
STUDENT CONTRIBUTION

Power, Jurisdiction and Admissibility: Reconceptualizing Procedural Legal Issues in the Interpretative Proceedings under Article 60 of the ICJ Statute

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Article 60 of the ICJ Statute provides a mechanism for interpreting a previous binding judgment in the event of dispute as to the meaning or scope of that judgment. Procedural legal issues such as jurisdiction and admissibility in interpretative proceedings under Article 60 are different from those in regular contentious or advisory proceedings before the ICJ. The Court has developed a set of concrete rules in its jurisprudence under the simple wording of Article 60 to adjudicate on these procedural issues. However, a case-by-case examination of the Court's jurisprudence reveals that there is still no structurally clear and logically sound framework, because the ICJ fails to conceptually divide the issues of 'power,' 'jurisdiction,' and 'admissibility' in interpretative proceedings. In order to rectify this problem, this article proposes an analytical framework for the ICJ with a clearer conceptualization of the Court's 'power,' 'jurisdiction,' and 'admissibility' under Article 60 to clarify the meaning of its previous judgments in interpretative proceedings.

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I. Introduction

The International Court of Justice (“ICJ”) is one of the most important dispute resolution institutions in the international community. The Court can adjudicate on contentious disputes between States¹ based on the parties’ consent² and provide advisory opinions “on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”³

In addition to these ‘contentious’ and ‘advisory’ jurisdictions, the ICJ also has an ‘interpretative’ jurisdiction, empowering it to interpret previous binding judgments in accordance with Article 60 of its Statute, which states:

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 98 of the Rules of Court clarifies that any party has the right to request interpretation.⁴ So far, the ICJ has exercised its interpretative jurisdiction in only five proceedings: *Asylum Request*,⁵ *Continental Shelf Request*,⁶ *Land and Maritime Boundary*

¹ I.C.J. Statute art. 34, ¶ 1. It provides: “Only States may be parties in cases before the Court.”

² I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 710 (7th ed. 2008).

³ I.C.J. Statute art. 65, ¶ 1.

⁴ The Rules of the Court (hereinafter The Rules), art. 98(1), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&> (last visited on June 15, 2017). It provides: “In the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation, whether the original proceedings were begun by an application or by the notification of a special agreement.”

⁵ Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. Reports 395 (Nov. 27). [hereinafter Asylum Request]

⁶ Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunis. v. Libya), Judgment, 1985 I.C.J. 192 (Dec. 10). [hereinafter Continental Shelf Request]

Request,⁷ *Avena Request*,⁸ and *Temple of Preah Vihear Request*.⁹

Despite interpretative proceedings before the ICJ being rare, it is important to study the procedural legal issues therein for the following reasons. First, procedural issues such as jurisdiction and admissibility in interpretative proceedings are not the same as those in regular contentious or advisory proceedings. In interpretative proceedings, the jurisdiction under Article 60 is not preconditioned by the existence of any other basis of jurisdiction between the parties to the original case.¹⁰ Rather, the jurisdictional threshold would ask whether there is any “dispute as to the meaning or scope of the [previous] judgment.”¹¹ In regular contentious cases, the issue of admissibility concerns “the application of relevant general rules of international law.”¹² In interpretative proceedings, however, it is specifically linked to the “real purpose of the request [for interpretation]” and the “principle of *res judicata*.”¹³ Second, the unique function of interpretative proceedings also necessitates a distinction being made between ‘power’ and ‘jurisdiction.’¹⁴ This unique distinction, although meaningless in regular contentious cases, is crucial for understanding the Court’s jurisprudence under Article 60. Third, the significance of jurisprudence for interpretative proceedings is highlighted by the fact that the phrasing of Article 60 - the sole statutory basis for the ICJ’s interpretative proceedings - is very simple. Since Article 60 does not specify any rules as to the procedure for such proceedings,¹⁵ normative conceptualization of the procedural issues in interpretative proceedings is to be developed by the ICJ’s jurisprudence.¹⁶

⁷ Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v. Cameroon), Judgment, 1999 I.C.J. 31 (Mar. 25). [hereinafter Land and Maritime Boundary Request]

⁸ Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2009 I.C.J. 3 (Jan. 19). [hereinafter Avena Request]

⁹ Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Judgment, 2013 I.C.J. 281 (Nov. 11). [hereinafter Temple of Preah Vihear Request]

¹⁰ *Id.* at 295, ¶ 32. See also Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Order, 2008 I.C.J. 323, ¶ 44 (Jul. 16) [hereinafter Avena Request Interim Order].

¹¹ I.C.J. Statute art. 60.

¹² M. SHAW, INTERNATIONAL LAW 1071 (6th ed. 2008). See also R. KOLB, THE ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE 173-7 (2014) (establishing that there is no close list of admissibility arguments and enumerating 15 arguments that the ICJ has considered in adjudicating the admissibility of contentious cases).

¹³ Temple of Preah Vihear Request, at 303, ¶ 55; Land and Maritime Boundary Request, at 36-7, ¶ 12; Asylum Request, at 402. For the critique of the conceptualization of admissibility in the ICJ’s jurisprudence, see Parts III-IV of this paper.

¹⁴ Parts II.A & IV.A-B of this paper.

¹⁵ A. Zimmermann & T. Thienel, *Article 60*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1296 (A. Zimmermann et al. eds., 2006).

¹⁶ See Aerial Incident of 3 July 1988 (Iran v. U.S.), Judgment, 1989 I.C.J. 158 (Dec. 13) (separate opinion by

The significance of this article lies in the fact that the ICJ's interpretative proceedings are largely neglected in academic discussions. As existing scholarship of this topic has just focused on doctrinal 'summarization' and 'compilation' of the ICJ's jurisprudence, it is dubious whether the Court's approach to procedural issues under Article 60 is legally convincing or consistent. This article is composed of five Parts including a short Introduction and Conclusion. By examining the jurisprudence of the ICJ and its predecessor, the Permanent Court of International Justice ("PCIJ"), Parts two and three will reveal that a structurally clear and logically sound analytical framework to conceptualize procedural legal issues is still lacking in interpretative proceedings. The ICJ has so far failed to distinguish clearly between the issue of 'jurisdiction' and the issues of 'power' and 'admissibility' under Article 60, and certain dicta in the Court's jurisprudence are clearly problematic. In order to rectify these problems, Part four will propose to provide a clear conceptualization of the procedural issues of 'power,' 'jurisdiction,' and 'admissibility' under Article 60.

