *The Judicial Committee of the Privy Council: Constitutional Bulwark or Colonial Remnant*, 5 OTAGO L. REV. 503, 504 (1984) (noting that “[a]ppellate jurisdiction had its genesis in the theory that the King was the source and dispenser of justice throughout his dominions and was therefore the authority to be resorted to in any case of grievance by error, delay or obstruction in the ordinary courts.”).

32. Stanley A. Cook, *Ancient Semitic Procedure*, in 2 EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS 659 (Albert Kocourek & John H. Wigmore eds. 1915).

33. Nina Nichols Pugh, *The Structure and Role of Courts of Appeal in Civil Law Systems*, 35 LA. L. REV. 1163, 1164–65 (1975). The French appeal procedure “permits a thorough overhaul of the case, extending to a retaking of old, as well as the taking of new, testimony and the exploration of issues of law that were not raised in the first instance proceedings.” ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 104 (2d ed. 1977).

34. John T. Hood Jr., *The Right of Appeal*, 29 LA. L. REV. 498, 498 (1969).

35. VON MEHREN & GORDLEY, *supra* note 33, at 104; JOHN BELL, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* 47 (2006). Since 1979, the *Cour de cassation* has had the power of *cassation sans renvoi*; that is, to “enter a definitive judgment” where quashing the decision of the lower court “does not require further inquiry into the facts of the case.” However, this does not fundamentally alter the fact that the *Cour de cassation* is a court of

functionally operates as appeal insofar as the decision of the *Bundesgerichtshof* to accept a motion for revision depends upon systemic factors such as whether the case raises a legal question of fundamental importance or a need to promote the development of the law. The decision then annuls the original judgment of the lower court and replaces it.³⁶

The history of the common law courts of appeal is significantly different. Appeal as of right was unknown; rather, appeal on questions of law (not fact) could be instigated by the issuance of a prerogative writ.³⁷ Other domestic legal systems have developed similar appellate procedures.³⁸

Appeal serves both an immediate “error correction” function,³⁹ and also one of ensuring “the proper interpretation of the Law”⁴⁰ in future cases.⁴¹ Or

review but does not re-decide cases submitted to it. JOHN BELL, SOPHIE BOYRON, & SIMON WHITTAKER, *PRINCIPLES OF FRENCH LAW* 3, 47, 48, 107 (1998).

36. See Mitidiero, *supra* note 9, at 213; see also Bravo-Hurtado, *supra* note 9, at 319.

37. At the King’s courts there were three writs available:

[A] writ of prohibition which prevents a court from exercising jurisdiction which does not belong to it and stops proceedings in it altogether, the writ of mandamus which compels a court to proceed and do justice according to the law, and, lastly, a very important writ, the writ of Certiorari, which brought up decisions at the law courts for review before the King’s court to be quashed for excessive jurisdiction or for error if it was placed on record that there was an obvious mistake in law.

Atkin, *supra* note 31, at 1, 2, 5. There was also a “writ of error” available in the common law courts. The writ was regarded as “an entirely new proceeding” and not as a continuation of the case under consideration, as in the civil system. Hood, *supra* note 34, at 499. This situation pertained until the United Kingdom’s *Judicature Act* of 1873 established the Court of Appeal. From the Court of Appeal lay further appeal to the House of Lords (now Supreme Court) under the United Kingdom’s *Appellate Jurisdiction Act* of 1876. In the United States, the Judiciary Act of 1789 created the Supreme Court and adopted “a procedure similar to the common law writ of error,” until the creation of the federal courts of appeal by the Evarts Act of 1891. See Act of Sept. 24, 1789, 1 Stat. 73; Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; Hood, *supra* note 34, at 512.

38. While it is not the place of this study to undertake a comprehensive review of appellate procedures in domestic legal systems, it is worth noting that appellate procedures were also well established in the Russian legal system. See generally GORDON B. SMITH, *REFORMING THE RUSSIAN LEGAL SYSTEM* (1996); Marianna Muravyeva, *Russian Early Modern Criminal Procedure and Culture of Appeal*, 38 REV. CENT. E. EUR. L. 295 (2013); Jane Henderson, *Improvements in Russian Courts: Citizens’ Appeals and Judges*, 2 EUR. PUB. L. 508 (1996). For examples from countries in Asia, such as South Korea and Japan, see Do Myoun-Hoi, *Discontinuity And Continuity In The Traditional Korean Judicial System During Its Modern Reform Period, 1894 to 1905*, 17 ACTA KOREANA 307 (2014); Tsukasa Mihira, *Institutional Change and Judicial Review in Contemporary Japan*, in *THE CHANGING ROLE OF LAW IN JAPAN - EMPIRICAL STUDIES IN CULTURE, SOCIETY AND POLICY MAKING* 173, 179 (Dimitri Vanoverbeke, Jeroen Maesschalck, David Nelken & Stepham Parmentier eds., 2014).

39. Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 60 (2010) (stating that the concern is not the governance of the system as a whole but rather the whether the “right” or “wrong” law was applied in the dispute.).

40. Mitidiero, *supra* note 9, at 210; see also Mateus Aimoré Carreteiro, *Appellate Arbitral Rules in International Commercial Arbitration*, 33 J. INT’L ARB. 185, 190 n.31 (2016)

as expressed by Irene Ten Cate, “appellate review fulfils two principal functions: error correction and lawmaking.”⁴² The remedy of revision is distinct from appeals in civil and common law systems at least in part because it is “carried out by the same [international] tribunal which made the original decision.”⁴³ Derek Bowett correctly has emphasized that:

[R]evision is in no sense an appeal. It involves no hierarchy of courts, with the object of allowing a second, and different, court to reverse the findings of the first court. Revision allows a reference back to the same court on the very limited ground that the discovery of new facts might justify the court in revising its own decision.⁴⁴

As such, the revision procedure provides for a “formal exception”⁴⁵ to the principle of *res judicata*.⁴⁶ This principle of finality is closely related to the effectiveness of the resolution of disputes.⁴⁷ The remedy of revision is dis-

(stating that the Brazilian civil system distinguishes between “ordinary” appellate courts having an error correction function and superior courts which serve the purpose of law harmonization).

41. In some instances, such as with a court of cassation, the only purpose of an appeal is to ensure the proper application of law; the application of that law to the facts is reserved for the court below. See BELL ET AL., *supra* note 35, at 3; VON MEHREN & GORDLEY, *supra* note 33, at 104.

42. Irene Ten Cate, *International Arbitration and the Ends of Appellate Review*, 44 N.Y.U. J. INT’L L. & POL. 1109, 1110 (2012). However, according to some legal scholars, appeal can be conceived as a form of patronage (benevolent intervention from a supreme authority), as a form of distributive politics (the adoption of efficient rules through market forces), and as a form of political integration (promoting unity). Shapiro, *supra* note 30, at 635. There is also the incentive of “error avoidance,” whereby judges of lower courts will be, Cate argues, more diligent when they know they are subject to review. Cate at 1143, 1147–48. However, the dominant view in the literature is that the primary goal of appeal lies in this dual function of error correction and law harmonization.

43. Derek W. Bowett, *Res Judicata and the Limits of Rectification of Decisions by International Tribunals*, 8 AFR. J. INT’L & COMP. L. 577, 577 (1996).

44. *Id.* at 591.

45. REISMAN, NULLITY AND REVISION, *supra* note 21, at 425; see also Geiß & Zimmerman, *supra* note 21, at 1654 (noting that, “revision adversely affects the principle of *judicata*”); CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 161 (2007) (suggesting that revision “does some violence to the principle of *res judicata*”).

46. Edgardo Sobenes Obregon, *Res Judicata and the Test of Finality*, 5 J. TERRITORIAL & MAR. STUDS. 75 (2018); Kulick, *supra* note 3, at 75; Iain Scobbie, *Res Judicata, Precedent and the International Court: A Preliminary Sketch*, 20 AUSTL. Y.B. INT’L L. 299, 303 (1999); Bowett, *supra* note 43, at 577; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 336–56 (1987).

47. Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHINESE J. INT’L L., 537, 558 (2009); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT’L L. 225, 245 (2012); see also Charter of the United Nations and Statute of the International Court of Justice, art. 36 ¶ 3, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (stating that “legal disputes should as a

tinct from appeal, at least in part, because it is “carried out by the same tribunal which made the original decision”⁴⁸ but also because no *res judicata* will arise until the final appeal is heard.⁴⁹

Thus, revision cannot be conceived as serving an error correction or lawmaking function.⁵⁰ Instead, the purpose of revision is to return to the original judgment and ensure it reflects the facts that the court ought to have known at the time when it renders the judgement. It is a protection against the miscarriage of justice,⁵¹ where, for reasons of ignorance or through deliberate fraud, the evidence presented to the court was misleading.⁵²

The distinct function of revision from that of appeal is also evident in revision’s historical roots in equity.⁵³ The federal courts in Canada,⁵⁴ Australia,⁵⁵ and the United States each incorporate a procedure for the amendment of judgments after they have been handed down.⁵⁶ Revision is also commonly used in civil law systems.⁵⁷ While there are slight variations in each jurisdiction, in all cases, revision requires the application of a party. This is contrary to situations where a court has an inherent jurisdiction to correct a slip or error,⁵⁸ or declare void and set aside a judgment so irregular as to amount to a nullity.⁵⁹

general rule be referred by the parties to the International Court of Justice”); *Nuclear Tests Case (N.Z. v. Fr.)*, Judgment, 1974, I.C.J. Rep. 457 ¶ 476 (Dec. 20).

48. Bowett, *supra* note 43, at 577.

49. CHENG, *supra* note 46, at 372.

50. *Contra* REISMAN, NULLITY AND REVISION, *supra* note 21, at 217–18 (taking the view that appeal, review, revision, interpretation, and rectification are relatively indistinguishable, save for the fact that appeal and review take place before a new tribunal and their respective “emotive differences”).

51. Bowett, *supra* note 43, at 591. For this reason, revision is a remedy available in respect of both civil and criminal judgments; see also Hakan Friman, *International Criminal Procedures: Trial and Appeal Procedures*, in HANDBOOK OF INTERNATIONAL CRIMINAL LAW 271, 281–83 (William A. Schabas & Nadia Bernaz eds., 2011); Anne-Marie La Rosa, *Revision Procedure under the ICC Statute*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1559 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2015).

52. Catherine A. Kunz, *Revision of Arbitral Awards in Switzerland: An Extraordinary Tool or Simply a Popular Chimera?*, 3 ASA BULL. 6, 6 (2020) (stating “[Revision] is only available in exceptional circumstances where justice and equity command.”); cf Nathalie Vosser & Anya George, *Revision of Arbitral Awards* 43 (Post Award Issues: ASA Special Ser. No. 38, 2011).

53. Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, CHI.-KENT L. REV. 919, 930 (1989).

54. Federal Courts Rules, SOR/98-106 ¶ 399(2) (Can.).

55. *Federal Court Rules 2011* (Cth) r 39.05 (Austl.).

56. FED. R. CIV. P. 59(e); see also Civ. Procedure Code, Act No. 5 of 1908, § 115 (India); Civ. Procedure Code, Act No. V of 1908, § 115 (Bangl.).

57. See CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 593–603 (Fr.).

58. *Lawrie v Lees* (1881) 7 App Cas 19, 34-5 (Austl.); see also Civ. Procedure Code, Act No. 5 of 1908, § 152 (India); *Federal Court Rules 2011* (Cth) r 39.05(e) (Austl.); FED. R. CIV. P. 60(c); The Civil Procedure Rules 1998, c. 40 §12 (UK); Federal Courts Rules, SOR/98-106 ¶ 397(2) (Can.). In respect of correcting a slip or error at the ICJ, see Geiß &

However, the grounds for revision of a judgment vary from country to country. In France, the *Code de procédure civile* provides for the revision of a judgment in cases where witness or documentary evidence is later found to be false.⁶⁰ Canadian federal courts will set aside or amend an order on the basis of “a matter that arose or was discovered subsequent to the making of the order.”⁶¹ The United States formulation closely resembles the ICJ Statute: “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial,”⁶² with express provision for a “rehearing.”⁶³ The roots of revision in domestic law highlight the importance of revision as a means of doing substantial justice to the parties.⁶⁴ They also illustrate critical points about revision procedure: first, revision is a remedy, demanding the reopening of a case and a variation of the judgment; second, it is a distinct procedure from the courts’ inherent jurisdiction to declare void and set aside a judgment so irregular as to amount to a nullity; and third, it differs from appeal insofar as the appeal is a process, not a remedy, demanding no particular outcome. By contrast, revision “has as its *raison d’être* in the discovery of some new fact”⁶⁵ that would have led the court to a different conclusion.

B. Early International Arbitration

One can see different approaches in early international arbitration. Agreements to arbitrate “differences of an important character”⁶⁶ between pre-Westphalian sovereigns at times included mechanisms for appeal or correction of the decisions. For example, an arbitration treaty between the Duke of Burgundy and the Count of Nevers reserved to the arbitrator, King Philip III of France, a power to “correct and to interpret” the award, which

Zimmermann, *supra* note 21, at 1651; Application for Revision and Interpretation of the Judgment of Continental Shelf (Tunis/Libya), Judgment, 1985, I.C.J. Rep. 192, 198 (Dec. 10).

59. Craig v. Kanssen [1943] KB 256 (Eng.); Chief Kofi Forfie, Odikro of Marban v. Barima Kwabena Seifah, Kenyasehene, 2 J. Afr. L. 46, 47 (P.C. Appeal, 1958) (Ghana); see also CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 112–121 (Fr.); *Taylor v Taylor* (1979) 25 ALR 418, 424 (Austl.) (stating the court has the inherent power to set aside an order made against a person who did not have a reasonable opportunity to appear and present their case).

60. CODE DE PROCÉDURE CIVILE [C.P.C.] art. 595 (Fr.) (“reconnues ou judiciairement déclarées fausses depuis le jugement.”).

