ЦЕНТР МЕЖДУНАРОДНЫХ
И СРАВНИТЕЛЬНО-ПРАВОВЫХ ИССЛЕДОВАНИЙ
INTERNATIONAL AND COMPARATIVE
LAW RESEARCH CENTER

# ДОКАЗАТЕЛЬСТВА В МЕЖДУНАРОДНЫХ СУДАХ И ТРИБУНАЛАХ

Материалы симпозиума (9 ноября 2018 г.) и круглого стола (15 мая 2019 г.)

# EVIDENCE BEFORE INTERNATIONAL COURTS AND TRIBUNALS

Symposium (November 9, 2018) and Round-Table (May 15, 2019) proceedings

Под редакцией Р.А. Колодкина, Е.В. Булатова, Е.С. Федорова
Edited by R. Kolodkin, E. Bulatov, E. Fedorov

Москва 2020
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*Центр международных и сравнительно-правовых исследований*
*International and Comparative Law Research Center*

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Настоящий сборник содержит материалы по вопросам доказательств в международных судах и трибуналах, в частности, посвящённые подходам судов и трибуналов к процессу доказывания в межгосударственных судебных спорах, региональных судах по правам человека, международной уголовной юстиции, а также международном инвестиционном, коммерческом и спортивном арбитраже.

Сборник может представлять интерес для практикующих юристов и исследователей в сфере разрешения международных споров, судей, а также представителей государственных органов, ответственных за представление интересов государств в различных международных судах и трибуналах.

The present collection contains materials on the issues of evidence in international courts and tribunals. Collected materials deal with approaches of courts and tribunals towards evidence in inter-state litigation, regional courts of human rights, international criminal jurisdiction, and international investment, commercial and sport arbitration.

The collection might be of interest to practicing lawyers and researchers in the field of international dispute resolution, judges, as well as officials of State authorities responsible for representing interests of States in various international courts and tribunals.

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# Предисловие

Центр международных и сравнительно-правовых исследований — некоммерческая неправительственная организация. Центр считает своей задачей способствовать развитию науки и практики в области международного права, а также распространению знаний о нём путём, в частности, проведения соответствующих мероприятий с участием ведущих специалистов. В ноябре 2018 года Центр провёл симпозиум на тему «Доказательства в международных судах и трибуналах: разные форумы, аналогичные подходы?». Его участники обсудили вопросы доказательств в межгосударственных судебных спорах, региональных судах по правам человека, международной уголовной юстиции, международном инвестиционном, коммерческом и спортивном арбитраже.

Тема получила развитие в рамках Петербургского Международного Юридического Форума 2019 года. Участники организованного Центром круглого стола обсудили различные аспекты так называемых доказательственных привилегий в международных судах и трибуналах, в том числе вопросы истребования доказательств, бремени доказывания, негативных выводов об обстоятельствах дела, прав государств на конфиденциальность их взаимодействий с юридическими консультантами.

В настоящем сборнике представлены материалы этих мероприятий, в которых участвовали международные судьи и арбитры, юридические консультанты сторон процессов и международных организаций, профессора российских и зарубежных университетов.

Это наш первый опыт публикации такого рода материалов, и мы намерены продолжить эту практику. Так, планируется выпускать сборники лекций Летней Школы по международному публичному праву, впервые проведённой Центром в 2018 году.

Центр международных и сравнительно-правовых исследований благодарит всех, кто принял участие в подготовке указанных мероприятий и сборника, и в особенности — Б.Р. Тузмухамедова и С.В. Усоскина, а также Российский арбитражный центр при Российском институте современного арбитража.

# Foreword

International and Comparative Law Research Center is a non-profit non-governmental organization. The Center aims to contribute to the development of science and practice in the field of international law, and promote knowledge about it, *inter alia*, by means of holding relevant events with the participation of leading experts. In November 2018, the Center held a symposium on 'Evidence before International Courts and Tribunals: Distinct Fora, Similar Approaches?' The participants discussed issues of evidence in inter-state litigation, regional courts of human rights, international criminal jurisdiction, international investment, commercial, and sport arbitration.

The topic was further elaborated within the framework of the 2019 St. Petersburg International Legal Forum. The participants of the round-table organized by the Center discussed different aspects of the so-called evidentiary privileges in international courts and tribunals, including issues of document production, burden of proof, adverse inferences, and the right of States to the privacy of their interactions with legal consultants.