II. Interpretative Proceedings before the PCIJ

The interpretative proceedings under Article 60 found their origin in the PCIJ era. In these days, there were two interpretative proceedings—Interpretation of Judgment No. 3¹⁷ and Interpretation of Judgments Nos. 7 and 8.¹⁸ The Court granted an interpretation only in the latter case. As to the conceptualization of procedural legal issues under Article 60, the PCIJ sketched two general questions that were deemed pertinent to interpretative proceedings: (1) the basis of the Court's power to interpret its own previous judgments; and (2) procedural legal questions relevant to Article 60.

A. *The Basis of the Court's Power*

Article 60 of the PCIJ Statute provides that "The Court *shall* construe it upon the request of any party," which means that the PCIJ is *obligated* to start interpretative proceedings as soon as *one* party requests it to do so. [Emphasis added]

In Interpretation of Judgment No. 3, however, the Court was concerned about

Shahabuddeen), available at <http://www.icj-cij.org/files/case-related/79/079-19891213-ORD-01-03-EN.pdf> (last visited on Oct. 3, 2017).

¹⁷ Interpretation of Judgment No. 3 (Bulg. v. Greece), 1925 P.C.I.J. (ser. A) No. 4 (Mar. 26).

¹⁸ Interpretation of Judgments Nos. 7 and 8 (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13 (Dec. 16).

whether it had ‘jurisdiction’ under Article 60 when the request for interpretation was unilateral. Greece requested an interpretation from the PCIJ of a judgment¹⁹ binding on Bulgaria and itself. In establishing its jurisdiction, the Court reasoned:

Whereas the Agent of the Bulgarian Government...submitted observations regarding the Greek Government’s request for an interpretation, without disputing the Court’s jurisdiction to give such interpretation; and as therefore the Court has jurisdiction to do so as the result of this agreement between the parties, so that there is no need for the Court to consider in the present case whether, in the absence of a definite dispute between the parties regarding the interpretation of the judgment of September 12th, 1924, the requisite jurisdiction could be based exclusively on the unilateral request made by the Greek Government.²⁰

In this reasoning, the PCIJ did not seem to confirm that Article 60 alone could provide the legal basis for the Court to interpret its previous judgment, because if it had done so it would never have had to consider whether the “requisite jurisdiction could be based exclusively on the unilateral request.”²¹

Therefore, the Court’s concern is not its ‘jurisdiction,’ but its ‘power,’ in a strict sense. The PCIJ was granted its power from States.²² This author defines the issues of ‘power’ and ‘jurisdiction’ in the interpretative proceedings as follows. The question of ‘power’ asks whether the Court’s power to initiate proceedings is conditioned on factors *external* to the provisions of Article 60, whereas that of ‘jurisdiction’ asks whether the *internal* subject-matter requirement of Article 60 is met. [Emphasis added] The answer to the first question determines whether the interpretative proceedings can commence, while the answer to the latter can only be reached at the end of the first phase (preliminary objection) of the proceedings. This unique distinction between power and jurisdiction, however, has no place in regular contentious cases.

The agreement between Greece and Bulgaria regarding the PCIJ’s interpretative jurisdiction was an external factor, as Article 60 is unambiguous in stating that the Court shall start interpretative proceedings upon the request of ‘any’ party. The PCIJ’s hesitation in exercising its statutorily based power might be more

¹⁹ Treaty of Neuilly, Article 179, Annex, ¶ 4 (Interpretation) (Bulg. v. Greece), 1924 P.C.I.J. (ser. A) No. 3 (Sept. 12) [hereinafter Treaty of Neuilly].

²⁰ Interpretation of Judgment No.3, at 5-6.

²¹ *Id.* at 6.

²² The doctrine of ‘attributed powers’ fits comfortably with the predominant positivist thinking of international law in the era of PCIJ. See J. KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 56 (2d ed. 2009).

understandable given the background to the international law on dispute resolution at that time.²³

The PCIJ was the first world court to be created on a non-temporary basis. Before its establishment, international dispute resolution took place through *ad hoc* arbitrations.²⁴ Since arbitration is traditionally considered to possess a purely consensual character,²⁵ it cannot be presumed without the consent of the parties.²⁶ International arbitrations before the PCIJ showed that the arbitrator did not, without the agreement of both parties, have the power to render an authentic interpretation of a decision made by him.²⁷ The arbitral tribunal becomes *functus officio* after the final decision is delivered.²⁸ Also, its jurisdiction to interpret a previous decision is “as original as in an ordinary case.”²⁹

Against this background, the PCIJ’s concern in Interpretation of Judgment No. 3 can be more pertinently evaluated. It was whether the Court’s power under Article 60 required additional agreement between the parties.³⁰ This concern is clearly redundant from a legal perspective. Unlike arbitration in which party’s autonomy is the primary source of the proceedings and procedure,³¹ procedural issues before the PCIJ were initially governed by the Statute and the Rules of Court. When the parties submitted their dispute to the Court for adjudication in contentious proceedings, they simultaneously gave their consent to the PCIJ Statute, which authorized the Court to commence interpretative proceedings under Article 60 upon a unilateral request.

B. Procedural Legal Questions related to Article 60

Due to the simple wording of Article 60, it was necessary for the PCIJ to elaborate on the procedural legal issues relevant to Article 60 through its jurisprudence. While Interpretation of Judgment No. 3 did not specify legal questions in an articulate way,

²³ TAKANE SUGIHARA, INTERNATIONAL JUDICIAL SYSTEM [国际司法裁判制度] 312-5 (Zhi’an Wang & Ping Yi trans. into Chinese, 2007).

²⁴ In addition to *ad hoc* arbitrations, the Central American Court of Justice existed before the PCIJ, but it was neither a ‘world’ court nor a long-lived institution.

²⁵ A. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 17 (2012).

²⁶ N. Hill, *The Interpretation of the Decisions of International Courts*, 22 GEO. L. J. 535 (1934); Question of Jaworzina (Polish-Czechoslovakian Frontier), Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, at 38 (Dec. 6), available at <http://www.icj-cij.org/en/pcij-series-b> (last visited on Oct. 8, 2017).

²⁷ K. Grzybowski, *Interpretation of Decisions of International Tribunals*, 35 AM. J. INT’L L. 484-5 (1941).

²⁸ T. Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA BULL. 441 (2009).

²⁹ *Supra* note 27, at 485.

³⁰ Without a clear conceptual distinction between ‘power’ and ‘jurisdiction’ in mind, the PCIJ’s concern could easily be misarticulated as whether Article 60 creates compulsory jurisdiction. See *supra* note 26, at 541-2.