61. Federal Courts Rules, SOR/98-106 ¶ 399(2)(a) (Can.).

62. FED. R. CIV. P. 60(b)(2).

63. Rules of the Supreme Court of the United States, 28 U.S.C. § 44 (2019).

64. See *Condon (Trustee) Re Rayhill (Bankrupt) v Truthful Endeavour Pty Ltd* (2015) 323 ALR 83, 105 (Austl.).

65. Bowett, *supra* note 43, at 589.

66. See Henry S. Fraser, *Sketch of the History of International Arbitration*, 11 CORNELL L. REV. 179, 193 (1926).

was exercised in 1285.⁶⁷ Additionally, Pierre Dubois of Normandy's 1306 plans for the creation of an arbitral court consisted of a bench of six judges from whom there would be one appeal to the Pope.⁶⁸

During the sixteenth to eighteenth centuries, however, the use of arbitration in international relations declined,⁶⁹ and therefore there is little evidence of state practice concerning the revision of judgments. Yet, doctrinal debates continued regarding the role of arbitration.⁷⁰ Many of these debates centred on the question of whether the decision should be subject to appeal or reconsideration. Michael Reisman posits that, over the centuries, writers have fallen into one of two camps: "Finalists," who maintained that finality of a judgment or award must be "inviolable;" and "revisionists," who argued that "in order to flourish," international arbitration must provide a system of review.⁷¹ Into the former camp, Reisman places the classical authors Pufendorf,⁷² Vattel,⁷³ and Grotius, who wrote:

[T]he Civil Law may direct and does in some places direct that it shall be lawful to appeal from them and to complain of their wrong; this cannot have a place between kings and peoples. For, in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision whether it be just or unjust.⁷⁴

Likewise, Vattel argued that "if the injustice is of small consequence, it should be borne or the sake of peace."⁷⁵ However, a closer reading of Vattel reveals that he also acknowledged the possibility of an *ultra vires* arbitral decision to which a party would not need to submit.⁷⁶ He put forward that a

67. Tobias Theinel & Andreas Zimmermann, *Article 60*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, *supra* note 21, at 1623.

68. Fraser, *supra* note 66, at 179–80.

69. *See id.* at 198 (describing this decline as "an eclipse").

70. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 1123 (Richard Tuck ed. 2005); *see also* Fraser, *supra* note 66, at 182.

71. REISMAN, NULLITY AND REVISION, *supra* note 21, at 21.

72. SAMUEL VON PUFENDORF, DE MODO LITIGANDI IN LIBERATE NATURALI [ON THE WAY OF DECIDING CONTROVERSIES IN THE LIBERTY OF NATURE] (W. Evans Darby trans., 1899). Although Pufendorf acknowledged that States could agree to such a mechanism: W. EVANS DARBY, INTERNATIONAL TRIBUNALS: A COLLECTION OF THE VARIOUS SCHEMES WHICH HAVE BEEN PROPOUNDED, AND OF INSTANCES SINCE 1815 60 (4th ed., Peace Society, 1900).

73. *See* EMER DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL JUSTICE (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund, Inc. 2008) (1758).

74. HUGO GROTIUS, DE JURE BELLI ET PACIS 350–51 (William Whewell trans., Cambridge 1st ed. 1853), *cited in* Reisman, NULLITY AND REVISION, *supra* note 21, at 22.

75. DE VATTEL, *supra* note 73, at 451.

76. *Id.* at 451.

sentence “evidently unjust and unreasonable” would “deserve no attention.”⁷⁷

With the ratification of the 1794 *Jay Treaty*,⁷⁸ the use of international arbitration witnessed a considerable increase.⁷⁹ By 1890, the Interparliamentary Union “agreed upon the arbitration as the *sine qua non* of any treaty.”⁸⁰ But the nineteenth-century international arbitration agreements rarely contained a procedure for revision of the award.⁸¹ One example is from 1898, wherein article 13 of the *Arbitration Treaty between Italy and the Argentine Republic* – one of only two general arbitration treaties in existence at the time – stated that:

The decision cannot be appealed from, and its execution is entrusted to the honor of the nations signatory to this agreement. However, a demand for revision will be allowed before the same tribunal which rendered the award and before it is executed:

- (1) If it has been based upon a false or erroneous document;
- (2) If the decision was in whole or in part the result of an error of positive or negative fact which results from the acts or documents in the case.⁸²

Another instance arose in an unratified 1897 Anglo-American treaty, which included permission for “a rehearing under certain determined conditions.”⁸³ In an 1899 treaty, Argentina and Uruguay agreed to permit revision where the award was based on a document that had been falsified or tampered with.⁸⁴

77. *Id.* at 451.

78. Treaty of Amity, Commerce, and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116; *see also* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 17 (Oxford University Press 2007); Charles H. Brower II, *The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law*, 18 DUKE J. COMPAR. & INT’L L. 259, 269 (2008).

79. Fraser, *supra* note 66, at 202–03.

80. ARTHUR EYFFINGER, THE 1899 HAGUE PEACE CONFERENCE: ‘THE PARLIAMENT OF MAN, THE FEDERATION OF THE WORLD’ 366 (Kluwer Law International 1999).

81. In two arbitrations involving the United States, there was an attempt of revision of the award. Both instances were unsuccessful, and neither is discussed here because the parties had not agreed upon a procedure for revision in the *compromis*. *See* KAIKOBAD, *supra* note 18, at 236.

82. General Treaty of Arbitration, It.-Arg., art. 13, July 23, 1898, 11 U.N.T.S. 1776–1949; *see also* JAMES BROWN SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS, THE CONFERENCE OF 1899, at 200–02 (Carnegie Endowment for International Peace ed., Oxford Univ. Press 1920) [hereinafter HAGUE 1899].

83. *Id.* at 624.

84. ARBITRATION TREATIES AMONG THE AMERICAN NATIONS TO THE CLOSE OF THE YEAR 1910, at 262 (William R. Manning, ed., Oxford Univ. Press 6th ed. 1924) (cited in KAIKOBAD, *supra* note 18, at 235).

There were also contemporaneous, overlapping discussions regarding the possibility of annulling an arbitral award. For example, in 1867, Johann Caspar Bluntschli proposed that an award was invalid if the tribunal exceeded its powers or if there was dishonesty on the part of the arbitrators.⁸⁵ In 1875, the *Institut de droit international* drafted a *Projet de règlement pour la procédure arbitrale internationale* in the hope that it would be used by states as a starting point for drafting their arbitration agreements. Article 27 of the *Projet* set out, “[t]he arbitration award is null in the event of a null *compromis*, or abuse of power, or proven corruption of one of the arbitrators or of essential error.”⁸⁶ Signor Pasquale Fiore, in 1897, suggested “an arbitral sentence may be disputed. . . and may be annulled”⁸⁷ where the arbitrators had gone beyond the limits of the *compromis*, or where it was “founded upon error, or obtained by fraud.”⁸⁸

In light of these limited examples, it is not surprising that Édouard Descamps noted in his seminal *Essai sur l'organisation l'arbitrage international* in 1896 that appeal was not the currently accepted practice.⁸⁹ But he also sought to grapple with the 1875 *Projet* and suggested that one of the benefits of a standing international court would be the ability to review the judgments of other tribunals for *excès de pouvoir*.⁹⁰ Descamps observed that “the power of appeal exists in almost all civilized states and by analogy the majority of the Commission has accepted it,”⁹¹ and as such, parties could legitimately provide for appeal procedures in their *compromis*. But the 1895 Brussels Conference of the Interparliamentary Union, during which the first

85. Johann Caspar Bluntschli, *Arbitration Proceedings, in* INTERNATIONAL TRIBUNALS: A COLLECTION OF THE VARIOUS SCHEMES WHICH HAVE BEEN PROPOUNDED, AND OF INSTANCES IN THE NINETEENTH CENTURY 188, 190 (W. Evans Darby ed., Wentworth Press, 4th ed. 1904).

86. “[I]a sentence arbitrale est nulle en cas de compromis nul, ou d’excès de pouvoir ou de corruption prouvée d’un des arbitres ou d’erreur essentielle.” INSTITUT DE DROIT INT’L, PROJET DE RÈGLEMENT POUR LA PROCEDURE ARBITRALE INTERNATIONALE art. 27 (1875), https://www.idi-iil.org/app/uploads/2017/06/1875_haye_01_fr.pdf (Author’s translation above the line). An earlier draft by Dr. Levin Goldsmith, which would have provided *recours* for any one of eleven grounds of nullity, was rejected by the Institut. See REISMAN, NULLITY AND REVISION, *supra* note 21, at 31–34; Chester Brown, *Supervision, Control, and Appellate Jurisdiction: The Experience of the International Court*, 32 ICSID REV. 595, 597 (2017); KAIKOBAD, *supra* note 18, at 234.

87. Signor P. Fiore, *The Arbitration Tribunal, in* INTERNATIONAL TRIBUNALS: A COLLECTION OF THE VARIOUS SCHEMES WHICH HAVE BEEN PROPOUNDED, AND OF INSTANCES IN THE NINETEENTH CENTURY, *supra* note 85, at 546, 570.

88. *Id.* For further examples and discussion thereof, see KAIKOBAD, *supra* note 18, at 234; see also REISMAN, NULLITY AND REVISION, *supra* note 21, at 29–31.

89. EDOUARD DESCAMPS, *ESSAI SUR L’ORGANISATION DE L’ARBITRAGE INTERNATIONAL MEMOIRE AUX PUISSANCES* 30 (E. Guyot 1896).

90. *Id.* at 34–35.

91. “[I]a faculté d’appel existe dans presque tous les États civilisés et par analogie la majorité de la Commission l’a admise.” *Id.* at 62–63 (Author’s translation.).

parameters of an international court were agreed upon,⁹² considered that an award should be final and without review.⁹³

C. *The Hague Peace Conference of 1899*

This short historical overview shows that at the close of the nineteenth century the notions of nullity and revision were somewhat overlapping, and the conceptual distinctions required refinement.⁹⁴ This began to emerge at the 1899 Hague Peace Conference, where the debate between finalists and revisionists arose again in a contestation between the American delegate Frederick Holls and his Russian counterpart Feodor Martens. Revision was in fact “the most vexed issue” in 1899.⁹⁵ It is worth considering their debates in more detail especially because the ICJ’s current revision procedure is functionally identical to the one agreed upon in 1899.⁹⁶

One of the key ambitions of the Third Commission of the 1899 Conference was to establish a “uniform practice”⁹⁷ with respect to the mechanisms of peaceful settlement of disputes between states. Having received several motions on the subject of a permanent international court of arbitration,⁹⁸ a *Comité d’Examen* was convened to discuss the establishment of such a court and an arbitral procedure “accepted by all.”⁹⁹ The *Comité* opened its ninth meeting with the Russian Draft of Arbitral Code,¹⁰⁰ which provided that any arbitral award would be “without appeal.”¹⁰¹ This proposal was objected to by the American delegation during the tenth meeting, with a request that this would be replaced with a provision that “every litigant shall have a right to a second hearing.”¹⁰² A vote on the matter was postponed in light of the deadlock.¹⁰³

Martens argued that, should revision or appeal become an accepted procedure, “we shall tear down with one hand what we construct with the other

92. EYFFINGER, *supra* note 80, at 366.

93. DESCAMPS, *supra* note 89, at 63.

94. KAIKOBAD, *supra* note 18, at 234.

95. Arthur Eyffinger, *A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference*, 54 NETH. INT’L L. REV. 197, 221 (2007).

96. SHABTAI ROSENNE, INTERPRETATION, REVISION AND OTHER RECOURSE FROM INTERNATIONAL JUDGMENTS AND AWARDS 9 (Martinus Nijhoff Publishers 2007).

97. *Peace Conference at the Hague 1899: Russian Circular January 11, 1899*, AVALON PROJ. https://avalon.law.yale.edu/19th_century/hag99-02.asp, (last visited Mar. 10, 2021).

98. This included motions from the Russian, British, and American delegations. EYFFINGER, *supra* note 80, at 584.

99. HAGUE 1899, *supra* note 82, at 583.

100. *Id.* at 180–83.

101. *Id.* at 180.

102. *Id.* at 733.

103. *Id.* at 751.

[and] perpetuate disputes which we would terminate.”¹⁰⁴ By contrast, the American delegation proposed that:

Every litigant which shall have submitted a case to the international tribunal shall have the right to a reexamination of its case before the same judges, within three months after the notification of the decision, if it declare itself able to invoke new evidence or questions of law not raised or settled the first time.¹⁰⁵

For the Americans, the matter was one of principle rather than form. Frederick W. Holls declared that he would “accept any text whatever,” provided there was some procedure for reconsideration of a case.¹⁰⁶ The German delegate Philipp Zorn, attempting to surmount the impasse, pointed out that the American proposal “had nothing in common with appeal,” insofar as the proposal did not move the case from one judge to another, but rather “the same judges would complete, so to speak, their former information.”¹⁰⁷

Unanimity was never achieved in the *Comité*—neither on the principle of revision nor on the form revision should take.¹⁰⁸ The resulting article 55 in the final text of *Convention [No I]*¹⁰⁹ was a compromise, and an unsatisfactory one at that.¹¹⁰ Drafted by TMC Asser in consultation with Holls, and then further amended by the President of the *Comité*, Léon Bourgeois, the final formulation was replete with ambiguity. It read:

The parties can reserve in the *compromis* the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon

104. *Id.* at 742.

105. The original American plan for a permanent international court had included a provision that “[e]very litigant before the International Tribunal shall have the right to make an appeal for re-examination of a case within three months after notification of the decision, upon presentation of evidence that the judgment contains a substantial error of fact or law.” U.S. STATE DEP’T OFF. OF THE HISTORIAN, *Instructions to the International (Peace) Conference at the Hague 1899*, in 2 PAPER RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS 511 (Dec. 3, 1907), <https://history.state.gov/historicaldocuments/frus1907p2/ch97subch12>; *see also* HAGUE 1899, *supra* note 82, at 189.

106. HAGUE 1899, *supra* note 82, at 749.

107. *Id.* at 749.

108. *Id.* at 752–55.