The present collection contains proceeding materials of these events, in which international judges and arbitrators, legal advisers to the parties of processes and international organizations, professors of Russian and foreign universities took part.

It is the Center's first experience in publishing such materials, and we intend to continue this practice. As such, we plan to release a collection of lectures of the Summer School on Public International Law first held by the Center in 2018.

International and Comparative Law Research Center wishes to thank everyone involved in the preparation of the events and the collection mentioned, Mr. Bakhtiyar Tuzmukhamedov, Mr. Sergey Usoskin, and the Russian Arbitration Center at the Russian Institute of Modern Arbitration, in particular.

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# Evidence in International Courts and Tribunals: Distinct Fora, Similar Approaches? (Symposium Proceedings, November 9, 2018)

***Р.А. Колодкин****

## Приветственное слово

Мы рады приветствовать вас на симпозиуме, посвящённом вопросу доказательств в международных судах и трибуналах. Он организован российской неправительственной организацией — Центром международных и сравнительно-правовых исследований, в библиотечном зале которого мы находимся, при поддержке Министерства юстиции РФ.

Нынешняя международная реальность характеризуется, *inter alia*, широким использованием государствами и другими акторами разных инструментов международного правосудия. Это правосудие разнообразно по формам; при этом судьи, арбитры, другие участники процессов представляют различные правовые культуры, системы, правовые школы. Причём зачастую эти различия в представлениях о праве проявляются в рамках одного международного суда или процесса. Кроме того, нередко одни и те же юристы участвуют в качестве судей, арбитров, юридических советников сторон в процессах в международных судах разного характера и форматов.

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Другой современной особенностью является сосуществование настоящей реальности и реальности виртуальной. Во многом благодаря последней приметой сегодняшнего дня стали разговоры о так называемых альтернативных фактах или фейковых новостях.

Между тем установление настоящих, а не «альтернативных» фактов остаётся одной из основных задач международного правосудия. Суд толкует и применяет право после того, как определяет факты, имеющие значение для рассмотрения дела. А для этого нужно иметь и оценить доказательства. Таким образом, представление и оценка доказательств являются одной из важнейших функций участников международных судебных и арбитражных процессов.

У международных судов, трибуналов и арбитражей нет общего свода правил, регулирующих доказательства. Помимо некоторых правил, отражённых в общих принципах права и, возможно, в обычных нормах международного права, каждый международный суд руководствуется правилами, установленными им самим или для него. Зачастую международные суды предпочитают иметь высокую степень дискреции в обращении с доказательствами. Вопрос о том, хороши ли такая дискреция и сопутствующая ей неопределённость или нет, адекватны ли правила и процедуры, применимые к доказательствам, является предметом дискуссии.

Естественно, тема доказательств представляет не только академический интерес. Например, в данный момент Россия является истцом, ответчиком или третьей стороной в процессах в Международном суде; в арбитраже, созданном на основании Приложения VII к Конвенции ООН по морскому праву; в разбирательствах в Европейском Суде по правам человека (ЕСПЧ); в спорах в рамках ВТО; в инвестиционных арбитражах.

Наша страна активно участвует в судебных разбирательствах в Экономическом суде СНГ и Суде Евразийского экономического союза.

Для России, в том числе как для постоянного члена Совета Безопасности ООН, должно быть отнюдь небезразлично, как устанавливаются факты в международных уголовных юрисдикциях.

Наши граждане и юридические лица также используют международное правосудие, будь то ЕСПЧ, разные формы арбитража, Суд Евразийского экономического союза, для отстаивания своих прав. Нередко эти процессы привлекают широкий общественный интерес.

Всё это стимулировало нас к проведению сегодняшнего мероприятия, несмотря на то, что теме доказательств в международных судах, трибуналах и арбитраже посвящено значительное число публикаций и исследований. Некоторые из них выставлены сегодня в зале, а авторы и участники ряда из них присутствуют здесь.

Как ясно из программы, мы хотим придать нашей дискуссии широкий кроссекторальный характер. Поэтому панельные дискуссии посвящены теме доказательств в международных судах разного характера, а выступать сегодня будут как те, кто участвует в различных судебных и арбитражных процедурах и непосредственно имеет дело с доказательствами, так и те, кто исследует эту тему. Мы признательны всем спикерам, принявшим наше приглашение, а также всем вам, находящимся здесь, за интерес к мероприятию.