³¹ J. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 27 (2003).

the message of the judgment was clear as a whole. As the Court stated at the end of its reasoning, “an interpretation - given in accordance with Article 60 of the Statute - of the judgment ... cannot go beyond the limits of that judgment itself, which are fixed by the special agreement.”³²

The message shows that interpretative proceedings are not new regular contentious proceedings, so that the Court’s power to interpret is completely based on and limited to the previous judgment. Judgment No. 3 was premised on a special agreement³³ in which “the applicability of [paragraph 4 of the Annex to Section IV, Part IX, of the Treaty of Neuilly] was taken for granted,”³⁴ and Greece’s request for interpretation was “clearly based on a different conception unknown to the special agreement, namely, that there is some doubt as to the applicability of the sentence in question [of said paragraph] as between the parties.”³⁵ As a result, the Court dismissed the request for interpretation.

The procedural legal questions in interpretative proceedings were discussed in detail when the PCIJ was called upon to interpret Judgments Nos. 7³⁶ and 8.³⁷ The Court interpreted Article 60 as requiring two legal conditions: (1) there must be a dispute as to the meaning and scope of a judgment of the Court; and (2) the request should have for its object an interpretation of the judgment.³⁸

In the first condition, ‘dispute’ means “a difference of views,” but it does not have to be manifest in a certain manner or in an official way such as by diplomatic negotiations.³⁹ The test is whether the parties “have *in fact* shown themselves as holding opposite views in regard to the meaning or scope of” the judgment in question.⁴⁰ The PCIJ, by reading Article 60 together with Article 59 of its Statute, construed the “meaning or scope of the judgment” as only covering “those points in the judgment ... which have been decided with binding force.”⁴¹ This speaks directly to the scope of *res judicata*.⁴²

³² Interpretation of Judgment No. 3, at 7.

³³ According to the special agreement, the dispute was submitted to the PCIJ in its Chamber for Summary Procedure. *See* Treaty of Neuilly, at 4.

³⁴ Interpretation of Judgment No. 3, at 6.

³⁵ *Id.* at 7.

³⁶ Certain German Interests in Polish Upper Silesia (Merits) (Ger. v. Pol), 1926 P.C.I.J. (ser. A) No. 7 (May 25).

³⁷ Factory at Chorzów (Jurisdiction) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

³⁸ Interpretation of Judgments Nos. 7 and 8, at 10.

³⁹ *Id.* at 10-1.

⁴⁰ *Id.* at 11. [Emphasis added]

⁴¹ *Id.*

⁴² For an overview of the scope of *res judicata* in international law, *see* S. SCHAFFSTEIN, THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS 89-92 (2016).

In the second condition concerning the object of the request, the Court was “of the opinion that the expression ‘to construe’ [in Article 60] must be understood as meaning to give a precise definition of the meaning and scope which the Court intended to give to the judgment in question.”⁴³ It is, however, not clear how this conceptualization is relevant to the second condition.⁴⁴ This author reads this conceptualization as speaking to the Court’s role after the two conditions have been met, rather than a useful clarification of what the conditions actually require.

Admittedly, the PCIJ’s characterization of procedural legal questions in Interpretation of Judgments Nos. 7 and 8 was neither complete nor flawless. In his dissenting opinion, Judge Anzilotti argued that neither condition under Article 60 was met because (1) the dispute was only in regard to “an incidental or preliminary point” that had not been decided by the Court with binding force⁴⁵ and (2) the object of the request did not concern the interpretation of a previous judgment but “exclusively relates to proceedings actually pending before the Court.”⁴⁶ Scholars have also seen the Court’s interpretation as implicitly recognizing and correcting a serious defect in its previous judgment,⁴⁷ which blurs the fundamental distinction between the ‘interpretation’ and the ‘correction/revision’⁴⁸ of judicial decisions. Despite the flaws, however, the PCIJ’s decision in Interpretation of Judgments Nos. 7 and 8 has not only become a “classic statement of the law”⁴⁹ regarding Article 60, but also laid the conceptual foundation for the ICJ to develop its jurisprudence for interpretative proceedings.

III. Jurisdiction and Admissibility in Interpretative Proceedings before the ICJ: A Case-by-Case Examination

Jurisdiction and admissibility are certainly among the most important ‘procedural’

⁴³ Interpretation of Judgments Nos. 7 and 8, at 10.

⁴⁴ The Court was clear that the cited sentence is “[a]s regards the latter condition.” *See id.*

⁴⁵ Dissenting opinion by M. Anzilotti. *See id.* at 26.

⁴⁶ *Id.* at 27.

⁴⁷ M. Bos, *The Interpretation of International Judicial Decisions*, 33 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL [Spanish Journal of International Law] 24 (1981).

⁴⁸ The revision mechanism of a previous binding judgment is stipulated in Article 61 of the PCIJ Statute and the ICJ Statute.

⁴⁹ S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005*, 1622 (4th ed. 2006).

issues in proceedings before the ICJ.⁵⁰ They are procedural in the sense that both are “aimed at prescribing the authority of the Court and the course of proceedings before it”⁵¹ without touching the merits of the case. The ICJ has attempted to conceptualize the issues of jurisdiction and admissibility in the five existing interpretative proceedings. This Part will examine the Court’s jurisprudence case by case.

A. Asylum Request

When the ICJ delivered its judgment in the *Asylum* case⁵² between Columbia and Peru on November 20, 1950, Colombia instantly requested the Court’s interpretation under Article 60, putting three particular questions:

- (1) Must the judgment be interpreted to mean that the qualification made by the Columbian Ambassador of the offence attributed to Mr. Torre was correct and that it is necessary to attribute legal effect to the said qualification?;
- (2) Must the judgment be interpreted to mean that the Peru is not entitled to demand the surrender of Mr. Torre and therefore that Colombia is not bound to surrender him?; or
- (3) On the contrary [to (2)], does the Court’s decision imply that Colombia is bound to surrender him?⁵³

These three questions essentially concern two issues, namely (1) the legal effect of the qualification that Mr. Torre was not a common criminal and (2) Colombia’s obligation to surrender him.

After restating the provision of Article 60, the Court interpreted it as “lay[ing] down two conditions for the admissibility of [the] request [for an interpretation of the previous judgment].”⁵⁴ The Court delivered:

- (1) The real purpose of the request must be to obtain an interpretation of the judgment [hereinafter “real purpose condition/requirement”] ...

⁵⁰ KOLB, *supra* note 12, at 167.

⁵¹ A. WEISBURD, *FAILING OF THE INTERNATIONAL COURT OF JUSTICE* 94 (2016).

⁵² *Asylum (Colom. v. Peru)*, Judgment, 1950 I.C.J. 266 (Nov. 20).

⁵³ *Asylum Request*, at 396-9.

⁵⁴ *Id.* at 402.