109. Convention for the Pacific Settlement of International Disputes art. 55, July 29, 1899, 1 Bevens 230.

110. *Contra* ROSENNE, *supra* note 21, at 10 (taking the view that it was “well conceived and well laid, and [has] stood the tests of time.”).

the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

The *compromis* fixes the period within which the demand for revision must be made.¹¹¹

Jonkheer van Karnebeek of the Dutch delegation considered the proposal to actually imply appeal, rather than revision.¹¹² Cases of fraud were a "new fact," Holls stated,¹¹³ despite the British delegate, Sir Julian Pauncetote, requesting that situations of fraud be entirely excluded from rehearing.¹¹⁴ These questions and inconsistencies were left unresolved, however.

Later authors, such as Reisman, suggest "the travaux of the 1899 Act pressed the concept of *new facts* into an omnibus function, similar to that served by *excès de pouvoir*."¹¹⁵ But this claim is not entirely made out, not least because the doctrine of *excès de pouvoir* does not serve such a function, rather it is a particular ground for annulling the decision of an arbitral tribunal on the basis of the tribunal having exceeded its jurisdiction.¹¹⁶ *Excès de pouvoir* was a concept very familiar to the members of the *Comité*,¹¹⁷ but

111. Convention for the Pacific Settlement of International Disputes, *supra* note 109, art. 55; HAGUE 1899, *supra* note 82, at 244.

112. HAGUE 1899, *supra* note 82, at 750; *see also* EYFFINGER, *supra* note 80, at 405.

113. HAGUE 1899, *supra* note 82, at 753.

114. EYFFINGER, *supra* note 80, at 393.

115. REISMAN, NULLITY AND REVISION, *supra* note 21, at 425.

116. *See* Mohammed Bedjaoui, *Jurisprudence Comparée des tribunaux administratifs Internationaux en matière d'excès de pouvoir*, 2 ANNUAIRE FRANÇAIS DE DROIT INT'L 482 (1956); Edouard Laferrière, *Origine et Développement Historique du Recours pour Excès de Pouvoir*, 5 LIBRAIRIE GÉNÉRALE DE DROIT ET DE JURISPRUDENCE 303 (1997); Arnold Raestad, *Le Recours à la Cour Permanente de Justice Internationale Contre les Sentences des Tribunaux d'Arbitrage Internationaux pour Cause d'Incompétence ou d'Excès de Pouvoir*, 13(ser. 3) REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 302 (1932); Alfred Verdoss, *Excès de Pouvoir du Juge Arbitral dans le Droit International Public*, 9(ser. 3) REVUE DE DROIT INT'L ET DE LEGISLATION COMPAREE 225 (1928); *see also* Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 106 (Nov. 12) (separate opinion by Shahabuddeen, J.); Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 130 (Nov. 12) (Weeramantry, J., dissenting).

117. *See* Edouard Descamps, *Essai sur l'organisation de l'arbitrage international mémoire aux puissances*, 28(ser. 1) REVUE DE DROIT INT'L ET DE LEGISLATION COMPAREE 5, 30 (1896).

the drafters of article 55 instead adopted the terminology of “*fait nouveau*,”¹¹⁸ relying on the Italy-Argentina treaty of 1898 for guidance.¹¹⁹

Whether or not an award could be annulled on the basis of *excès de pouvoir* or any other ground was treated as a question separate from the revision procedure and was left unresolved.¹²⁰ Holls’ suggestion that the *Comité* should accept the text of article 27 of the 1875 *Projet* was rejected.¹²¹ Article 26 of the Russian Draft of Arbitral Code, which declared that “[t]he arbitral award is void in case of a void *compromis* or exceeding of powers, or of corruption proved against one of the arbitrators,”¹²² was not taken further and not incorporated into *Convention [No I]*.¹²³ The *Comité* could not decide on who should judge such claims of invalidity, and so avoided the issue altogether, in the hope that the newly created Permanent Court of Arbitration could eventually “guide [s]tates to a solution of this matter.”¹²⁴ The important distinction between revision on the basis of *fait nouveau* and annulment for *excès de pouvoir* are discussed in Part IV, below.

D. Revision at the PCIJ

While revision was one of the most hotly contested issues in The Hague, it was barely mentioned during the drafting of both the Permanent Court of International Justice (“PCIJ”) and ICJ Statutes.¹²⁵ As noted above, the present article 61 is substantially identical to article 55 of *Convention [No I]*.¹²⁶ Article 55 was retained, with inconsequential amendments,¹²⁷ at the Second Hague Peace Conference in 1907. Martens did attempt to have

118. A. PEARCE HIGGINS, *THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR* 152–54 (Cambridge Univ. Press 1909).

119. See HAGUE 1899, *supra* note 82 at 749, 753. The *Comité*, however, did not adopt the precise text of the 1898 treaty as it was considered too broad and too close to appeal.

120. *Id.* at 151.

121. *Id.* at 749–50.

122. *Id.*

123. Convention for the Pacific Settlement of International Disputes, *supra* note 109, art. 55.

124. HAGUE 1899, *supra* note 82, at 151.

125. The principle of revision of arbitral awards was debated during the 1912 Annual Meeting of the American Society of International Law, but those in favor of revision won the day. Joaquin D. Casaus & Frederic D. McKenney, *Revision of Arbitral Awards*, 6 PROCS. AM. SOC’Y INT’L L.: ANN. MEETING (1907-1917) 59 (1912).

126. Convention for Pacific Settlement of International Disputes, *supra* note 109.

127. The question of the time limit for revision was the subject of some contention, but this discussion does not have any impact on the present study. See also LEAGUE OF NATIONS ADVISORY COMM. JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE, 16 JUNE–24 JULY 1920, at 744 (The Hague, Van Langenuysen Bros. 1920); REISMAN, NULLITY AND REVISION, *supra* note 21, at 425.

the provision “suppressed” at the Conference, but his motion was “rejected almost unanimously.”¹²⁸ The Brazilian delegate Ruy Barbosa declared:

[T]here would be nothing more harmful to the authority of arbitration than to assure to such judgments the privilege of incontestability. We must cling to the idea that arbitration is a means of peace only because it is an instrument of justice.¹²⁹

For the 1920 Commission of Jurists, the 1907 project “served as a point of departure,”¹³⁰ with the stipulation added that ignorance of the new fact must “not be due to a failure on the part of the party to use due diligence in the conduct of the case.”¹³¹ Eventually, the phrase “not due to negligence” was settled on and “considered sufficient.”¹³² The time limit for bringing an application for revision was also extended to ten years overall, but within six months of the discovery of the new fact.¹³³ The only comment of any real substance relating to the revision procedure at the PCIJ came in the Advisory Committee of Jurists’ final 1924 report, authored by James Brown Scott:

The right of revision is a very important right, and affects adversely in the matter of *res judicata*, a point which for the sake of international peace should be considered as finally settled. Justice, however, has certain legitimate requirements; the Committee, after due consideration, decided that there must be a right of revision.¹³⁴

Beyond this, no further debate was recorded. By contrast, a Romanian proposal to allow for appeal against a judgment of the PCIJ where it had failed to follow agreed procedure was dismissed as “useless and dangerous.”¹³⁵ It was “inadmissible that the Court should be able to annul its own decisions.”¹³⁶ No more was said on this matter.¹³⁷

128. REISMAN, NULLITY AND REVISION, *supra* note 21, at 425; *see also* HAGUE 1899, *supra* note 82, at 369–71, 437; Convention for the Pacific Settlement of International Disputes, *supra* note 109.

129. 2 CARNEGIE ENDOWMENT FOR INT’L PEACE, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS, THE CONFERENCE OF 1907, at 370 (Oxford Univ. Press 1920).

130. Leo Gross, *New Rules and Institutions for the Peaceful Settlement of International Disputes*, 76 PROCS. AM. SOC’Y INT’L L. 131, 134 (1982) (quoting MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, at 83–84 (Macmillan 1943)).

131. LEAGUE OF NATIONS ADVISORY COMM. JURISTS, *supra* note 127, at 744; *see also* ROSENNE, *supra* note 21, at 27–33.

132. LEAGUE OF NATIONS ADVISORY COMM. JURISTS, *supra* note 127, at 744; *see also* ROSENNE, *supra* note 21, at 27–33.

133. *See also* KAIKOBAD, *supra* note 18, at 245–47 (outlining these debates concerning the time limit for bringing an application for revision).

134. LEAGUE OF NATIONS ADVISORY COMM. JURISTS, *supra* note 127, at 744.

135. Preparation of the Rules of Court of January 30th 1922, 1921 P.C.I.J. (ser. D) No. 2, at 103.

136. *Id.*

The first rules of court were adopted by the PCIJ in its preliminary session on March 24, 1922. It was agreed that an application for the purposes of article 61(1) was to be made “in the same form as the application mentioned in article 40 of the Statute;”¹³⁸ that is, in the same form as an application instituting fresh proceedings. Moreover, for the purposes of article 61(3), the court could make a “special order rendering the admission of an application conditional upon previous compliance with the terms of the judgment impeached.”¹³⁹ The 1922 Rules also contained a separate provision for the court (or president if the court was not sitting) to unilaterally correct an error in a judgment arising from a “slip or accidental omission.”¹⁴⁰ This provision was deleted in 1934 and never used.¹⁴¹

During the drafting of the rules, the Judges Altamira and Loder, as well as the Secretariat, amongst others, each submitted a memorandum setting out proposals for the court’s procedure. Judge Altamira proposed that upon receipt of an application for revision, the original case be reopened and re-argued after the court had decided that a new fact had been discovered.¹⁴² Judge Loder and the Secretariat, by contrast, proposed that proceedings in revision should be treated as a new case.¹⁴³ Shabtai Rosenne suggests this latter approach, which was adopted by the court, aims at preserving the “finality of the original *res judicata*”¹⁴⁴ while revision proceedings are outstanding. However, the procedural interaction between the old (impeached) case and the new case is not addressed. Unlike in a case of interpretation,

137. Or if it was, those thoughts have not been recorded for posterity. As noted by James Brown Scott, there were three unofficial and unrecorded meetings dedicated to rules of procedure, on which “substantial agreement was reached,” with the results of those discussions being “silently incorporated in the finished project.” JAMES BROWN SCOTT, *THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS: REPORT AND COMMENTARY* 11 (1920); see also Ole Spiermann, *Who Attempts Too Much Does Nothing Well: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice*, 2002 BRIT. Y.B. INT’L L 187.

138. Rules of Court (adopted March 24, 1922), 1922 P.C.I.J. (ser. D) No. 1, art. 61.

139. *Id.*

140. *Id.* art. 75.

141. Elaboration of the Rules of Court of March 11th, 1936, 1936 P.C.I.J. (ser. D) No. 2, app. 3, at 603; see also Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunis./Libya), Judgment, 1985 I.C.J. Rep. 192, ¶ 198 (Dec. 10) (“The Court does of course have the power to correct, in one of its judgments, any mistakes which might be described as “*erreurs matérielles*”. That power would not normally be exercised by way of a judgment since the very nature of the correction of such an error excludes any element of contentious procedure.”).

142. Preparation of the Rules of Court, 1922 P.C.I.J. (ser. D) No. 2, at 280.

143. *Id.* at 250.

144. ROSENNE, *supra* note 21, at 53; see also Karel Wellens, *The International Court of Justice, Back to the Future: Keeping the Dream Alive*, 64 NETH. INT’L L. REV. 193, 207 (2017); Jessica Joly Hébert, *Distinguishing Interpretation and Revision Proceedings at the International Court of Justice*, 19 L. & PRAC. INT’L CTS. & TRIBS. 200, 222–23 (2020).

where the original *res judicata* remains unchanged,¹⁴⁵ in a case of revision, the original *res judicata* is replaced, but that replacement may not extend to the entirety of the original decision.¹⁴⁶ If the revision is treated as a new case, the result is intolerable double jeopardy. On the other hand, if revision is treated—as it is in domestic courts—as a procedure for reopening and variation, there is no confusion regarding the original judgment’s status.

This anomaly was not addressed in later iterations of the rules. Rather, a new complication was added in 1926 with the creation of a new procedure for separating preliminary objections from the merits,¹⁴⁷ which can be seen in *Mavrommatis*¹⁴⁸ and *Certain German Interests in Polish Upper Silesia*.¹⁴⁹

The introduction of preliminary objections added two complications for the revision procedure. The first complication was a short-lived provision requiring that objections to the court’s jurisdiction to revise a judgment should be addressed as preliminary objections in accordance with the new article 38.¹⁵⁰ This provision did not survive past the 1936 Rules. The second and much more important complication, which still remains today, is whether a separate decision on preliminary objections “constitutes a *res judicata* in the proper sense of that term,”¹⁵¹ and is therefore subject to revision. The issue did not confront the PCIJ, as no requests for revision were brought any time from its inaugural sitting in 1922 until its dissolution in 1946.¹⁵² The implications for the present court are discussed in Part IV, below.

145. Theinel & Zimmermann, *supra* note 67.

146. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunis/Libya), Judgment, 1985 I.C.J. Rep. 192, ¶ 247 (Dec. 10) (separate opinion by Bastid, J.); *see also* KAIKOBAD, *supra* note 18, at 313.

147. Elaboration of the Rules of Court of March 11th, 1936, 1936 P.C.I.J. (ser. D) No. 2, add. 3, at 282.

148. The Mavrommatis Palestine Concessions (Greece v. U.K.), Jurisdiction, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30).

149. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, 1925 P.C.I.J. (ser. A) No. 6. (Aug. 25).

150. ROSENNE, *supra* note 21, at 55.

151. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, ¶ 59 (July 18).

152. The Permanent Court of International Justice (“PCIJ”) did very briefly discuss revision in two of its advisory opinions. In one case, the PCIJ appeared to indicate that the power of revision is inherent. Authors disagree and international judicial practice is inconsistent regarding this question. *See* Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 55 (July 13). Bowett, considers revision not to be an inherent power. BOWETT, *supra* note 3, at 590. Brown takes the opposite view. Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 2005 BRIT. Y.B. INT’L L 195, 218; *see also* Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion, 1924 P.C.I.J. (ser. B) No. 9, ¶ 64 (Sept. 4) (“The Court refers to what it has already said regarding the definitive character of the decision in question, and does not feel called upon to give an opinion on the question whether such decisions can—except when an express reservation to that effect has been made—be revised in the event of

E. Revision at the ICJ

In 1945, the San Francisco Conference received no proposals for amendments to article 61 of the Statute, nor was there any discussion of the reasons for continuing with it.¹⁵³ This is perhaps surprising given that the utility of a completely neglected procedure must surely have been open to question. The revision procedure was slightly amended in the 1946 Rules, with the addition of a paragraph stating that the court, if it admits the application for revision, “will determine the written procedure required for examining the merits of the application.”¹⁵⁴ The effect of this change served only to emphasize the two-stage procedure already demanded by article 61. Save for renumbering, the rules relating to revision were untouched in 1972.¹⁵⁵ When the court adopted a completely new set of rules in 1978,¹⁵⁶ there had still been no application for revision, and so the court had no experience to draw on. The 1978 Rule is merely “in the main a clearer rendering of the fundamental procedural requirements of previous versions of the Rules.”¹⁵⁷ In substance, the procedure under the rules for instituting revision of a judgment is the same as it has been since 1922.