Наш keynote speaker — член Комиссии международного права ООН, доктор Анируддха Раджпут.

*A. Rajput**

# Evidence before the International Courts and Tribunals: Distinct Fora, Similar Approaches?

Excellencies, Honourable Judges, Ladies and Gentlemen:

I feel honoured to deliver this keynote address on a topic of practical importance and daily utility for the users of international law: States and individuals, as parties to disputes, and the courts and tribunals as adjudicators. I would like to thank the International and Comparative Law Research Centre for this very kind invitation and, in particular, Judge Kolodkin — a friend and former colleague at the Commission.

The experience of mature legal systems at the national level shows that they have advanced substantive as well as procedural rules. The substantive norms regulate the rights and obligations of the parties to a dispute, whereas the procedural norms govern the processes of adjudication. A clear set of procedural norms ensures clarity and consistency in the adjudicative process — aptly encapsulated in the phrase 'due process'. The judicial organs at the national level have existed for a relatively long period and performed the adjudicative function on a daily basis, which in turn has resulted into developed norms of procedure in adjudication. In recent decades, international law has seen a sudden rise in the number of courts and tribunals and greater willingness of States — the principal actors in the international legal system — to use them. One also cannot ignore the effect of the rights of individuals — private persons and corporate entitles — to commence international judicial proceedings. On the one hand, the proliferation of courts and tribunals has contributed to the growth of procedural law within international law, while on the other, international adjudication demands greater attention towards procedural law. An important component of procedural law is the law of evidence.

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Evidence in international law adjudication arises in two contexts: first, evidence to establish a rule of international law, which may be in the form of a customary law, or a conventional law, or a general principle (within the meaning of Article 38(1)(c) of the Statute); second, evidence to establish a fact. We are concerned today with the second, i.e. evidence as a process for presenting and establishing a fact. Evidence often plays a decisive role in the outcome of a case. As encapsulated in the Latin phrase *idem est non probari non esse* (something which is not proved does not exist or is not true). In the past, it was not often that a court or tribunal would have to deal with complex factual scenarios or scientific or technical cases. The proliferation of courts and tribunals and the specialised subject matter of some of them has brought to the fore the need for greater attention towards issues of evidence. In the backdrop of the consensual nature of international dispute resolution, clarity of the process of proving facts is crucial for the credibility of the adjudication process. It is thus timely to ask the question: Evidence before international courts and tribunals: distinct fora, similar approaches?

It is the title of today's topic. 'Distinct fora' and 'similar approaches' are two principal interconnected themes embedded in it. I will first discuss them.

'Distinct fora', in my view, does not just represent the numerical plurality of courts and tribunals in today's world; it is more than that. It represents the diversity of the subject matter. The International Court of Justice has been and continues to be a generalist institution that can comfortably adjudicate on a range of diverse subject matters; it has done so in the past and continues to do so. In the present-day dispute resolution mechanism, we see many specialised courts and tribunals. The Panels and Appellate Body of the World Trade Organization deal with matters relating to international trade; the Tribunal for the Law of the Sea comprises law of the sea experts and specialises in the adjudication of law of the sea matters; investment tribunals decide cases involving a challenge to governmental action, often involving a commercial or financial component. The International Criminal Court deals with a distinct branch — the international criminal law, which has resuscitated in the last couple of decades. Except for the ICJ, the caseload of the specialised courts and tribunals is distinct from one another. The priorities of substantive law applied by them are based upon their founding treaty and thus differ from one forum to another. The institutional priorities

influence their approach towards a dispute they decide. The Panel and the Appellate Body of the WTO would look at issues of human rights from a trade perspective and the European Court of Human Rights *vice versa*. The question really is whether the differences in the subject matter affect principles of evidence, which they apply.

Another aspect of the distinctive nature of the courts and tribunals is the level at which they function. Some are regional whereas others are global. At the regional level, we have the European Court of Human Rights and the Court of Justice of the European Union in Europe, Inter-American Court of Human Rights in the Americas and the African Court on Human Rights and Peoples' Rights in Africa. These judicial institutions have a jurisdiction limited to the region and based upon regional treaties with regional priorities. Needless to add, even at the regional level, the subject matter differs *inter se*. Thus, the European Court of Justice would be a generalist institution for the EU legal system, whereas the European Court of Human Rights would be a specialist institution, within the regional architecture.