- (2) In addition, it is necessary that there should exist a dispute as to the meaning or scope of the judgment [hereinafter “dispute condition/requirement”].⁵⁵

This conceptualization of the procedural legal issues under Article 60 essentially reiterated the two procedural legal conditions in the PCIJ’s jurisprudence,⁵⁶ but with two caveats. First, the order of the two conditions was reversed, and the phrase ‘in addition’ seems to imply that the ‘real purpose’ condition is a primary consideration that comes prior to the dispute condition. Second, in *Asylum Request*, both conditions were conceptualized under the “admissibility of the request,” but it was not clarified how the “admissibility of the request” relates to the issues of ‘jurisdiction’ and ‘admissibility.’

Although the first condition was focused on the ‘real purpose’ of the request, the Court did not conceptualize ‘real purpose’ as a subjective/psychological motive, so that it was not asking what Colombia was really thinking when the request was submitted. In contrast, a consideration of the ‘real purpose’ condition led the Court to analyze whether the three questions raised by Colombia were within the scope of the previous judgment. The Court found that neither the legal effect of the qualification nor Colombia’s obligation as to the surrender were points at issue in the submissions of the original contentious proceedings. Accordingly, the Court emphasized that “Interpretation can in no way go beyond the limits of the [previous] judgment” and found that Colombia’s real purpose was to obtain a decision on new questions that could not be decided by means of interpretation.⁵⁷

As for the second condition, the Court restated: “A dispute requires a divergence of views between the parties on definite points” and found that there was no such dispute because “the mere fact that one party finds the judgment obscure when the other considers it to be perfectly clear”⁵⁸ does not amount to a ‘dispute.’ This reasoning clearly speaks to the written communications between Colombia and Peru.⁵⁹ However, it is not very convincing, because “a divergence of views, a difference of opinion, a dispute”⁶⁰ indeed manifests itself when one party finds a judgment obscure and the other considers it to be perfectly clear. Therefore, the issue here is not whether there was a ‘dispute’ - clearly there was - but whether the dispute

⁵⁵ *Id.*

⁵⁶ Interpretation of Judgments Nos. 7 & 8, at 10.

⁵⁷ *Asylum Request*, at 402-3.

⁵⁸ *Id.* at 403.

⁵⁹ Letter of the Agent of the Government of Peru (Nov. 22, 1950) ¶ 1, *recited from id.* at 400.

⁶⁰ Letter of the Agent of the Government of Colombia (Nov. 24, 1950), *recited from id.* at 401.

was in regard to “the meaning or scope of the judgment.”⁶¹ However, the Court had already decided on this question in the real purpose condition. In this regard, the Court’s jurisprudence is problematic as its conceptualization of the first condition essentially renders the second condition redundant.

B. Continental Shelf Request

On July 27, 1984, Tunisia requested an interpretation of a 1982 judgment⁶² concerning its continental shelf delineation with Libya. Tunisia’s primary request was for a *revision* of the judgment. It also asked an *interpretation* of the judgment and the *correction* of an error ‘altogether subsidiarily.’⁶³

In these proceedings, the ICJ’s conceptualization of the procedural legal issues under Article 60 was basically identical to that in *Asylum Request*.⁶⁴ However, a particular circumstance in the original contentious proceedings provided the Court with an opportunity to discuss the relationship between its power under Article 60 and the parties’ consent.

In the original contentious proceedings, the dispute was submitted to the Court under a special agreement between Tunisia and Libya. Article 3 of the special agreement provided for a particular procedural mechanism, stating:

In case the agreement mentioned in Article 2 [i.e., the agreement to implement the Court’s judgment] is not reached within a period of three months, renewable by mutual agreement from the date of delivery of the Court’s judgment, the two parties shall together go back to the Court and request any explanations or clarifications which would facilitate the task of the two delegations to arrive at the line separating the two areas of the continental shelf, and the two parties shall comply with the judgment of the Court and with its explanations and clarifications.⁶⁵

Responding to Tunisia’s request for interpretation, Libya contended: “The Court does not possess the requisite jurisdiction to admit Tunisia’s request” under Article 60.⁶⁶ It also said that the parties had “first to exhaust the remedy of seeking explanations

⁶¹ I.C.J. Statute art. 60.

⁶² Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18 (Feb. 24).

⁶³ Continental Shelf Request, at 195-6, ¶ 6. [Emphasis added]

⁶⁴ The ICJ employed the real purpose condition and the dispute condition, finding the request for interpretation partially admissible, *id.* at 214 & 220-3, ¶¶ 41-50 & 53-6.

⁶⁵ *Id.* at 214, ¶ 41.

⁶⁶ *Id.* at 215, ¶ 42.

and clarifications under Article 3 of the Special Agreement.”⁶⁷ As mentioned above, this argument raises the question of the Court’s ‘power’ rather than of its ‘jurisdiction’ under Article 60. The question here is not whether the jurisdictional requirement of Article 60 - the existence of a dispute as to the meaning or scope of a previous judgment - was satisfied, but whether the Court’s power under Article 60 to initiate interpretative proceedings was conditioned by external factors. Here, the external factor was the specific procedural mechanism under Article 3 of the special agreement.

The Court confirmed that its power under Article 60 to entertain a unilateral request for interpretation was not constrained by Article 3 of the special agreement. After emphasizing the fundamental principle of the consensual basis of its jurisdiction, the ICJ made it clear: “The jurisdiction of the Court to give an interpretation of one of its own judgments ... is a special jurisdiction deriving directly from Article 60 of the Statute” and therefore “the parties ... in becoming parties to the Statute of the Court, have consented to that jurisdiction without pre-condition.”⁶⁸ It appears that a clear conceptual distinction between ‘jurisdiction’ and ‘power’ would help to clarify the Court’s reasoning. By ‘jurisdiction,’ the ICJ was referring exclusively to its power to commence the interpretative proceedings under Article 60. The question of whether the jurisdictional requirement under Article 60 was satisfied would only be decided at the end of the first phase (i.e., the preliminary objection phase) of the proceedings.

It would have been desirable for the Court to go one step further to state that the applicability of interpretative proceedings under Article 60 of the ICJ Statute cannot be opt-out by agreement of the parties, and so to bring to an end this kind of argument once and for all. However, the ICJ appeared to be rather hesitant about characterizing its Statute as one from which there could be absolutely no derogation. The Court confirmed its power under Article 60 in another way by reasoning:

Whether or not such an agreement could validly derogate—as between the parties thereto—from the Statute, it is not lightly to be presumed that a State would renounce or fetter its right under Article 60 of the Statute to request an interpretation unilaterally.⁶⁹

Problematic aspects of the ICJ’s conceptualization of the procedural legal issues under Article 60 remained in *Continental Shelf Request*. Without a clear sub-categorization of the procedural issues, the Court merely articulated two procedural legal requirements

⁶⁷ *Id.*

⁶⁸ *Id.* at 216, ¶ 43.