III. REVISION PROPER OR REVISION SIMULACRA: CHARTING THE COURT’S APPROACH

As noted above, the court has only dealt with three cases of revision proper, applying article 61, since it was set up in 1945. Geiß observes that certain kinds of territorial disputes tend to characterize revision cases,¹⁵⁸ but

the existence of an essential error being proved, or of new facts being relied on. But even if revision under such conditions were admissible, these conditions are not present in the case before the Court.”); *id.* ¶ 66 (“fresh documents do not in themselves amount to fresh facts”). This issue presented significant challenges for parties in a later ICJ proceeding, but that is beyond the scope of this chapter. See Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 2003 I.C.J. Rep. 392, ¶ 31 (Sept. 11).

153. See generally Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 39 AM. J. INT’L L. 1 (1945).

154. International Court of Justice Registry, *International Court of Justice: Amended Rules of the Court*, 11 I.L.M. 899, art. 78.

155. Rules of Court, 1978 I.C.J. Acts & Docs. 99; see also International Court of Justice Registry, *International Court of Justice: Amended Rules of the Court*, 11 I.L.M. 899; Shabtai Rosenne, *The 1972 Revision of the Rules of the International Court of Justice*, 8 ISR. L. REV. 197 (1973); Eduardo Jiménez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT’L L. 1 (1973).

156. See generally SHABTAI ROSENNE, PROCEDURE IN THE INTERNATIONAL COURT; A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE 1 (Martinus Nijhoff Publishers 1983).

157. ROSENNE, *supra* note 21, at 68.

158. Robin Geiß, *Revision Proceedings Before the International Court of Justice*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 167, 175 (2003); see also KAIKOBAD, *supra* note 18, at 235.

for the court, this has not been the only context in which applications for revision arise. In addition, there have been cases that might be considered revision simulacra – instances where the court has reconsidered a judgment but without an application of article 61. Some of these cases manifest the potential problems identified in the drafting history above. In particular, these include the importance of the conceptual distinction between revision and annulment; the intersection between preliminary objections and revision; and the effect of the court’s decision in 1922 to treat revision, procedurally, as a new case.

A. *Revision Proper*

1. *Tunisia v. Libya*

Tunisia v. Libya combined requests for revision, interpretation, and the “correction” of an error.¹⁵⁹ The original case was brought pursuant to a 1978 special agreement and concerned the delimitation of the continental shelf between Libya and Tunisia.¹⁶⁰ As with many delimitation cases, the 1982 judgment was detailed and technical.¹⁶¹ Each state had granted various petroleum concessions in the Mediterranean, and the geographical placement of these concessions and their apparent congruence was relied on by the court in the determination of the appropriate delimitation line.¹⁶²

In its application for revision, Tunisia submitted that there was, no commonality in the lines of the states’ petroleum concessions. This was the “new fact,”¹⁶³ which had only been discovered upon Tunisia unearthing a resolution of the Libyan Council of Ministers setting the boundary of Libya’s 1968 concession at twenty-four degrees east of north. Tunisia argued the apparent convergence of the states’ petroleum concession boundaries was “a decisive factor in the court’s judgment.”¹⁶⁴

The court held that, while the exact coordinates of the Libyan concession were not known to the court or to Tunisia, they were readily obtainable by Tunisia, had proper inquiries been made, and it was in Tunisia’s own in-

159. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis./Libya), Judgment, 1985 I.C.J. Rep. 192, ¶ 53 (Dec. 10) (sidestepping the question of whether it had jurisdiction to correct “*erreurs matérielles*” by finding that Tunisia’s application in this respect was “based upon a misreading of the Judgment, and has thus become without object.” The Court held therefore there was “no need . . . to examine the wider question of the correction of an error in a judgment.” As noted above, the jurisdiction to correct a genuine error is common in domestic courts.)

160. *Case Concerning the Continental Shelf*, 1985 I.C.J. Rep. 192 ¶¶ 32–34.

161. WILLIAM MICHAEL REISMAN & CHRISTINA PARAJON SKINNER, *FRAUDULENT EVIDENCE BEFORE PUBLIC INTERNATIONAL TRIBUNALS: THE DIRTY STORIES OF INTERNATIONAL LAW* 78 (Cambridge Univ. Press 2014).

162. *Case Concerning the Continental Shelf*, 1985 I.C.J. Rep. 192 ¶ 203 (Dec. 10).

163. *Id.* ¶ 21.

164. *Id.* ¶ 16.

terest to have obtained them. In other words, “one of the essential conditions of admissibility of a request for revision” was lacking, as Tunisia had been negligent in failing to ascertain the north-western boundary of the Libyan petroleum concession.¹⁶⁵ Moreover, “the line resulting from the grant of the concession was . . . by no means the sole consideration taken into account by the Court.”¹⁶⁶ As such, it did not constitute a “decisive factor” in the original decision. The court, rather, held that “the details of the correct coordinates of Concession No. 137 would not have changed the decision of the Court as to the first sector of the delimitation.”¹⁶⁷

Despite it being the first revision case in the court’s history, the judges had little to say on the function served by the procedure. Only Judge *ad hoc* Bastid was inspired to comment on the implications of a revision, noting:

The Statute of the Court, while laying down the conditions of admissibility of an application for revision, is silent as to the effects of that application if deemed admissible. What would it imply to reopen the merits of a case, and to what extent should the case as a whole be reviewed?¹⁶⁸

She continued by observing that a request for revision was one of utmost gravity,¹⁶⁹ and, as such, strictness in weighing the question of admissibility was vital.¹⁷⁰ *Ad hoc* Judge Bastid’s views signify a cautious approach, emphasizing the importance of the consequences of a revision, while at the same time due regard for “the parties” situation as sovereign States.¹⁷¹ *Ad hoc* Judge Bastid’s reflections mirror the unanswered questions raised during the drafting of the 1922 Rules.¹⁷²

2. *El Salvador v. Honduras*

In this case, Honduras questioned whether the new documentary evidence as to the course of the River Goascorán constituted a “new fact” or was instead a new interpretation of a previously known fact.¹⁷³ Honduras ar-

165. *Id.* ¶ 28.

166. *Id.* ¶ 35.

167. *Id.* ¶ 39; see also Alexander Orakhelashvili, *The International Court and its Freedom to Select the Ground Upon Which it Will Base its Judgment*, 56 INT’L & COMPAR. L.Q. 171, 175–76 (2007).

168. Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunis./Libya), 1985 I.C.J. Rep. 247, ¶ 2 (Dec. 10) (separate opinion by Bastid J.).

169. *Id.* ¶ 3.

170. *Id.*

171. *Id.*

172. See Preparation of the Rules of Court of January 30th 2022, 1921 P.C.I.J. (ser. D) No. 2, at 280; Rosenne, *supra* note 21, at 53

173. There was a minor side conflict as to whether El Salvador had complied with the concomitant time limit of six months since the date of discovery of the allegedly new fact, but it was not taken up by the Court. Application for Revision of the Judgment of 11 September

gued that there is a distinction between “the facts alleged and the evidence relied upon to prove them.”¹⁷⁴ Rather than taking the opportunity to clarify the meaning of “new facts,” the revision chamber elided this issue by proceeding on the basis of an assumption that the “alleged facts” were indeed “new facts,” and focused its analysis on whether they were of such a nature as to be decisive factors. In the chamber’s view, they were not. Rather, the new map did “not overturn the conclusions arrived at . . . in 1992; it bears them out.”¹⁷⁵ The chamber also addressed the issue of whether an application for revision could be admissible based on the agreement of the parties; the answer was a clear no. The chamber held that “regardless of the parties’ views on admissibility, it is for the court “to ascertain whether the admissibility requirements laid down in Article 61 of the Statute are met.”¹⁷⁶

Again, the chamber emphasized the need to take a strict approach to the admissibility requirements of article 61¹⁷⁷ but otherwise made no comment on the general function or purpose of revision. *Ad hoc* Judge Paolillo, in dissent, made a number of relevant observations; in particular, “an application for revision is by its very nature and object exceptional.”¹⁷⁸ Furthermore, this dissenting opinion observed that there exists:

a negative perception of the institution of revision, which is viewed as a means of breaching the sacrosanct principle of *res judicata*. According to this view, revision is a substitute for appeal and as such represents a threat to legal certainty.¹⁷⁹

El Salvador v. Honduras also raised an interesting point of procedure. In the original case Nicaragua had appeared as an intervener¹⁸⁰ but was not before the chamber during the revision proceedings.¹⁸¹ The nature of the relationship between an intervener and a revision judgment is not at all clear from the statute, rules, or the court’s jurisprudence. Rosenne suggests that an intervener cannot initiate revision proceedings, but can request permis-

1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Judgment, 2003 I.C.J. Rep. 392, ¶ 36 (Sept. 11).

174. *Id.* ¶ 31; see also Question of the Monastery of Saint-Naoum (Albanian Frontier), Advisory Opinion, 1924 P.C.I.J. (ser. B) No. 9 (Sept. 4).

175. *Case Concerning the Land, Island and Maritime Frontier Dispute*, 2003 I.C.J. Rep. 392, ¶ 53.

176. *Id.* ¶ 59.

177. *Id.* ¶ 22.

178. Application for Revision of the Judgment of 11 September 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal./Hond.), 2003 I.C.J. Rep. 413, ¶ 32 (Dec. 18) (Paolillo J., dissenting).

179. *Id.* ¶ 30.

180. See Statute of the International Court of Justice art. 62, Oct. 24, 1945, 33 U.N.T.S. 993.

181. Nicaragua was supplied with a copy of the revision application but did not appear in the proceedings or make any submissions.

sion to intervene, again, under article 62.¹⁸² For present purposes, as it has been the court's consistent practice to treat applications for revision as new cases, Rosenne's approach, at first, appears logical. But, as argued below, treating revision as a new and separate proceeding is not procedurally neutral. It leads to potentially absurd outcomes, such as an intervener having to reapply and re-establish its legal interest, and the court having to re-decide this issue.

3. *Bosnia & Herzegovina v. Serbia & Montenegro* (Genocide)

The third case of revision proper was *Bosnia & Herzegovina v. Yugoslavia*, one of the most procedurally complex matters to have ever come before the court.¹⁸³ Commenced in 1993, Yugoslavia had filed preliminary objections to the jurisdiction and to the admissibility of the case. On July 11, 1996, the court dismissed those objections and proceeded to the merits phase, accepting that it had jurisdiction to hear the case pursuant to article IX of the Genocide Convention.¹⁸⁴ Yugoslavia submitted its counter-memorial in 1997, including a number of counterclaims that were subsequently withdrawn on April 20, 2001. The matter concluded with a judgment on the merits, issued in 2007.

In the meantime, on November 1, 2000, the Federal Republic of Yugoslavia (Serbia & Montenegro) ("FRY") was admitted to membership of the United Nations. Yugoslavia had ceased to exist,¹⁸⁵ but, for many years, FRY had asserted its status as the successor state, claiming it would "strictly abide by all the commitments that [Yugoslavia] assumed internationally."¹⁸⁶ Despite this, and having come to the view that FRY was in fact *not* the successor to Yugoslavia's international obligations, in April 2001, FRY filed an application for revision of the preliminary objections judgment and requested the suspension of the merits proceedings.¹⁸⁷ FRY argued *inter alia* that

182. ROSENNE, *supra* note 21, at 169–70.

183. For a detailed account, see Karin Oellers-Frahm, *The Principle of Consent to International Jurisdiction - Is It Still Alive: Observations on the Judgment on Preliminary Objections in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, 2009 GER. Y.B. INT'L L. 487.

184. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. Rep. 595, ¶ 47 (June 26).

185. S.C. Res. 777 (Sept. 19, 1992).

186. Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Yugoslavia v. Bosn. & Herz.), Judgment, 2003 I.C.J. Rep. 7, ¶ 1 (Feb. 3).

187. See Institution of Proceedings, Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), INT'L CT. J. (Apr. 24, 2001), <https://www.icj-cij.org/en/case/122/institution-proceedings>. In May 2001 the Federal Republic of Yugoslavia (Serbia & Montenegro) ("FRY") also submitted to the Court a document titled "Initiative to the Court to Reconsider *ex Officio* Jurisdiction over Yugoslavia", which argued

because it had not continued the legal personality of the former Yugoslavia, it was impossible for FRY to have been a party to the Genocide Convention, and there was no alternative basis for the court's jurisdiction.

The court refused FRY's request to suspend the merits proceedings.¹⁸⁸ The revision proceedings were entered in the General List as a new case, as has been the practice. But this seemingly innocuous administrative detail now takes on a profound importance because the impugned decision is not a final judgment on the merits but an interlocutory decision on jurisdiction. To begin with, the court's decision in this respect seems to contravene if not the letter then at least the spirit of what is now article 79bis(4) of the court's rules, requiring that when preliminary objections are entered, the proceedings on the merits are ("shall be") suspended. This article (which has existed since the 1936 iteration of the PCIJ Rules) promotes the efficient use of the court and the parties' resources. It ensures the court does not act on the merits without the authority to do so.

By ignoring this article in respect of FRY's application for revision, and indeed by permitting an application for revision of an interlocutory decision in the first place, the court rendered a potentially absurd outcome whereby it can hand down a decision on the merits, deciding a matter *res judicata*, and yet not have had the legal authority to do so. Moreover, the court failed to grapple with the fact that the remedy for a judicial act *ultra vires* is not revision, but annulment. These matters are returned to in Part IV, below.