Despite the differences in the substantive subject matter and level of functioning, can there be similar approaches to evidence? If yes, then what could they be? In my view, there can be and should be similar approaches. Before I turn to the reasons why there should be similar approaches and some areas of caution while drawing similarities, I wish to address the second theme embedded in the tile: what does 'similar' mean.

Another aspect is the presence of individuals — either as a claimant or as a respondent. In investment arbitration, they would be claimants, or at times even respondents. In international criminal proceedings, they are respondents. In sports arbitration, the proceedings would mostly involve an individual, the organiser of a sports event or a sports authority. Direct involvement of a sovereign element would be limited. In WTO proceedings although the proceedings are brought by a State, the effect of the measure would ultimately be on individuals. Individuals can thus be seen directly or indirectly involved to a different degree, which could also be treated as a factor to notice the distinctness of the fora.

I think the choice of 'similar' is deliberate and thoughtful. It is better suited than 'common'. I am aware of the book by Professor Chester Brown called 'A Common Law of International Adjudication', where he identifies

rules of procedure in international adjudication, including evidence, and develops the thesis that there is some form of 'common law' that has developed[1]. I would avoid striking a controversy between common and civil lawyers and commend the choice of the word 'similar' rather than 'common' at this stage. I will come to some aspects of the controversy between civil and common law, relating to evidence, a little later. The word 'similar' is flexible as opposed to 'common'. The word 'common', even if not used in the common law sense, tends to give the impression of some form of standardisation. One cannot neglect the seamless homogeneity of some of the principal aspects of evidence in different regimes, but at the same time, the divergences desired by the regime also need to be acknowledged. The word similar leaves sufficient flexibility in my view.

I now turn to the question of whether there should be similar approaches to evidence across fora; and what the possible way of finding common ground for mutual benefits is.

If not all, the principal and foundational aspects of evidence remain similar across different fora. There is consensus in the literature on this point[2]. This point can be best explained through some illustrations. Let us take the example of expert evidence. The substantive contents of expert evidence would obviously differ from case to case and not just one forum to another. However, there is no reason why the manner of presentation and its evidential value should differ. At present, different courts and tribunals depending on the extent of their involvement with expert evidence apply different procedures, which are at different stages of development. If a similar approach was applied for the presentation and evaluation of expert evidence, it would only be a helpful contribution to the courts and tribunals.

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[1] Ch. Brown, 'A Common Law of International Adjudication', Oxford University Press, 2007.

[2] M. Kazazi, 'Burden of Proof and Related Issues: A Study on Evidence before International Tribunals', Kluwer Law International, 1996. H. Thirlway, 'Procedural Law and the International Court of Justice' in *Lowe and Fitzmaurice* (eds.). 'Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings', Cambridge University Press, 1996, p. 389. Sh. Rosenne, 'The Law and Practice of the International Court 1920-1996', vol. III, Nijhoff, 1997, p. 1201. Ch. Brown, Op. cit., pp. 83–118; also see C.F. Amaresinghe, 'Evidence in International Litigation', Martinus Nijhoff Publishers, 2005.

One forum can benefit from the experiences of others. Similar approaches can be helpful in this regard.

Aspects of evidence are procedural in nature and insulated from the substantive peculiarities of the subject matter of the dispute. One of the settled rules, which has a strong claim to be a rule of customary international law or a general principal of law (within the meaning of Article 38(1)(c) of the Statute) is *onus probandi incumbit actori*, the claimant has the burden of proof. The claimant may not be the claimant in the case as such, but a party alleging a certain fact. It does not matter whether the dispute is decided by the Panel or the Appellate Body of the WTO, or a territorial claim is taken to the ICJ or an arbitral tribunal. The rule of *onus probandi* remains the same in different regimes. The same argument of neutrality of principles of evidence can be applied to several other principles, such as production of documents, exceptions or exemptions, presentation and assessment of oral evidence, adverse inference, site visit, privileged communications, etc. There would be some principles of evidence, which by their very nature are influenced by the subject of the dispute. Standard of evidence and burden of proof are such examples. The cases before the International Court of Justice show this. In the *Military and Paramilitary Activities* Case, the ICJ applied 'convincing evidence'[3]; in *Bosnia Genocide* cases, it used the standard of 'fully conclusive'[4]. Judge Greenwood in his Separate Opinion in the *Pulp Mills* Case used 'balance of probabilities'[5] — the standard applied in common law to decide civil cases. The divergence may appear merely of nomenclature in some situations, but it is substantive in many others. This divergence is understandable, since the nature of the subject matter of a dispute would demand a distinct standard of proof and burden of proof. In environmental law, it may be enough to have the standard of preponderance of probabilities, but in cases, involving international criminal law, a higher standard of convincing proof would be required. Likewise, in land boundary