⁶⁹ *Id.*

-the real purpose requirement and the dispute requirement. The normative core of the two requirements also problematically overlaps, as both are conceptualized to ask about “the meaning or scope of the [previous] judgment” from the same angle.

C. Land and Maritime Boundary Request

On October 28, 1998, Nigeria requested an interpretation of a preliminary objections judgment⁷⁰ concerning a land and maritime boundary dispute with Cameroon. This was the first occasion on which Article 60 was applied to a judgment of the ICJ on preliminary objections. In these proceedings, significant developments were made in the conceptualization of procedural legal issues under Article 60. The Court came up with both an analytical structure that specifies the issues of ‘jurisdiction’ and ‘admissibility,’ and a normative standard to ascertain the scope of *res judicata* in its previous judgments.

1. The Conceptualization of Jurisdiction

The Court confirmed that Article 60 is applicable to judgments on preliminary objections as well as those on merits, because the “provision makes no distinction as to the type of judgment concerned.”⁷¹ The issue of jurisdiction was examined before that of admissibility.

By quoting the PCIJ’s characterization of Article 60 that “the second sentence of Article 60 was inserted in order ... to enable the Court to make quite clear the points which had been settled with binding force in a judgment,”⁷² the ICJ articulated the normative standard of its jurisdiction under Article 60 as follows: “Any request for interpretation must relate to the operative part of the judgment and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative part.”⁷³

This is the first time that the ICJ specified the jurisdictional threshold under Article 60. Reading together with the cited PCIJ jurisprudence, the ICJ essentially stated that the binding force of its judgment only extends to the operative part of the judgment and the reasons inseparable from the operative part.⁷⁴ This clarified the

⁷⁰ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 1998 I.C.J. 275 (June 11).

⁷¹ Land and Maritime Boundary Request, at 35, ¶ 10.

⁷² Interpretation of Judgments Nos. 7 & 8, at 11.

⁷³ Land and Maritime Boundary Request, at 35, ¶ 10.

⁷⁴ In the dissenting opinion of Interpretation of Judgments Nos. 7 & 8, however, Judge Anzilotti argued that: “At all events, it is the operative part which contains the Court’s binding decision and which, consequently, may form the

scope of *res judicata* of the ICJ judgments in a definite way. The Court finally decided that the jurisdictional threshold under Article 60 was met, because the request for interpretation concerned the operative part and the reasons set out in paragraphs 98-101 of the previous judgment which the Court deemed inseparable from the operative part.⁷⁵

2. The Conceptualization of Admissibility

The ICJ started conceptualizing the issue of admissibility by stressing that the previous judgment is “final and without appeal” according to Article 60 and the interpretative proceeding cannot be used to “impair ... the finality and delay ... the implementation of [that judgment].”⁷⁶

In contrast to the conceptualization of the jurisdiction issue, the ICJ did not formulate a clear normative threshold for admissibility. The Court merely emphasized *res judicata* as a principle that “must be maintained” and quoted its conceptualization of the real purpose condition in *Asylum Request* and *Continental Shelf Request*.⁷⁷ Therefore, it is necessary to rely on the Court’s analysis of the facts in these proceedings to figure out how the normative aspect of admissibility was characterized.

The three submissions in Nigeria’s request essentially pointed to one legal question - whether the dispute in the original contentious proceedings included any incidents not specified in Cameroon’s Application and Additional Application, and consequently whether Cameroon was allowed to present additional facts about those incidents. The Court relied on the operative part of the sixth preliminary objection and the inseparable reasons in paragraphs 98-101 to find that the legal question in Nigeria’s request for interpretation had been decided in the previous judgment. The previous judgment clearly concluded that Article 38(2) of the Rules of Court “does ... not preclude later addition to the statement of the facts and grounds on which a claim is based” and “it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations.”⁷⁸ The Court also decided that the freedom of State parties to present additional facts and considerations is limited by the condition that additional facts

subject of a request for an interpretation.” See Interpretation of Judgments Nos. 7 & 8, at 24. This view that *res judicata* does not extend to any reasons was contested by some contemporary scholars. See, e.g., *supra* note 47, at 39.

⁷⁵ Land and Maritime Boundary Request, at 35-6, ¶ 11.

⁷⁶ *Id.* at 36, ¶12.

⁷⁷ *Id.*

⁷⁸ Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 1998 I.C.J. 318, ¶¶ 98-99 (June 11).

and considerations are “not to transform the dispute brought before the Court ... into another dispute which is different in character” and that in the contentious proceedings, “Cameroon has not so transformed the dispute.”⁷⁹ For these reasons, the ICJ found the request for interpretation inadmissible, holding that it would be “unable to entertain [the request] without calling into question the effect of the [previous] judgment concerned as *res judicata*.”⁸⁰

3. The Confusing Paragraph

After finding Nigeria’s request inadmissible, the Court held in Paragraph 17:

In view of the conclusions it has reached above, there is no need for the Court to examine whether there is, between the parties, a “dispute as to the meaning or scope of the judgment” of 11 June 1998, as contemplated by Article 60 of the Statute.

This paragraph is utterly confusing, because it seems to imply that the tests of jurisdiction and admissibility do not involve the normative core of Article 60, namely the existence of a “dispute as to the meaning or scope of the [previous] judgment.” Paragraph 17 in its plain reading suggests that jurisdiction and admissibility are procedural legal issues to be examined prior to the analysis under Article 60. These implications are clearly wrong, as Article 60 is the sole legal basis of the Court’s interpretative proceedings.

D. Avena Request

The ICJ’s analysis of the procedural issues in *Avena Request* is peculiar to the case. The Court adopted a unique analytical approach that does not seem to correspond well to its previous jurisprudence.

In *Avena Request*, the ICJ first examined “whether there does exist a dispute over whether the obligation in paragraph 153 (9) of the *Avena* judgment is an obligation of result” and “whether there is indeed a difference of opinion between the parties as to whether the obligation in paragraph 153 (9) of the *Avena* judgment falls upon all United States federal and state authorities.”⁸¹ This could be seen as a formulation of the dispute condition. The Court’s approach to the dispute condition, however, became rather peculiar. The ICJ observed that opposite findings could be derived

⁷⁹ *Id.* at 319, ¶ 99.

⁸⁰ Land and Maritime Boundary Request, at 39, ¶ 16.