In 2003, the court rejected FRY's application for revision as inadmissible on the rather tenuous and highly contested¹⁸⁹ basis that FRY did not "rely on facts that existed in 1996" but rather on "the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised."¹⁹⁰ *Ad hoc* Judge Dimitrijević, in dissent, called it "an attempt to dispose of the case 'epistemologically,' by restrictively interpreting the meaning of the term 'fact' as used in Article 61."¹⁹¹ Together with the judg-

that the Court had no jurisdiction *ratione personae* over FRY and requesting that the Court "suspend proceedings regarding the merits of the case." Rather than suspend the merits, FRY was granted the opportunity to address the matter of jurisdiction during the oral phase of the merits proceedings. See "Initiative to the Court to Reconsider Ex Officio Jurisdiction over Yugoslavia", Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), INT'L CT. J. (May 4, 2001), <https://www.icj-cij.org/en/case/91/other-documents>; see also ROSENNE, *supra* note 21, at 135.

188. ROSENNE, *supra* note 21, at 135.

189. See Matthew Craven, *The Bosnia Case Revisited and the New Yugoslavia*, 15 LEIDEN J. INT'L L. 323 (2002); Vojin Dimitrijević & Marko Milanović, *The Strange Story of the Bosnian Genocide Case*, 21 LEIDEN J. INT'L L. 65 (2008).

190. *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2003 I.C.J. Rep. 7, pmb1.

191. *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Yugoslavia v. Bosn. & Herz.)*, Judgment, 2003 I.C.J. Rep. 53, ¶ 1 (Feb. 3) (Dimitrijević, J., dissenting).

ment in *El Salvador*, the *Genocide* case decision on revision illustrates the complexity of defining, as Karnebeek noted in 1899, the scope and limits of what constitutes a “new fact.”¹⁹²

In 2017, Bosnia & Herzegovina applied for revision of the 2007 merits judgment, but the basis of the application is not on public record. Before the case was entered in the List, the court determined that the Agent submitting the application, Mr. Sakib Softić, had not been validly appointed and, as such, the court had not been properly seized.¹⁹³ The application was rejected outright.¹⁹⁴

This incident highlights in yet another form the essential procedural question of whether revision proceedings should be treated as a new case.¹⁹⁵ While Mr. Softić had represented Bosnia & Herzegovina as Agent in the original proceedings, because the court treated the revision application as a new and different case, a new appointment as Agent was required. This too is considered in greater depth in Part IV, below.

B. Revision Simulacra

In addition to the three cases detailed above, the court has also faced two incidents of revision simulacrum — cases that raise similar issues to revision. The first involved the “examination” of an earlier judgement,¹⁹⁶ and the second an alleged revision undertaken by the court *sua sponte* without engaging article 61.¹⁹⁷

192. HAGUE 1899, *supra* note 82, at 750.

193. International Court of Justice Press Release No. 2017/12, Document Entitled “Application for Revision of the Judgment of 26 February 2007 in the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)” - Statement by H.E. Judge Ronny Abraham, President of the International Court of Justice (Mar. 9, 2017), <https://www.icj-cij.org/files/press-releases/0/000-20170309-PRE-01-00-EN.pdf>.

194. Although, as noted by Milanovic: “the Court was perfectly aware that if it allowed the revision case to proceed now, the case actually had zero prospects for success. When I say zero, I don’t mean just low or unlikely, but a zero ‘unless a majority of the judges had a seizure’ kind of zero.” Marko Milanovic, *The Strangest ICJ Case Got Even Stranger, Or the Revision That Wasn’t*, EJIL: TALK! (March 13, 2017), <https://www.ejiltalk.org/the-strangest-icj-case-got-even-stranger-or-the-revision-that-wasnt/>.

195. Geiß & Zimmermann, *supra* note 21, at 1666; *see also* Dapo Akande, *Applications for Revision of the International Court of Justice’s Judgments: The Curious “Case” for Revision of the Bosnian Genocide Judgment*, EJIL: TALK! (March 13, 2017), <https://www.ejiltalk.org/applications-for-revision-of-the-international-court-of-justice-judgments-the-curious-case-for-revision-of-the-bosnian-genocide-judgment/>.

196. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the *Nuclear Tests* (N.Z. v. Fr.) Case Order, 1995 I.C.J. Rep. 288 (Sept. 22).

197. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6 (July 18).

1. *New Zealand v. France*

In *New Zealand v. France*, on August 21, 1995, New Zealand filed a “Request for an Examination of the Situation” — a procedure unknown to the Statute and Rules. The Request was brought on the basis of the court’s 1974 judgments in the *Nuclear Tests* cases,¹⁹⁸ which stated *inter alia*, “if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.”¹⁹⁹ The original case concerned a claim for the cessation of nuclear testing. France did not appear before the court, but unilateral statements made by the French authorities undertook that such testing would cease. The court considered that “the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.”²⁰⁰ As such, the court issued a Judgment that was in effect a non-decision. It held in the *dispositif* that “the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon.”²⁰¹

While France did cease atmospheric nuclear testing, it announced plans in 1995 for a series of underground nuclear tests at the Mururoa and Fangataufa atolls. New Zealand’s original case “concerned nuclear contamination of the environment arising from nuclear testing of whatever nature”²⁰² and as such, the government of New Zealand considered the situation to warrant a “resumption of the case begun by Application on 9 May 1973.”²⁰³

In 1995, the use of the phrase “in accordance with the provisions of the Statute” in the original Judgment had caused the parties significant consternation. New Zealand was adamant that it was “not seeking an interpretation of the 1974 Judgment under Article 60 of the Statute, nor a revision of that Judgment under Article 61.”²⁰⁴ Rather, the proceedings were “derivative”;²⁰⁵ “part of the same case and not of a new one.”²⁰⁶ By contrast, France argued that New Zealand’s request was one to “reopen . . . proceedings declared closed by the Court,”²⁰⁷ and that the action by New Zealand was “more akin

198. Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 63 (Dec. 20); Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 60 (Dec. 20).

199. *Nuclear Tests Case (N.Z. v. Fr.)*, 1974 I.C.J. Rep. ¶ 63.

200. *Id.* ¶ 55.

201. *Id.* ¶ 75.

202. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. Rep. 288, ¶ 4 (Sept. 22).

203. *Id.* ¶ 3.

204. *Id.* ¶ 50.

205. *Id.* ¶ 48.

206. *Id.* ¶ 49.

207. *Id.* ¶ 40.

to a request for revision.”²⁰⁸ An application for revision under article 61 was manifestly inadmissible as the ten-year time limit had passed long before. As such, France argued that New Zealand should have brought either an application for interpretation under article 60 or simply filed a new application under article 40(1).²⁰⁹

The court’s decision with respect to the procedure of the Request is sparse. The court held:

in expressly laying down, in paragraph 63 of its Judgment of 20 December 1974, that, in the circumstances set out therein, “the Applicant could request an examination of the situation in accordance with the provisions of the Statute,” the Court cannot have intended to limit the Applicant’s access to legal procedures such as the filing of a new application (Statute, Art. 40, para. 1), a request for interpretation (Statute, Art. 60) or a request for revision (Statute, Art. 61), which would have been open to it in any event;

Whereas by inserting the above-mentioned words in paragraph 63 of its Judgment, the Court did not exclude a special procedure, in the event that the circumstances in the paragraph were to arise, in other words, circumstances which “affected” the “basis” of the Judgment.²¹⁰

The court further held that the Request, while a permissible *ad hoc* procedure, was not made out insofar as the 1974 Judgment “dealt exclusively with atmospheric nuclear tests”²¹¹ and not underground testing. This decision ignores the fact that “New Zealand’s previous application had been founded on the harm caused to the South Pacific environment by nuclear testing . . .”²¹²

Returning to the matter of the procedure, the court was unanimous as to the validity of the request. The three dissenting Judges concurred on this point. Judge Weeramantry considered the request to be “unusual,”²¹³ but legitimate, as the court had “used its undoubted powers of regulating its own procedure to devise a procedure *sui generis*.”²¹⁴ Judge Weeramantry further posited that there was “no merit in the submission that an application under paragraph 63 is an application for revision under another guise. The two

208. *Id.*

209. *Id.*

210. *Id.* ¶¶ 53–54.

211. *Id.* ¶ 63.

212. Surabhi Ranganathan, *Nuclear Weapons and the Court*, 111 AM. J. INT’L L. UNBOUND 88, 88 (2017).

213. Request for an Examination of the Situation in Accordance with Paragraph 63 of Court’s Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. 288, 320 (Sept. 22) (Weeramantry, J., dissenting).

214. *Id.* at 320 (Judge *ad hoc* Palmer stated the same view at 399 and expressed his general agreement with the opinion of Judge Weeramantry at 421).

procedures are totally different in conception, nature and operation.”²¹⁵ Judge Koroma likewise stated that “paragraph 63 did not anticipate the discovery of new facts but rather provided for an examination of the subject-matter of the Judgment.”²¹⁶

Putting aside the expiration of the time limit, could the request be conceived as an application for revision? First, it is arguable that there was a discovery of a new fact — essentially, that underground testing was just as harmful to the environment as atmospheric testing. This fact was true in 1974 but, due to the limitations in scientific understanding, could not be known. As observed by New Zealand in its written submissions, if the court had known this it “could hardly have taken the view that the French renunciation of atmospheric testing could by itself have brought the “dispute” to an end.”²¹⁷

Second, the fact must be a decisive factor. In this respect, there is no distinction between a fact that may be a decisive factor in a judgment, and a situation that could arise to “affect the *basis* of the Judgment,” as Judge Weeramantry posits.²¹⁸ However, Judge Weeramantry goes on to draw the following distinction:

[R]evision involves an alteration or modification of the Judgment, whereas the Court’s action was aimed at preserving the Judgment in its full integrity, in the event that some event had occurred which undermined the basis of the Judgment.²¹⁹

I would suggest that “preserving” the Judgment was not the intention of the court, given that no decision was made. Rather, the court appears to have been attempting to reserve to itself the option of making a decision in the future. In this respect, as observed by Judge *ad hoc* Palmer, it was “an unusual Judgment of which it might be said that proceedings were not definitely ended.”²²⁰ Bearing in mind that the 1974 Judgment had not conclusively ruled on whether the court had jurisdiction over the dispute, the intent behind paragraph 63 appears to have been to preserve the *prima facie* jurisdiction of the court.

215. *Id.* at 321.

216. Request for an Examination of the Situation in Accordance with Paragraph 63 of Court’s Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. 288, 363, 376 (Sept. 22) (Koroma, J., dissenting).

217. Application, Request for an Examination of Situation, Nuclear Tests (N.Z. v. Fr.), (May 9, 1973), <https://www.icj-cij.org/public/files/case-related/97/7187.pdf>.

218. Request for an Examination of Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. 288, 321 (Sept. 22) (Weeramantry, J., dissenting).

219. *Id.* at 320.

220. Request for an Examination of the Situation in Accordance with Paragraph 63 of Court’s Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. 288, 382, 398 (Sept. 22) (Palmer, J., dissenting).

For this reason, the Request cannot be considered as a revision. There was no decision in 1974,²²¹ no *res judicata* in respect of the issues raised in New Zealand's 1973 Application.²²² As such, there was nothing to revise. However, the approach taken by the court to the Request is informative.

As noted by Judge *ad hoc* Palmer, "the formal fact of the status of the case on the Court's formal list is irrelevant."²²³ Technically, the *Nuclear Tests* case was treated as concluded and removed from the List. The Request was entered as a new case in the List. But, as submitted by New Zealand and accepted by the court, the Request proceedings were not a new case. Rather, they were derivative,²²⁴ "part of the same case and not of a new one."²²⁵ The original case had in fact been resumed. As explained in Part IV below, there is no reason not to conceive of revision cases in the same manner.

However, to raise a point of distinction, it must be observed that the decision on the Request comes in the form of an order in accordance with article 48 of the Statute,²²⁶ rather than a judgment: Revision proceedings are always dealt with by judgment, as mandated by article 61. This could suggest that revision proceedings are a distinct, new case with a new judgment. But it is not conclusive; there is no particular reason that proceedings must end with a judgment rather than an order (domestic lawyers would be familiar with an order for costs following judgment), nor does a separate judgment following a decision on the merits of necessity indicate that the matter under consideration is separate from the original proceedings.²²⁷

2. South West Africa

Another incident of revision simulacrum arose in the notorious *South West Africa (Second Phase)* judgment. In 1960, the court received two sepa-

221. See *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 I.C.J. 457, ¶ 62 (Dec. 20). ("It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having disappeared, there is nothing on which to give judgment.")

222. Request for an Examination of Situation in Accordance with Paragraph 63 of Court's Judgment of 20 December 1974 in *Nuclear Tests (N.Z. v. Fr.)*, Order, 1995 I.C.J. 288, 377 (Sept. 22) (Koroma, J., dissenting).

223. Request for an Examination of the Situation in Accordance with Paragraph 63 of Court's Judgment of 20 December 1974 in *Nuclear Tests (N.Z. v. Fr.)*, Order, 1995 I.C.J. 288, 382, 399 (Sept. 22) (Palmer, J., dissenting).

224. Request for an Examination of the Situation in Accordance with Paragraph 63 of Court's Judgment of 20 December 1974 in *Nuclear Tests (N.Z. v. Fr.)*, Order, 1995 I.C.J. 288, 302–03 (Sept. 22).

225. *Id.*

226. See Statute of the International Court of Justice, art. 48 ("The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.")