[3] Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua* v. *United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports1986, 14, p. 29.

[4] Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina* v *Yugoslavia*), Preliminary Objections, Judgment of 11th July 1996, ICJ Reports 2006, 595, p.129, para. 209.

[5] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Merits, Judgment of 20 April 2010, ICJ Reports 2010, 14, Separate opinion of Judge Greenwood, paras. 25–26.

delimitation cases in situation of acquiescence, a higher standard of proof may be desired. There are some areas of evidence purely dependent on the peculiarities of the regime. It may not be possible to extrapolate those, but the rest can certainly be. In international criminal adjudication, the responsibility of establishing the guilt of the accused would be of the prosecutor. The test for choosing principles of evidence to be borrowed from another field is whether that principle is neutral or insulated from the peculiarities of the regime in which it has originated or been applied.

Principles of evidence would be in the nature of secondary norms. Primary norms relate to rights and obligations, whereas procedural norms relate to procedures for the enforcement of the primary norms. To that extent, as secondary norms, principles of evidence would be detached from primary norms, which influence the subject matter of a dispute.

The next argument supporting similar approaches is the benefit of cross-fertilization. The International Court of Justice has a unique position in the contemporary architecture of adjudication. It is not only a *de jure* principal judicial organ of the United Nations, but it has become so *de facto*. The willingness of States to bring all kinds of disputes before the ICJ, including those that would otherwise fall within a specialised regime, is a vivid proof of it. This unique position of the Court and its reception among States, gives special relevance to its determinations on all aspects including those of evidence. Other courts and tribunals often rely on the decisions of the ICJ. As a generalist court, the ICJ has to face cases involving different degrees of evidential issues. A survey of the jurisprudence of the specialised regimes shows that they have developed expertise in handling certain kinds of evidential issues due to the nature of their adjudication. The WTO principles of evidence relating to expert witnesses are most advanced. The Panels and Appellate Body have to deal with complex technical issues on a regular basis. The ICJ and other fora, such as investment tribunals, can benefit from the approach of dispute resolution under the WTO. In their Dissenting Opinions in the *Pulp Mills* Case, Judges Al-Khasawneh and Simma expressed discomfort with the majority for not having taken into account the jurisprudence of the WTO while dealing with expert evidence[6]. This was also flagged in the literature that ensued. Tribunals

[6] *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*), Merits, Judgment of 20 April 2010, ICJ Reports 2010, 14, Separate opinion of Judges Al-Khasawneh and Simma, para. 16.

constituted under Annex VII of UNCLOS have conducted site visits. Their procedures can be good examples for other courts and tribunals to follow. The international criminal courts and tribunals have probably the most advanced systems for handling evidence, both oral and documentary, cross-examination, in particular. These practices can be handy tools for handling complex factual matters for other courts and tribunals. The ICJ faced with these challenges in the *Genocide* Cases. The advanced practices of one forum can be used by another, strengthening and enriching each other. This allows a court or a tribunal to look for a more developed practice on another forum.

Lastly, a general point that could be made is that the notion of the principle of evidence that would remain should be crosscutting in different general, specialised and regional regimes.