⁸¹ *Avena Request*, at 10, ¶ 20.

from the facts and evidence. The Court found:

On the one hand, it could be said that a variety of factors suggest that there is a difference of perception that would constitute a dispute under Article 60 of the Statute.⁸²

[But] On the other hand, there are factors that suggest, on the contrary that there is no dispute between the parties.⁸³

Facing such a dilemma, the Court eventually came up with two arguments to justify dismissing the request for interpretation. First, it could be argued that Mexico did not specify clearly enough in its claim that there was a dispute “as to whether the obligation of result falls upon all state and federal authorities and as to whether they share an understanding that it does so fall,”⁸⁴ and thus failed to meet the criteria in Article 98 (2) of the Rules of Court.⁸⁵ Second, even if a dispute were found to exist, “[t]he parties’ different stated perspectives on the existence of a dispute reveal also different contentions as to whether paragraph 153 (9) of the Avena judgment envisages that a direct effect is to be given to the obligation contained therein.”⁸⁶ However, this question of ‘direct effect’ was not decided in the Avena judgment and is therefore “outside the jurisdiction specifically conferred upon the Court by Article 60.”⁸⁷

The ICJ’s jurisprudence in *Avena Request* is confusing and questionable, because neither argument is convincing. The first argument is based on what the dissenting Judge Sepúlveda-Amor called “a misreading and a misinterpretation in the present judgment of Mexico’s position.”⁸⁸ The Court read Mexico’s claim as saying there was a dispute relating only to the “position taken by the United States *Government* in the Supreme Court”⁸⁹ and found it “very non-specific ... as to whether the obligation of result falls upon *all state and federal authorities*.”⁹⁰ However, this reading is contrary to Mexico’s submission, which explicitly relates the dispute to “the United States, acting through all of its competent organs and all its constituent subdivisions, including all branches of government and any official, state or federal, exercising government

⁸² *Id.* at 13, ¶ 31.

⁸³ *Id.* at 14-5, ¶ 36.

⁸⁴ *Id.* at 15, ¶ 38.

⁸⁵ *Id.* at 15-7, ¶¶ 38-41.

⁸⁶ *Id.* at 17, ¶ 43.

⁸⁷ *Id.* ¶ 45.

⁸⁸ Dissenting opinion of Judge Sepúlveda-Amor. *See id.* at 47, ¶ 50.

⁸⁹ *Avena Request*, at 10, ¶ 24.

⁹⁰ *Id.* at 15, ¶ 38. [Emphasis added]

authority.”⁹¹ The second argument is unpersuasive because the question of ‘direct effect’ should not bar the Court from interpreting other questions that had been decided in the *Avena* judgment.

Avena Request is also extremely ambiguous regarding the conceptualization of procedural legal issues under Article 60. It was not ultimately decided whether there was a dispute as to the meaning or scope of the judgment, although the judgment could indeed be read as implicitly recognizing such a dispute.⁹² Moreover, it was not clear why the Court did not adopt the ‘jurisdiction-admissibility’ analytical framework that it came up with in *Land and Maritime Boundary Request*.

E. Temple of Preah Vihear Request

1. The Conceptualization of Jurisdiction

In *Temple of Preah Vihear Request*, the ICJ asked whether there is a “dispute as to the meaning or scope of the [previous] judgment.”⁹³ The Court recalled its previous jurisprudence to conceptualize ‘dispute’ and “meaning or scope of the judgment.”⁹⁴

The English word ‘dispute’ is used in both Articles 60 and 36(2) of the ICJ Statute. The Court noted, however, that “the French text of Article 60 uses the term ‘*contestation*,’ which has a broader meaning than ‘*différend*,’ the term used in the French text of Article 36(2).”⁹⁵ Therefore, the normative threshold of dispute under Article 60 is lower than that under Article 36(2). As for “meaning or scope of the judgment,” the Court re-emphasized that a dispute under Article 60 should relate to the operative clause and inseparable reasons in the previous judgment.⁹⁶

The ICJ articulated a two-pronged analysis of jurisdiction: (1) to “determine whether a dispute indeed exists between the parties as to the meaning or scope of the operative clause [in the previous judgment]”; and - if such a dispute exists - (2) to “identify the precise point or points that require interpretation.”⁹⁷ These two prongs were conceptualized respectively as “the existence of a dispute” and “the subject -

⁹¹ *Id.* at 7, ¶10.

⁹² In his dissenting opinion, Judge Sepúlveda-Amor maintained: “A careful reading of the Court’s judgment in the present case suggests an implicit recognition by the Court that Mexico and the United States have in fact shown themselves as holding opposing views in regard to the meaning and scope of the *Avena* judgment.” *See id.* at 31, ¶ 4 (Dissenting opinion of Judge Sepúlveda-Amor).

⁹³ I.C.J. Statute art. 60.

⁹⁴ *Id.*

⁹⁵ *Temple of Preah Vihear Request*, at 295, ¶ 33.

⁹⁶ *Id.* at 296, ¶ 34.

⁹⁷ *Id.* at 297, ¶ 36.

matter of the dispute before the Court.”⁹⁸ In these proceedings, the Court identified three aspects of dispute between Cambodia and Thailand.⁹⁹

2. THE CONCEPTUALIZATION OF ADMISSIBILITY

The Court once again linked the issue of admissibility to the real purpose of the request and the principle of *res judicata*.¹⁰⁰ Thailand objected to Cambodia’s request, maintaining that the real purpose of the request was “not to obtain the Court’s interpretation of the [previous] judgment but, rather, to obtain the Court’s ruling on the parties’ delimitation dispute in the area of the Temple.”¹⁰¹ Cambodia, on the contrary, insisted that it was “merely asking the Court to explain the findings that it reached in [the previous] judgment.”¹⁰²

Consistent with its previous jurisprudence, the ICJ did not attempt to conjecture about the psychological/subjective motive of the requesting State. It simply stated:

[within the limits of *res judicata*,] the Court considers that there is a need for the interpretation of the second operative paragraph of the 1962 judgment and of the legal effect of what the Court said regarding the Annex I map line.¹⁰³

This appears to be the only reasoning on the issue of admissibility. However, the question still remains what the admissibility analysis adds to the jurisdiction analysis.

IV. Evaluation of the Court’s Jurisprudence: Proposal for an Analytical Framework with a Clearer Conceptualization of Power, Jurisdiction and Admissibility

The case-by-case review of the ICJ’s jurisprudence demonstrates that a structurally clear and logically sound analytical framework for conceptualizing the procedural legal issues under Article 60 is yet to be developed. So far, the Court’s approach to the procedural legal issues has been inconsistent; the issue of jurisdiction is conceptually

⁹⁸ *Id.* at 297, ¶ 300.