227. See, e.g., *Corfu Channel (U.K. v. Alb.)*, Compensation, 1949 I.C.J. 390, 392 (July 28).

rate Applications from Ethiopia and Liberia, each instituting proceedings against South Africa relating to the Mandate for South West Africa. The Class C Mandate had been created under the auspices of the League of Nations, whereby South Africa, as Mandatory, was permitted to apply South African law to the territory and treat South West Africa as an integral portion of its own territory. The claim related to the duties and performance of South Africa as Mandatory.²²⁸ The Applications invoked article 7 of the Mandate²²⁹ and article 37 of the Statute²³⁰ as the basis of the court's jurisdiction. The court joined the proceedings,²³¹ which were then met with preliminary objections from South Africa. South Africa argued that Ethiopia and Liberia lacked standing to bring the case,²³² and the Mandate for South West Africa was no longer in force,²³³ despite the court having held in its three 1950s Advisory Opinions that South West Africa was still a mandated territory.²³⁴ South Africa also asserted there was no dispute between the parties.²³⁵ In 1962, the court rejected all of South Africa's contentions and held that it had jurisdiction to adjudicate on the merits of the dispute.²³⁶

In 1966, the Court could have addressed the merits of the case. Instead, the court returned to two questions of jurisdiction that it considered as having an "antecedent character."²³⁷ First, the court considered whether the Mandate continued to be in force,²³⁸ notwithstanding that in 1962 the court

228. South West Africa (Eth. v. S. Afr.), Preliminary Objection, 1962 I.C.J. 319, 321 (Dec. 21).

229. *Mandate for German South-West Africa*, League of Nations Doc. C.1920 (1920) art. 7 ("The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such a dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.").

230. See Statute ICJ, *supra* note 2, art. 37 ("Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.").

231. South West Africa (Eth. v. S. Afr.), Order, 1961 I.C.J. 4, 4–5 (Dec. 5).

232. South West Africa (Eth. v. S. Afr.), Preliminary Objection, 1962 I.C.J. 319, 326 (Dec. 21).

233. *Id.* at 326–27.

234. International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128 (July 11); Voting Procedure on Questions Relating to Reports and Petitions Concerning Territory of South-West Africa, Advisory Opinion, 1955 I.C.J. 67 (June 7); Admissibility of Hearings of Petitioners by the Committee on South West Africa, Advisory Opinion, 1956 I.C.J. 23 (June 1). For a general history and overview of the cases, see generally Makane Moïse Mbengue & Najib Messih, *The South West Africa Cases: 50 Years Later*, 1 ETH. Y.B. INT'L L. 1, 11 (2016).

235. South West Africa (Eth. v. S. Afr.), Preliminary Objection, 1962 I.C.J. 319, 327 (Dec. 21).

236. *Id.* at 347.

237. South West Africa (Eth. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, 18 (July 18).

238. *Id.* at 19.

had held that it did.²³⁹ Second, the court returned to the question of standing. The court stated that the 1962 Judgment had only addressed the question of Ethiopia and Liberia's standing "before the Court itself,"²⁴⁰ and not their "legal right or interest in the subject-matter of their claim."²⁴¹ The court held that individual members of the League of Nations were not to be regarded as having their own legal right or interest in the administration of the Mandate; only the League itself could bring an action concerning the performance of the Mandate.²⁴²

The two judgments are clearly inconsistent.²⁴³ For present purposes, the point of interest is Reisman's thesis that the second phase of *South West Africa* constitutes a revision of the 1962 Judgment, notwithstanding that the court did not follow the procedure laid down in article 61.²⁴⁴ Reisman argues that the matter of Ethiopia and Liberia's "legal right or interest" was definitively settled in 1962, in favor of the applicants,²⁴⁵ and was *res judicata*.²⁴⁶ As such, the court was obliged to follow that decision "unless it specifically resorted to the revision procedure . . . including a judgment expressly recording the existence of a 'new fact'."²⁴⁷ Reisman explains that the court's failure to follow the article 61 procedure was "a severe denial of justice" and "an act in excess of jurisdiction";²⁴⁸ an *excès de pouvoir*. Thus, there were "compelling grounds for nullity" of the 1966 decision.²⁴⁹

This analysis raises a number of interesting questions, most pertinent of which is the status of decisions on preliminary objections as *res judicata*. In *South West Africa*, the court opined that it was unnecessary to decide on "whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, whether it ranks as a "decision" for the purposes of article 59 of the court's Statute, or as "final" within the meaning of

239. *South West Africa (Eth. v. S. Afr.)*, Preliminary Objection, 1962 I.C.J. 319, 347 (Dec. 21) ("The Court concludes that Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation. Consequently, the Court is competent to hear the dispute on the merits.")

240. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Preliminary Objections, 1962, I.C.J. Rep. 319 ¶ 347 (Dec. 21) at 347; *South West Africa (Eth. v. S. Afr.)*, Second Phase, 1966 I.C.J. Rep. 6, 18 (July 18).

241. *South West Africa (Eth. v. S. Afr.)*, Second Phase, 1966 I.C.J. Rep. 6, 19 (July 18).

242. *Id.* at 28–29.

243. Mbengue & Messih, *supra* note 234.

244. William M. Reisman, *Revision of the South West Africa Cases*, 7 VA. J. INT'L L. 1, 64–65 (1966).

245. *Id.* at 66–68.

246. *Id.* at 68–71.

247. *Id.* at 71.

248. *Id.*

249. *Id.* at 83.

article 60.”²⁵⁰ Judge Jessup, in dissent, forcefully argued there was no distinction between a judgment in respect of jurisdiction and a judgment on the merits in terms of its binding effect.²⁵¹ In later years, the court has made clear that it considers decisions on jurisdiction as *res judicata*.²⁵² However, it is one thing to conclude that decisions on preliminary objections are *res judicata*. It is a step further to reason that decisions on preliminary objections should be subject to revision. This is returned to in Part IV, below.

3. Ongoing Supervision of Judgments and Related Procedures

There have been other attempts to relitigate issues without resort to the revision procedure. In the *Haya de la Torre* case,²⁵³ Cuba’s application for intervention was denied on the basis that it was an attempt to reopen the court’s decision in the earlier *Asylum* case.²⁵⁴ In *Nicaragua v. Colombia*,²⁵⁵ one of Colombia’s preliminary objections contended that Nicaragua was seeking to appeal the 2012 *Territorial and Maritime Dispute* judgment.²⁵⁶ This objection was dismissed without discussion.²⁵⁷

There are also cases in which the court continues to exercise a certain supervisory role in the implementation of its judgments. One example is the *Gabčíkovo-Nagymaros Project*, in which the special agreement between Hungary and Slovakia provides that following Judgment, the parties will enter into negotiations for its execution, and should there be no agreement within six months, either party may “request the Court to render an additional Judgment to determine the modalities of executing its Judgment.”²⁵⁸ Slovakia submitted such an application for additional judgment in 1998, but

250. South West Africa (Eth. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, ¶ 59 (July 18).

251. South West Africa (Eth. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, 325, 336–37 (July 18) (Jessup, J., dissenting).

252. Request for Interpretation of Judgment of 11 June 1998 Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objection, 1999 I.C.J. 31, 35 (Mar. 25).

253. *Haya de la Torre* (Colom. v. Peru), Judgment, 1951 I.C.J. 71, 77 (June 13).

254. Christine M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 AM. J. INT’L L. 495, 509 (1986).

255. Question of Delimitation of Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objection, 2016 I.C.J. 100, 110 (Aug. 14); see also Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, 28 EUR. J. INT’L L. 13, 65 (2017).

256. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624 (Nov. 19).

257. Question of Delimitation of Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objection, 2016 I.C.J. 100, 133 (Aug. 14).

258. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Special Agreement, 1993 I.C.J. 1971, art. 5(3) (July 2).

negotiations recommenced and the application was eventually discontinued in 2017.²⁵⁹ The case remains pending at the court, on the basis that the jurisdiction provided for by the special agreement continues and article 5(3) means that another application for additional judgment could be filed at any time.²⁶⁰

The court has also made orders for the ongoing supervision of the implementation of Provisional Measures orders.²⁶¹ This is entirely acceptable as provisional measures are incidental of the main event; their purpose is to preserve the *status quo* pending judgment, and the court's power to continue supervision thereof will cease once the Judgment is entered. These examples are not analogous to revision.

IV. PROPOSALS FOR IMPROVING THE REVISION PROCEDURE

The cases examined above reveal a series of potential problems arising from the court's current approach to revision cases: the intervener problem, as seen in *El Salvador v. Honduras*; the jurisdiction and related Agent problem, as arising in the second revision application in *Genocide*; and the interlocutory problem demonstrated by the first *Genocide* revision application. One may break these challenges into two essential questions of procedure: First, whether the court should continue its practice of entering revision proceedings as new cases; and second, whether the court should permit revision of preliminary objections judgments.

A. *A New Case and a New Jurisdiction?*

The court has a clear and consistent practice of entering applications for revision as new contentious cases in the General List, but it is not at all obvious that this practice is necessary or required.²⁶² Juan Quintana explains the process:

The formal opening of new proceedings is an operation that occurs when the case is entered in the General List and is assigned an official name and folio number. This is an internal measure that is taken by the Registrar of the Court, in consultation with the President, and it is normally performed shortly after a document instituting

259. Gab ikovo-Nagymaros Project (Hung./Slok.), 2017-2018 Y.B. (I.C.J.) 8.

260. *Id.*

261. See Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), Provisional Measure, 2020 I.C.J. 1, 23–24 (Jan. 23); Certain Activities Carried Out by Nicaragua in Border Area (Costa Rica v. Nicar.), Provisional Measure, 2011 I.C.J. 6, 28 (Mar. 11); Request for Interpretation of Judgment of 15 June 1962 in Temple of Preah Vihear (Cambodia v. Thai.), Provisional Measure, 2011 I.C.J. 537 (Apr. 28); Application of International Convention on Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Provisional Measure, 2008 I.C.J. 353, ¶ 149 (Oct. 15).

262. ROSENNE, *supra* note 21, at 53.

proceedings is filed. The entering of a new case in the General List is not disclosed to the public at large as such, and this is why the name that the case is to bear and the number under which it makes an entry in the List are only known when the Court issues the first procedural order in the case, which is normally the order fixing time-limits for the initial round of written pleadings. The actual entering of the case in the List, however, always precedes the adoption of that order.²⁶³

Rather than opening a new case, a revision proceeding should be considered as a derivative or incidental proceeding. A derivative or incidental proceeding is an application which seeks any order other than a final judgment; examples include a decision on provisional measures under article 41,²⁶⁴ or an order in respect of compensation rendered after the decision on the merits.²⁶⁵ Manley Hudson introduced the expression “incidental jurisdiction” in 1934,²⁶⁶ using it to describe proceedings for revision and interpretation. Rosenne argues that incidental proceedings take place *pendente lite* while the mainline proceedings are in progress, while derivative proceedings take place after the principal judgment on the merits of the case.²⁶⁷ There is nothing in the Statute or the Rules which requires the court to open a separate case in derivative proceedings. Properly conceived, revision proceedings are necessarily derivative, and should not be treated as a new case.

Andreas Zimmermann and Geiß put forward a series of justifications for treating revision applications as new cases.²⁶⁸ The first reason has to do with the structure of the court’s Rules — a “systematic” reason. They observe that incidental proceedings are dealt with in Part III, Section D, while revision proceedings are regulated in Section F, subsection 2.²⁶⁹ This rather tenuous argument is further supported by their contention that it is “consistent with the practice that judges *ad hoc* of the original proceedings are

263. Juan J. Quintana, *Procedure Before the ICJ: A Note on the Opening (Or Not) of New Cases*, 9 L. & PRAC. INT’L CTS. & TRIBS. 115, 117 (2010); see also ROSENNE, *supra* note 28, at 197–208 (for more information on the General List).

264. See Cameron Miles, *The Origins of the Law of Provisional Measures before International Courts and Tribunals*, 73 HEIDELBERG J. INT’L L. 615, 671 (2013).

265. See *Corfu Channel (U.K. v. Alb.)*, Order, 1949 I.C.J. 237 (Nov. 19).

266. MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE: A TREATISE* 360 (1934).

267. ROSENNE, *supra* note 21, at 190.

268. See Geiß & Zimmermann, *supra* note 21, at 1666; Akande, *supra* note 195. The arguments of all three authors are approved by Jessica Joly Hébert. She likewise recommends that revision be treated as a new case; although suggests that because the links between a revision and its original judgment are “sturdier” than in a situation of interpretation, revision proceedings should be given a new designation as “additional proceedings”. Hébert, *supra* note 144, at 222–27.

269. Geiß & Zimmermann *supra* note 21, at 1666.

not considered as *ipso facto* retaining their position in the revision proceedings”²⁷⁰ and that:

[T]he very nature of revision proceedings supports their qualification as a new case, given that . . . the [s]tate intends to initiate the reconsideration of a settled case, already removed from the Court’s list of pending cases.²⁷¹

Zimmermann and Geiß, along with Dapo Akande, also point to the court’s treatment of the Agent for Bosnia and Herzegovina, Mr. Sakib Softić, in the second *Genocide* revision application, described in Part III.A.3 above. Because the court treated the revision application as a new case, it could not be submitted by Mr. Softić without a clear, new, appointment as Agent.²⁷² However, the court’s treatment of Mr. Softić is a consequence of the court’s treating revision applications as new cases; it is not a cause. It does not explain the court’s approach.

Nor do the other arguments support a claim that revision must be treated as a new case. To take the argument related to judges *ad hoc*, it is true that rarely have the same judges opined on both the original case and the revision application. In *El Salvador v. Honduras*, because the original judgment had been delivered by an *ad hoc* Chamber, article 100(1) of the Rules of Court required that request for its revision should be dealt with “by that Chamber.” Yet, in *El Salvador v. Honduras*, the *ad hoc* Chamber no longer existed and “most of its members had passed away,”²⁷³ requiring the constitution of a new Chamber. And in *Genocide*, neither of the judges *ad hoc* were reappointed. But, as with the issue of the Agent, this confuses cause and consequence. In *New Zealand v. France*, even though the Request was treated as “part of the same case and not of a new one,”²⁷⁴ a different judge *ad hoc* (Sir Geoffrey Palmer, replacing Sir Garfield Barwick) was appointed.²⁷⁵ The court’s practice in this respect did not demand that revision be treated procedurally as a new case. At best, it was inconclusive.

What then of the argument that revision requires the reopening of a settled case, which will have been removed from the List?²⁷⁶ Again, *New Zealand v. France* is instructive. As noted by Judge *ad hoc* Palmer, in that case, “the formal fact of the status of the case on the Court’s formal list is irrele-

270. *Id.*

271. *Id.*; see also Akande, *supra* note 195.

272. Geiß & Zimmermann *supra* note 21, at 1666; Akande, *supra* note 195.

273. ROSENNE, *supra* note 21, at 141.

274. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. 288 ¶ 49 (Sept. 22).

275. *Id.*

276. Geiß & Zimmermann *supra* note 21, at 1666; see also Akande, *supra* note 195.

vant”.²⁷⁷ The *Nuclear Tests* case was treated as concluded and removed from the List, and the Request was entered separately on the List, but this did not prevent the court from treating the Request proceedings as derivative and as a continuation of the original case.²⁷⁸

Treating applications for revision as new cases also immediately raises the question of where the court finds the jurisdiction of the new case. The court did not appear to consider a new consent to jurisdiction necessary. As observed by Quintana:

[S]ince 1978 the governing criterion for the Registrar as to the manner in which he treats unilateral acts seeking to institute contentious proceedings should be whether the Application proposes to found the jurisdiction of the Court upon a consent already given or manifested by the State named as Respondent in that document.²⁷⁹

The Registrar has never rejected a revision application for want of jurisdiction, nor have parties recited any pleas with respect to jurisdiction in their applications for revision. On this basis, the revision jurisdiction is either founded on a continuation of the original case jurisdiction, or somewhere else. Consensus appears to favor the latter. Akande points out that despite the revision application being entered as a new case, the jurisdictional basis is not the same as that for the original case, nor does the court require the parties' consent. Rather, it is the parties' "consent to the Statute itself" that gives the court jurisdiction.²⁸⁰ Quintana agrees, observing that the jurisdiction of the court to revise its own judgments is "statutory."²⁸¹ He says that the revision jurisdiction is "bestowed upon the Court by all of the [s]tates that become parties to the Statute."²⁸² Rosenne also says that the court's treatment of its interpretation jurisdiction, as "a special jurisdiction deriving directly from Article 60 of the Statute,"²⁸³ is analogous and "equally applicable to requests for revision."²⁸⁴ Chester Brown goes so far as to claim that the jurisdiction of a court to revise its judgments is inherent.²⁸⁵

277. Request for an Examination of Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in *Nuclear Tests (N.Z. v. Fr.)*, Order, 1995 I.C.J. 288 ¶ 52 (Sept. 22). (Palmer, J., dissenting).

278. See Request for an Examination of Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in *Nuclear Tests (N.Z. v. Fr.)*, Order, 1995 I.C.J. 288, ¶¶ 49–54 (Sept. 22).

279. Quintana, *supra* note 263, at 123.

280. Akande, *supra* note 268.

281. QUINTANA, *supra* note 21, at 1029.

282. *Id.*

283. Application for Revision and Interpretation of Judgment of 24 February 1982 in *Continental Shelf (Tunis./Libya) Judgment*, 1985 I.C.J. 192 ¶ 43 (Dec. 10).

284. ROSENNE, *supra* note 21, at 36 n.26; see also Kazimierz Grzybowski, *Interpretation of Decisions of International Tribunals*, 35 AM. J. INT'L L. 482, 495 (1941) (stating that the Permanent Court of International Justice [PCIJ] "possesses this jurisdiction as an excep-

These arguments related to jurisdiction are convincing, even though they do not directly resolve the Agent problem. However, for present purposes the question is whether revision demands to be treated as a new case. To the extent that the parties are not required to manifest a new consent to the court's jurisdiction, this is evidence that it is not a new case. Indeed, the key feature of incidental and derivative jurisdiction is that it does not depend upon the consent of the parties but flows directly from the Statute.²⁸⁶

As to the Agent problem, the invalidity of the appointment of the Agent in *Genocide* needs not be justified on the basis that the revision was a new case – problems relating to the validity of the appointment of an Agent can arise in any phase.²⁸⁷ Moreover, the appointment, or not, of an Agent does not preclude a challenge to the court's jurisdiction; the two issues are quite separate.²⁸⁸

An additional point to note is that if revision were in fact a new case, one could argue that the admissibility of the application should turn not only on the existence of a new fact under article 61, but should also require the existence of a dispute under article 38, and the respondent party's awareness

tion from the general principles of international law, and it is based upon the express wording of Article 60 of the Statute.”).

285. Chester Brown, *The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals*, 30 LOY. L.A. INT'L & COMP. L. REV. 219, 224–25 (2008); see also Brown, *supra* note 152, at 218. See generally Effect of Awards of Compensation Made by United Nations Administrative Tribunal, Advisory Opinion, 1954 I.C.J. 47, 55 (July 13) (suggesting that the PCIJ appeared to indicate that the power of revision is inherent.). *Contra* Bowett, *supra* note 3, at 590 (arguing that it is “doubtful” there is an inherent power of revision.).

286. HUDSON, *supra* note 130, at 360; see Cameron Miles, *Provisional Measures and the ‘New’ Plausibility in the Jurisprudence of the International Court of Justice*, BRIT. Y.B. INT'L L. (ADVANCE ARTICLE) 1 (2018) (showing an example where an order for provisional measures need only establish *prima facie* jurisdiction).

287. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. v. Socialist Federal Republic of Yugoslavia), Judgment, 2007 I.C.J. 43, ¶¶ 22–24 (July 11). Indeed, the validity of an Agent's appointment was raised during the merits phase of *Genocide*: A Co-Agent purportedly appointed by the Serbian member of the tripartite Presidency of Bosnia and Herzegovina attempted to discontinue the case, while the Chairman for the Presidency and the agent originally appointed (Mr. Sakib Softi) did not wish to do so. The Court eventually held that “Bosnia and Herzegovina had not demonstrated its will to withdraw the Application in an unequivocal manner” and thus “there had been no discontinuance of the case.” *Id.*; see also Franklin Berman & Gleider Hernández, *Article 42, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* *supra* note 21, 967, 969–72.

288. See Statute ICJ, *supra* note 2, art. 42 (the article requires the appointment of an Agent but makes no provision as to who appoints the Agent). The other articles also do not make a provision for appointment the Agent. See Statute of the International Court of Justice. In the Nuclear Tests Case, however, France did not appoint an Agent at all. Request for an Examination of Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), Order, 1995 I.C.J. 288, ¶ 29 (Sept. 22); see also Maritime Delimitation Between Guinea-Bissau and Senegal (Guinea-Bissau v. Sen.), Order, 1995 I.C.J. Rep. 423, 424 (Nov. 8); Berman & Hernández, *supra* note 287, 969–72.

of that dispute.²⁸⁹ Thus, it does not further support the view that revision should not be considered a new case.

Dietmar Prager also points out that it is unconvincing to argue that a new case is required because the Statute requires the filing of an Application. Interventions under article 62 are not dealt with as new cases, even though a request to intervene also requires an Application.²⁹⁰

Revision is, rather, a remedy that returns to the point of origin. It reopens the original case, for reasons of individual justice and systemic authority, to ensure that the facts on which the judgment were based are accurate. A revision is an amendment, “without reargument.”²⁹¹ The International Law Commission in 1958 defined the revision procedure as one for “reopening a case upon the ground of the discovery of new facts,”²⁹² and as noted by Judge Koroma, the court’s task is to “reconsider a matter”²⁹³ in light of the fresh evidence. Judge *ad hoc* Bastid called it a “modification.”²⁹⁴

This leads to the question of what it implies to reopen the merits of a case.²⁹⁵ Kaikobad argues that “a flawed decision based on incomplete knowledge with potentially adverse effects cannot create valid legal rights.”²⁹⁶ As such, once new, decisive facts are found to exist, the original judgment may no longer have the force of *res judicata*.²⁹⁷ To this end, some take the view that the court is not bound by any of its reasoning in the principal judgment.²⁹⁸ Dissenting Judge *ad hoc* Paolillo in *El Salvador v. Honduras* perceives the second stage of the procedure as being a “fresh exami-

289. Juliette McIntyre, *Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility Before the International Court*, 19 MICH. J. INT’L L. 546, 548 (2018). *Contra* Statute ICJ, *supra* note 2, art. 60 (requiring the existence of a dispute regarding “the meaning or scope of the judgment.”).

290. Dietmar W. Prager, *Procedural Developments at the International Court of Justice*, 1 L. & P. INT’L CTS. & TRIBS. 189, 214 (2002).

291. DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 284 (1939), *cited in* REISMAN, NULLITY AND REVISION, *supra* note 21, at 212 n.139, 425.

292. Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat, U.N. Doc. A/CN.4/92, 101 (1955).

293. Application for Revision of Judgment of 11 July 1996 in Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. v. Socialist Federal Republic of Yugoslavia*), Judgment, 2003 I.C.J. 7, 24 ¶ 2 (Feb. 3) (separate opinion by Koroma, J.).

294. Application for Revision and Interpretation of the Judgment of 24 February 1982 in Continental Shelf (Tunis/Libya), Judgment, 1985 I.C.J. 192, ¶¶ 3, 248 (Dec. 10) (separate opinion by Bastid, J.).

295. *See id.*

296. KAIKOBAD, *supra* note 18, at 305.

297. CHENG, *supra* note 46, at 370.

298. Geiß, *supra* note 8, at 184–85; *see also* Application for Revision and Interpretation of Judgment of 24 February 1982 in Continental Shelf (Tunis/Libya), Judgment, 1985 I.C.J. 192, 247 (Dec. 10) (separate opinion by Bastid, J.) (while observing that the Statute is “silent” as to the effects of an admissible revision application, queries, “[w]hat would it imply to reopen the merits of a case, and to what extent should the case as a whole be reviewed?”).

nation of the merits of the dispute . . . A new decision on the merits.”²⁹⁹ Dissenting Judge *ad hoc* Dimitrijevi in *Genocide* posited that opening the proceedings for revision would not have precluded “any possible finding by the Court that the facts existing at the time of the 1996 Judgment were such that the Court could nevertheless entertain jurisdiction,”³⁰⁰ including those the court had previously dismissed.³⁰¹ In other words, the revision would set aside the entirety of the original judgment, not merely the part impeached by the new fact.³⁰² By contrast, Joly Hébert suggests that “both judgments remain, at least partly, applicable.”³⁰³ Judge Vereshchetin considered that the admissibility of an application for revision did not prejudge “the ultimate result of the revision.”³⁰⁴ While of decisive importance, the new fact may not ultimately change the outcome.³⁰⁵ Bowett, however, suggests that “because revision is dependent on the discovery of new facts, the procedure does not allow a re-hearing of legal arguments already heard and decided upon.”³⁰⁶

The court has not to date answered this question, but regardless of the extent to which the original judgment is altered, the fact remains that a successful revision will result in “the judgment which ought to have been given in the first place.”³⁰⁷ As observed by the drafters in The Hague, the judges undertaking revision “complete, so to speak, their former information.”³⁰⁸ This strongly indicates that revision is not a new case but, rather, a derivative proceeding. This is not a point of mere semantics, rather a demand for a clear procedural and conceptual relationship between the revision proceedings and the impeached judgment.

299. Application for Revision of Judgment of 11 September 1992 in Land, Island and Maritime Frontier Dispute (El Sal./Hond), Judgment, 2003 I.C.J. 392, 413, 425–26, ¶ 42 (Sept. 11) (Paolillio, J., dissenting).

300. Application for Revision of Judgment of 11 July 1996 in Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. v. Yugoslavia), Judgment, 2003 I.C.J. Rep. 7, ¶¶ 53, 68 (Feb. 3) (Dimitrijevi, J., dissenting).

301. *Id.* at 69 ¶ 57.

302. *Contra* CHENG, *supra* note 46, at 370 n.23 (writing that “[i]t need hardly be recalled that nullity and a fortiori error may affect only part of a judgment.”).

303. Hébert, *supra* note 144, at 226.

304. Application for Revision of Judgment of 11 July 1996 in Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. v. Yugoslavia), Judgment, 2003 I.C.J. Rep. 7, 39, 50 ¶ 28 (Feb. 3) (Vereshchetin., dissenting).

305. KAIKOBAD, *supra* note 18, at 321. Kaikobad explains the complexity of this issue with respect to boundary lines and suggests that the law of delimitation requires that even where a new fact of decisive importance is found to exist, the Court must still assess whether or not to redraw the boundary line, and once it has done so factors additional to the new fact, such as equitable considerations, will come into play.

306. Bowett, *supra* note 43, at 591.

307. KAIKOBAD, *supra* note 18, at 306.

308. SCOTT, *supra* note 82, at 749.

There is one final point to be made supporting this position, and, while it is made in passing, it is of vital importance. It relates to the intervenor problem. According to article 63(2) of the court's Statute, a State intervening in proceedings concerned with the interpretation of a multilateral treaty is bound, just as the original parties are, by the court's interpretation. But the court's present approach of treating revision as a new case means that if the intervening State does not apply to appear in the revision proceedings, it will be bound by a decision that is no longer correct. This absurdity (along with the inefficiencies of re-intervening under article 62 identified in section III.A.2, above) could be easily avoided if the court treated revision as derivative, rather than as a new case.

B. *Revision of Preliminary Objections – A Return to Finality*

The procedural flaws in the court's habit of treating revision proceedings as new cases become even more apparent when one considers that the court has also permitted revision of judgments on preliminary objections. A separate case does not make sense if the principal proceedings are still pending.³⁰⁹ One may make a strong argument for why the court should amend its Rules to prevent applications for revision in respect of preliminary objections.³¹⁰

To begin with, it is entirely probable that a decision on the merits will be rendered prior to the expiry of the ten-year time limit mandated by article 61.³¹¹ Were the court to revise a decision on preliminary objections, the flow-on effect for the merits judgment would not be clear at all. In *Genocide*, the court did not suspend proceedings on the merits,³¹² suggesting the possibility of rendering a decision on the merits that turns out to have been issued *ultra vires*. By treating the revision as a new case, rather than as a derivative proceeding, the procedural relationship becomes even further removed.

It may be that one could simply say the merits decision is automatically voided. But this is not necessarily the case; for example, if a jurisdictional claim based on the treaty is revised, what happens to claims based upon cus-

309. Prager, *supra* note 290, at 214.

310. *Contra* Kunz, *supra* note 52, at 8. In the context of arbitration, Kunz asserts but does not justify that revision is available as a remedy for preliminary decisions. Kunz goes on to suggest that revision cannot be sought against procedural orders or orders for interim relief which a tribunal can reverse or modify. This approach would unnecessarily reopen the can of worms in the South West Africa Case. *See* South West Africa (Eth. v. S. Afr.), Preliminary Objection, 1962 I.C.J. 319 (Dec. 21).