⁹⁹ *Id.* at 301-2, ¶¶ 48-52.

¹⁰⁰ *Id.* at 303, ¶ 55.

¹⁰¹ *Id.* at 302-3, ¶ 53.

¹⁰² *Id.* at 303, ¶ 54.

¹⁰³ *Id.* ¶ 56.

intertwined and overlapping with the issue of admissibility and power; and certain reasoning in the Court's jurisprudence is clearly problematic. These problems call for an analytical framework with a clearer conceptualization of 'power,' 'jurisdiction,' and 'admissibility' under Article 60. In this analytical framework, the normative scope of each conceptual component should be distinct, and they should not overlap with each other.

A. Power

Broadly construed, the Court's 'power' underlies the whole proceedings which includes the privilege to decide on issues of jurisdiction and admissibility under Article 60. Nevertheless, for the sake of clarity, it is preferable that the normative scopes of each component in the analytical framework (i.e., power, jurisdiction, and admissibility) do not overlap. Therefore, 'power' is narrowly conceptualized here to refer only to the Court's power *to initiate the interpretative proceedings and procedural vehicles therein*. [Emphasis added]

The Court's power is not conditioned by any external conditions so long as one party requests an interpretation under Article 60. Upon receipt of the request, the ICJ will initiate the interpretative proceedings and notify the other party. The Court has the power to indicate provisional measures by an order¹⁰⁴ and to determine whether an order on provisional measures has been breached,¹⁰⁵ even if the request for interpretation is found to be inadmissible.

The ICJ's power derives directly from Article 60 of its Statute. The parties would have automatically consented to this power by submitting the dispute to the Court for adjudication in the original contentious proceedings. However, the Court has been ambiguous about whether there can be derogation from Article 60 by a specific and unequivocal agreement between the parties.¹⁰⁶ This ambiguity is a critical flaw of the Court's jurisprudence. The Court should have confirmed that there can be no derogation from the procedural rules in its Statute—a principle that clearly corresponds to the judicial rather than arbitral nature of the Court and the design of

¹⁰⁴ See Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Order, 2011 I.C.J. 537 (July 18) [hereinafter Temple of Preah Vihear Request Interim Order]. See also Avena Request Interim Order.

¹⁰⁵ In *Avena Request*, the Court has confirmed that its "competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures." See *Avena Request*, at 19, ¶ 51.

¹⁰⁶ Part III.B of this article.

the Rules of Court.¹⁰⁷

B. Jurisdiction

The question of jurisdiction asks whether the subject-matter requirement under Article 60 - the existence of a “dispute as to the meaning or scope of the [previous] judgment” - is met. Basically, most reasoning in the existing jurisprudence of the ICJ - including that under the admissibility section - only concerns this question of jurisdiction. There are two prongs under the question of jurisdiction: ‘dispute’ and “meaning or scope of the judgment.”

1. DISPUTE

Within the meaning of Article 60, ‘dispute’ (*contestation*) is “a difference of opinion or views.”¹⁰⁸ As the French text indicates, this has a broader meaning than the ‘dispute’ (*différend*) in Article 36(2).¹⁰⁹ Both the ICJ and the PCIJ have repeatedly stated that the dispute does not have to be manifested in a formal way – all that is required is that the parties have *in fact* shown themselves as holding opposite views.¹¹⁰

The Court has not answered “*who* is having a dispute,” i.e., whose opinion/view counts as the *party*’s. [Emphasis added] This is the core question in *Avena Request*, but unfortunately the Court rendered a very confusing judgment. The author submits that the US argument in *Avena Request* that only the federal executive is qualified to speak for the party must be discarded. Opinions and views of a State are expressed through all its competent organs. *Avena Request* precisely shows that a party does not always speak with one voice and that there can be diverse official views within a State as to the meaning or scope of an ICJ judgment.

It is thus not necessary to prescribe beforehand which organ’s view counts as the party’s. The view of any State organ is relevant as long as “[t]he conduct of [... said organ] shall be considered an act of that State under international law.”¹¹¹

¹⁰⁷ Forlati noted: “Whenever specific decisions are entrusted to the parties by the Rules of Court, this choice reflects an indication of the Statute.” See S. FORLATI, *THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY?* 25 (2014).

¹⁰⁸ Temple of Preah Vihear Request Interim Order, at 542, ¶ 22, (Restated in Temple of Preah Vihear Request, at 295, ¶ 33. See also *Avena Request Interim Order*, at 326, ¶ 55 (“different views”); *Asylum Request*, at 403 (“a divergence of views”).

¹⁰⁹ Temple of Preah Vihear Request, at 295, ¶ 33. In general, a treaty term should be interpreted to render authentic text in different languages the same meaning. See VCLT art. 33.

¹¹⁰ Temple of Preah Vihear Request, at 295, ¶ 33. See also *Avena Request Interim Order*, at 325-6, ¶ 54; *Continental Shelf Request* at 217-8, ¶ 46. This dictum finds the origin in Interpretation of Judgments Nos. 7 & 8, at 11. [Emphasis added]

¹¹¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 4, ¶ 1, [2001] 2 Y.B. Int’l L. Comm’n

Consequently, each party could potentially hold several different, and even contrary, views. As long as there is a difference between party A's view and party B's view, a dispute is established between them. In the example of *Avena* Request, the difference between the view of Mexico and that of the US Supreme Court should have led the Court to find the existence of dispute.

2. MEANING OR SCOPE OF JUDGMENT

When a dispute is found to exist, the Court then needs to decide whether the dispute concerns the “meaning or scope” of the previous judgment. *Res judicata* is the key principle behind this requirement.¹¹² Since *res judicata* covers only the operative clauses and the reasons inseparable from the operative clauses,¹¹³ only a dispute on this portion of the judgment qualifies as a “dispute as to the meaning or scope of the judgment.”¹¹⁴ When there is a dispute between the parties as to whether a point has been decided by the previous judgment with binding force, it is up to the Court to decide whether the point in question is *res judicata*.¹¹⁵ Such a dispute thus meets the jurisdictional requirement under Article 60, as well.¹¹⁶

C. Admissibility

The question of admissibility only arises after the Court has confirmed its jurisdiction by finding that there is in fact a dispute as to the meaning or scope of the previous judgment.¹¹⁷ One of the biggest problems in the ICJ's jurisprudence is the overlapping conceptualization of jurisdiction and admissibility. Most of the Court's reasoning under the heading of ‘admissibility’ is essentially an analysis of the “meaning or scope of the judgment” condition for jurisdiction.¹¹⁸ Accordingly, the Court has barely

40, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (pt. 2).

¹¹² Temple of Preah Vihear Request, at 303, ¶ 55; Continental Shelf Request, at 218, ¶ 47; Land and Maritime Boundary Request, at 36, ¶ 12.

¹¹³ Temple of Preah Vihear Request, at 296, ¶ 34; Temple of Preah Vihear Request Interim Order, at 542, ¶ 23; Avena Request Interim Order, at 323, ¶ 47; Land and Maritime Boundary Request, at 35, ¶ 10.

¹¹⁴ I.C.J. Statute art. 60.

¹¹⁵ This reflects the competence-competence principle of international courts and tribunals. See generally B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 275-8 (1953).

¹¹⁶ Interpretation of Judgments Nos. 7 & 8, at 11-12. See also Continental Shelf Request at 217, ¶ 45.

¹¹⁷ This analytical order is important, because “[w]ere the Court to consider first a plea to the admissibility and to uphold it making thereby the question of ascertaining whether it has jurisdiction redundant, it may happen that it does so without having jurisdiction at all.” See M. Iwanek, *The Jurisdiction of the International Court of Justice: The Plea to the Admissibility*, 1 POLISH Y.B. INT'L L. 167 (1966).

¹¹⁸ Temple of Preah Vihear Request, at 302-4, ¶¶ 53-56; Avena Request, at 17, ¶¶ 43-46; Land and Maritime Boundary Request at 36-7, ¶¶ 12-13.

touched upon the conceptualization of admissibility in its true sense.

Jurisdiction and admissibility address different questions. For international courts, “jurisdiction entails not only a legal power to adjudicate, but also a non-discretionary legal obligation to do so.”¹¹⁹ When the subject-matter requirement under Article 60 is satisfied, the ICJ must confirm its jurisdiction over the request. However, “questions of admissibility pertain to whether or not the court may decline to exercise the power to adjudicate.”¹²⁰ The Court must ask if the request is “fit [or] mature for judicial treatment.”¹²¹

Having this conceptual distinction between jurisdiction and admissibility in mind, the author proposes that admissibility under Article 60 be conceptualized as the question of whether the previous judgment is sufficiently clear to render the difference of opinion as to its meaning or scope unreasonable. This conceptualization reflects what Vattel called “the first general maxim of interpretation ... that *it is not allowable to interpret what has no need of interpretation.*”¹²²

State parties may have different interpretations of an ICJ judgment even though the judgment is perfectly clear. In this case, the Court should decline to interpret it and find the request inadmissible. The proposed conceptualization of admissibility can find support in the drafting history of the PCIJ Statute where “[t]he original draft of Article 60 contained a reference to an *uncertainty* of the previous judgment.”¹²³ The rationale is simple: when there is no *uncertainty*, or, to put it differently, the previous judgment is sufficiently clear to render the difference of opinion as to its meaning or scope unreasonable, the Court should not entertain the request for interpretation because there is a lack of “a need for the interpretation.”¹²⁴

This proposed conceptualization of admissibility can also be reconciled with the Court’s existing jurisprudence. The historical origin of the ICJ’s admissibility analysis under Article 60 is the real purpose condition put forward in the PCIJ’s jurisprudence. A subjective approach to the real purpose condition has been consistently rejected by both Courts. Such an approach is rightly rejected, because the requesting party can

¹¹⁹ Y. Shany, *Jurisdiction and Admissibility*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 787 (C. Romano et al. eds., 2013).

¹²⁰ *Id.*

¹²¹ *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 247 (Aug. 4, 2011), available at <https://www.italaw.com/cases/35> (last visited on Oct. 8, 2017).

¹²² E. Vattel, *THE LAW OF NATIONS: EDITED AND WITH AN INTRODUCTION BY BÉLA KAPOSSY AND RICHARD WHATMORE* 408 (2012). [Emphasis added]

¹²³ A. Zimmermann, *Interpretation of Judgments of the International Court of Justice under Art. 60 of the Statute of the ICJ*, in *FESTSCHRIFT FÜR HANS-ERNST FOLZ* 409 (F. Zehetner ed., 2003). [Emphasis added]

¹²⁴ *Temple of Preah Vihear Request*, at 303, ¶ 56. [Emphasis added]

always claim that the sole purpose of its request is to obtain the Court's interpretation. It is almost impossible "to argue that we know better than the State itself"¹²⁵ what is the State's subjective motive behind the request. The proposed conceptualization of admissibility can be read as an objective approach to the real purpose condition. The claimed purpose of the requesting party becomes unconvincing when the previous judgment is objectively too clear to render the difference of opinion as to its meaning or scope reasonable.

V. Conclusion

As more States are turning to the ICJ for dispute resolution, its interpretative proceedings have gained more potential importance.¹²⁶ Therefore, a clearer conceptualization of the procedural legal issues under Article 60 is desirable, so that both the parties can prepare more pertinent arguments and the Court can adjudicate on these issues in a more consistent and legally convincing manner. If the analytical framework proposed in this article is adopted, the goal of clarifying the meaning and scope¹²⁷ of the judgment will be accomplished when it is in dispute. After jurisdiction has been established under Article 60, the clarification will be rendered either in the admissibility analysis of the preliminary objection phase if the previous judgment is found to be sufficiently clear, or in the substantive interpretation of the merit phase if the request is found to be admissible.

A clear conceptualization of power, jurisdiction, and admissibility in the interpretative proceedings is important not only for the ICJ, but also for other bodies of international dispute resolution that are empowered with the authority to interpret binding decisions previously delivered. Article 33(3) of the Statute of the International Tribunal for the Law of the Sea¹²⁸ provides: "In the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party." Article 43 of the Statute of the Court of Justice of the European

¹²⁵ M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 328 (2005).

¹²⁶ *Supra* note 123, at 425.

¹²⁷ The goal of the interpretative mechanism under Article 60 is to clarify the meaning and scope of the previous judgment, as "the expression 'to construe' [in Article 60] must be understood as meaning to give a precise definition of the meaning and scope which the Court intended to give to the judgment in question." *See* Interpretation of Judgments Nos. 7 & 8, at 10.

¹²⁸ 1833 U.N.T.S. 561, Dec. 10, 1982.

Union¹²⁹ also stipulates: “If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.” The analytical framework proposed in this article to conceptualize procedural legal issues under Article 60 of the ICJ Statute might also be transplanted into the interpretative proceedings before other courts and tribunals. It will finally become part of “a common law of international adjudication.”¹³⁰

¹²⁹ Consolidated Version of the Statute of the Court of Justice of the European Union, *available at* https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf (last visited on Oct. 31, 2017).

¹³⁰ *See generally* C. BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007).