311. The International Law Association reports that as of 2018, the average length of proceedings, from application to judgment, was 103-104 months (excluding extensions, joinder of proceedings, and provisional measures. ARMAN SARVARIAN, INTERNATIONAL LAW ASSOCIATION, PROCEDURES OF INTERNATIONAL COURTS AND TRIBUNALS, INTERIM REPORT (2018).

312. *See supra* Part III.A.3.

tomary law or another treaty?³¹³ This relates directly to the issue discussed above—how much of the impugned original judgment is to stand? It is entirely possible that the merits judgment, or parts thereof, could remain in force by taking an alternative jurisdictional route. Nothing in the Statute, Rules, or the court’s current practice offers an answer to this problem.

More fundamentally, revision of preliminary objections judgments should not be permitted because it will conflate revision on the basis of *fait nouveau* with annulment for *excès de pouvoir*. As detailed in Part II, above, when the contours of the revision procedure were agreed at The Hague, a clear distinction was drawn between revision and the possibility of annulment. Whether or not an arbitral award could be annulled was left unresolved.³¹⁴ Some judges on the Advisory Committee of Jurists in 1920 declared that it was “inadmissible” that the Permanent Court of International Justice should be able to annul its own decisions.³¹⁵ In subsequent years, this has been overlooked.

The precise contours of *excès de pouvoir* are open to debate, but, without question, it encompasses decisions made in excess of the jurisdictional competence of the tribunal.³¹⁶ It embodies the maxim *extra compromissum arbiter nihil facere potest*—a maxim deriving from Roman civil law meaning that because the arbitrator’s jurisdiction is voluntary, they cannot act outside the authorization granted by the parties.³¹⁷ The court has grappled with this concept in its case law. In *Guinea-Bissau v. Senegal*, the parties had been unable to reach a settlement in respect of maritime delimitation. They had submitted their dispute to an arbitral tribunal, the decision of which was rendered in 1989. Guinea-Bissau subsequently brought an action to the court, alleging the award rendered by the tribunal was null and void on the grounds of *excès de pouvoir* and insufficiency of reasoning.³¹⁸ In concluding that the award was not void, the court defined *excès de pouvoir* as an act “in

313. See Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 448 ¶ 63 (July 20). The Court did “not find it necessary” to consider its jurisdiction under Statute, art. 36(2), because it had founded jurisdiction on the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 6(2), 7(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

314. SCOTT, *supra* note 82, at 151.

315. League of Nations, *Documents Concerning the Action Taken by the Council of the League of Nations Under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, at 103, League of Nations (1921).

316. R. Erich, *Projet de Conférer à la Cour Permanente de Justice Internationale des Fonctions d’une Instance de Recours*, 3(*ser.* 12) REVUE DE DROIT INT’L ET DE LEGISLATION COMPAREE 268 (1931).

317. AARON X. FELLMETH & MAURICE HORWITZ, *GUIDE TO LATIN IN INTERNATIONAL LAW* 35 (2009).

318. See *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, Judgment, 1991 I.C.J. Rep. 53, 59 (Nov. 12).

manifest breach of the competence conferred” on the tribunal.³¹⁹ Judge Ni described it as a situation in which a tribunal “has exceeded or overstepped the powers which have been attributed to it by the Parties.”³²⁰

As such, where any tribunal allegedly lacks jurisdiction, the appropriate claim is one of nullity for *excès de pouvoir*, not an application for revision of the decision. Annulment is concerned with the legitimacy of the process,³²¹ not the substantive correctness of the decision,³²² which is the realm of revision. Moreover, and in any event, allegations of *excès de pouvoir* cannot be raised until after the conclusion of the hearing on the merits.³²³ Indeed, this must necessarily be the case, because until the merits have been decided, it cannot be known with certainty whether the decision-makers have overstepped the bounds of their authority. It must be recalled that when the revision procedure was drafted, there was no procedure for separating preliminary objections from the merits—this was not included until the 1926 iteration of the PCIJ Rules.³²⁴ In 1875, the *Institut de droit international* declared there was to be no appeal from any preliminary judgments on the question of a tribunal’s competency.³²⁵ The intersection of revision and preliminary objections was not given any consideration.

Decisions on preliminary objections were not considered *res judicata* until relatively recently. As noted in Part III.B.2, above, the court held in *South-West Africa* that it was unnecessary to decide on “whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, whether it ranks as a ‘decision’ for the purposes of article 59 of the court’s Statute, or as ‘final’ within the meaning of article 60.”³²⁶

It was not until the 1978 iteration of the Rules that decisions on preliminary objections were required to be rendered in the form of a judgment.

319. *Id.* at 69.

320. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 53, 96, 101 (Ni, J. dissenting).

321. See David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID FOREIGN INV. L.J. 21, 26 (1992).

322. See, e.g., Christoph Schreuer, *From ICSID Annulment to Appeal: Half Way Down the Slippery Slope*, 10 L. & PRAC. INT’L CTS. & TRIBUNALS 211, 212 (2011).

323. See, e.g., Verdoss, *supra* note 116, at 242 (quoted as saying, “*Ce n’est que lorsque la sentence finale est rendue que la cause de nullité pour excès de pouvoir peut être invoquée éventuellement,*” which translates to, “It is only when the final award is made that the cause of nullity for excess of power can possibly be invoked.”).

324. See discussion *supra* Part II.D.

325. See *Projet de règlement pour la procédure arbitrale internationale*, 1877 ANNUAIRE INSTITUT DE DROIT INT’L 130 (“*Aucune voie de recours ne sera ouverte contre des jugements préliminaires sur la compétence, si ce n’est cumulativement avec le recours contre le jugement arbitral définitif.*” [“No appeal will be opened against preliminary judgments on jurisdiction, except cumulatively with appeal against the final arbitral judgment.”]).

326. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Second Phase, 1966 I.C.J. Rep. 6, ¶ 37 (July 18).

Subsequently, the court has emphasized that there is no “distinction between judgments on jurisdiction and judgments on the merits when it comes to the application of the *res judicata* principle.”³²⁷ In the interpretation proceedings in *Cameroon-Nigeria*,³²⁸ the court stated:

By virtue of the second sentence of article 60, the Court has jurisdiction to entertain requests for interpretation of any judgment rendered by it. This provision makes no distinction as to the type of judgment concerned. It follows, therefore, that a judgment on preliminary objections, just as well as a judgment on the merits, can be the object of a request for interpretation.³²⁹

Rosenne suggests that this judgment settles the “doctrinal controversy whether a judgment on preliminary objections constitutes *res judicata*,”³³⁰ which in turn opens decisions on jurisdiction to being “subjected to the procedures of interpretation and presumably revision.”³³¹ That decisions on preliminary objections could be the subject of revision is also alluded to in the dissenting opinion of Judge Jessup in *South-West Africa*,³³² and, of course, the court in *Genocide* did not question Bosnia and Herzegovina’s application on such a basis.³³³ However, it is one thing to conclude that decisions on preliminary objections are *res judicata*. It is a step further to argue that decisions on preliminary objections should be subject to revision. To permit this

327. Mbengue & Messihi, *supra* note 234, at 28; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. Rep. 43, 90 (Feb. 26).

328. Request for Interpretation of the Judgment of 11 June 1998 in Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 1999. I.C.J. Rep. 31, 35 (March 25).

329. *Id.*

330. ROSENNE, *supra* note 21, at 111.

331. *Id.* at 109. *Cf.* Benjamin Salas Kantor & María Elisa Zavala Achurra, *The Principle of Res Judicata Before the International Court of Justice: In the Midst of Comradeship and Divorce Between International Tribunals*, 10 J. INT’L DISP. SETTLEMENT 288, 294 (2019) (“the extent to which a decision on jurisdiction is binding for the Court in the merits phase is still controversial”).

332. *See* South West Africa (Eth. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, 325, 332 (July 18) (Jessup, J., dissenting); *see also* South West Africa (Eth. v. S. Afr.), Second Phase, 1966 I.C.J. Rep. 6, 239, 240 (Koretsky, J. dissenting).

333. However, by hearing arguments as to jurisdiction raised by the Initiative during the oral phase of the merits, proceedings in *Bosn/Herz. v. Serb.*, 2007 I.C.J. Rep. at 90, the Court muddied the waters somewhat. The distinguishing factor, one could argue, is that while a decision on preliminary objections is *res judicata*, to the extent that it does not address every preliminary issue, other arguments could be raised at a later date. This was the interpretation of Article 79*bis*(1) of the Rules of Court (“other objection the decision upon which is requested before any further proceedings on the merits”) contented for by FRY/Serbia’s counsel. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. V. Serb.), Verbatim Record, ¶ 4.29 (Mar. 9, 2006, 10:00 AM), <https://www.icj-cij.org/public/files/case-related/91/091-20060309-ORA-01-00-BI.pdf>.

is to blur the line between revision and nullity and to take the procedure further than it was ever intended to go.

So, if decisions on preliminary jurisdiction should not be subject to revision, can one ensure justice is done between the parties? Theinel and Zimmermann take an uncompromising approach, suggesting “a judgment upholding jurisdiction with the force of *res judicata* in fact establishes such jurisdiction as a matter of law.”³³⁴ On this basis, the Court effectively cannot act *excès de pouvoir*. The possibility of revising the decision on the merits, of course, remains.

Alternatively, Verdoss considers that if an *excès de pouvoir* is established, part of the judgment or award rendered without authority is void, *ipso jure*.³³⁵ But this arguably runs the risk of a party unilaterally declaring the judgment void in order to avoid compliance, which has potentially disastrous consequences for the court’s perceived legitimacy,³³⁶ along with the stability of legal relations.³³⁷

Cheng suggests an invalid decision could be reconsidered by another tribunal if both parties agree to submit the question to arbitration.³³⁸ However, this raises the question of the authority of that tribunal to judge the acts of the court, and certainly calls into question the perception of the court as sitting at the apex of the system’s fragmented international courts and tribunals.³³⁹

Instead, as Thomas Franck has observed, the court’s capacity to “pull” states towards compliance with its decisions rests on the legitimacy and fairness of its opinion-forming process.³⁴⁰ This returns to the heart of the matter and brings to light the relationship between procedural justice and “essential justice—a correct decision on the merits of the case.”³⁴¹ Put simply, revision has an important but not omnipresent role to play. On balance, finality should trump justice in respect of decisions on jurisdiction.

334. Theinel & Zimmermann, *supra* note 67, at 1633.

335. See Verdoss, *supra* note 116, at 241.

336. See Franck, *supra* note 19, at 40.

337. See REISMAN, *supra* note 21, at 45.

338. See, e.g., CHENG, *supra* note 46, at 371.

339. See Jonathon I. Charney, *Third Party Dispute Settlement and International Law*, 36 COLUM. J. TRANSNAT’L L. 65, 71 (1998); Andrew Lang, *The Role of the International Court of Justice in a Context of Fragmentation*, 62 INT’L & COMPAR. L.Q. 777, 779 (2013); Neil B. Nupur, *Infallible or Final?: Revisiting the Legitimacy of the International Court of Justice as the “Invisible” International Supreme Court*, 8 L. & PRAC. INT’L CTS. & TRIBS. 145, 146 (2019).

340. See Franck, *supra* note 19, at 31.

341. H.W.A. Thirlway, *Procedural Law and the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE – ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 389, 400 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

As such, the court's *compétence de la compétence* should not be open to revision.³⁴² In an extreme case, such as fraud, the proper remedy is not revision, but annulment.³⁴³ This leads to one difficulty faced by the delegates at The Hague in 1899: Who judges the judges? Their inability to answer this question led to the matter of annulment being left out of the drafting task altogether. This problem is no greater than that faced by courts of last resort in domestic systems.³⁴⁴ A court has inherent power to set aside a judgment which it has delivered without jurisdiction. As noted by the English Court of Appeal, so far as procedure is concerned "the court in its inherent jurisdiction can set aside its own order, and. . . it is not necessary to appeal from it."³⁴⁵ It is a matter *ex debito justitiae*, and there should be no requirement to meet the stringent conditions of article 61. Rather, the court should adopt a procedure, *sui generis*, should the need ever arise.³⁴⁶

V. CONCLUSION

This account of the revision procedure suggests that it continues to be in need of some refinement. The procedure has been neglected, if not at times entirely disregarded. The procedural problems that arise in the court's practice are avoidable errors, requiring two minor changes: first, the court should no longer treat revision applications as new cases. There is nothing in the Statute or the Rules which requires this approach, and, as seen above, it leads to several unnecessary complications. Second, the court should no longer accept applications for revision of preliminary objections and should make this clear in its Rules. The only solution for a claim of incorrectly seized jurisdiction is to annul the decision. Revision is not the appropriate remedy. These proposals do not advocate for increased formalism but, rather, for increased clarity and a greater thoughtfulness. The domestic antecedents and drafting history of revision emphasize the role of revision as a means of doing substantial justice between the parties,³⁴⁷ and it remains an

342. See CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 185 (2009).

343. See, e.g., *id.* at 189; see also CHENG, *supra* note 46, at 358.

344. See generally *Craig v. Kanssen* [1943] KB 256 (Eng.); *Forfie v. Seifah* [1958] AC 59 (PC) (appeal taken from WACA); CODE DE PROCÉDURE CIVILE [C.P.C.] arts. 112–121. For example, a court has the inherent power to set aside an order made against a person who did not have a reasonable opportunity to appear and present their case. *Taylor v Taylor* [1979] 143 CLR 1, 1 (Austl.).

345. *Craig v. Kanssen* [1943] KB at 262.

346. The power to do so would arise under Statute, art. 30, as it did in Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.), Orders, 1995, I.C.J. Rep. 288, at ¶ 288 (Sept. 22).

347. SCOTT, *supra* note 82; LEAGUE OF NATIONS ADVISORY COMM. JURISTS, *supra* note 127, at 215.

important remedy for the court. With some adjustment, revision can continue to serve its essential, if limited, function.