In any adjudicative process, there is a challenge of drawing a balance between flexibility and certainty. Flexibility demands the need of adequate discretion for an adjudicator to analyse the facts on a case-by-case basis. While the parties to a dispute desire certainty in procedure and process of adjudication. The process of drawing upon similarity in approaches in different regimes assists to develop a body of principles on evidence that can contribute towards certainty of the process. In the absence of a set of identified principles, there is discretion without parameters, which creates a challenge for the parties as well as for international courts and tribunals. A conclusion based on a practice followed frequently in the past by other courts or tribunals grants a certain amount of authority to those conclusions. If the principles of evidence are clearly laid out, parties are aware, firstly, what material to produce, and, secondly, how that material would be analysed and weighed. It gives certainty to the adjudicative process. In practical terms, if the parties are aware they may be dissuaded from producing excessive and unnecessary evidence. With increasing caseload of courts and tribunals, this would be a helpful approach.

One cannot insist on rigid rules of evidence in a completely definitive manner, but at the same time, they cannot be left unidentified. An analogy can be drawn with the drafting process of rules of interpretation of treaties, what became Articles 31 and 32 of the Vienna Convention on the Law of Treaties. When the rules were discussed by the International Law Commission, one of the questions was, whether such an identification would destroy the

discretion of the adjudicator. Instead of leaving the entire discretion to the adjudicator, the Commission and the States through the Vienna Conference concluded that they need a certain set of basic rules that regulate the process of interpretation. Otherwise, discretion without guidance will result in inconsistent decisions. The choice of rules and their arrangement was not easy, because if they had not been identified, we would have been in the uncertain phase where it would be difficult to distinguish the outcome of interpretation in one case versus another. The process of identification of similar evidentiary practices in different fields of international law can form the basis for identification of the common denominator on evidence. The common denominator remains similar across different fields. Furthermore, these common denominators cannot be exhaustive. It would be a limited number of principles that would function alongside specific demands based upon the peculiarities of the institution or the subject matter of the dispute. Burden of proof is one example that I have already given.

A relatively controversial issue is of the role and relationship of civil and common law. As we know, the approach towards the function of a judge in the common and civil law is very different. In civil law, judges have greater latitude in deciding cases. Unlike, common law, where the remit of the judge's adjudicating power is limited to the arguments of parties, often called the *non ultra petita rule.* In domestic law, a wide discretion of a judge in evidential matters may not raise serious legitimacy issues. The judges in a domestic set-up are aware of the political context, cultural sensitivities, and social realities. An international court or tribunal is insulated from it: the very idea is not to allow such considerations of one of the disputing parties or of the judge to influence the proceedings and the outcome. The membership of international adjudication bodies such as the ICJ and ITLOS is drawn upon different legal systems and traditions to neutralise the influence of any system. To borrow the words from Article 9 of the ICJ Statute that the Court, as a whole, should be a body that represents 'the main forms of civilization and of the principal legal systems of the world'. The nature of international adjudication demands hedging of differences of the background and understanding on the part of judges and arbitrators. With this diversity of adjudicators and parties, clarity about the rules and principles that regulate the process of presenting and handling of evidence and conclusion based upon them is only preferable. The experience of the

European Court of Justice and the European Court of Human Rights can be of immense help, since the jurisdictions covered come from a diverse background. I am sure we would get to know more about how these challenges are addressed by them. I will not venture any further to discuss how the convergence of civil and common law can enrich the principles of evidence. In the panels composed of adjudicators dealing with these issues, it would be helpful to see how the regimes of common and civil law interact with one another in international adjudication. The only general methodological point I wish to make is that due care has to be exercised while borrowing principles from the domestic law on evidence. I like the note of caution appended by Judge McNair in *South West Africa* Cases[7]:

The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel,' ready-made and fully equipped with a set of rules.

One of the distinguishing features of modern adjudicative process is the possibility of individuals having the standing to participate in international adjudication. In the case of investment arbitration and various human rights courts and tribunals, such as the Inter American Court of Human Rights, individuals are the claimants. Although, foreign investors may be at times respondents for causing environmental harm or violating human rights. In the international criminal courts and tribunals, individuals are the accused, respondents in that sense. Does the presence of individuals in any manner affect the approaches towards evidence? In relation to international criminal law, such peculiarity may be required since there are questions of individual liberty and the need of due process. There is a disparity, in the cases brought before international human rights courts, where individuals may be weak against State or investment tribunals, where in some situations individuals may be stronger than some States. In both situations, there appears to be a greater degree of latitude in trying to create parity between the parties. Investment tribunals tend to apply principles of evidence as applied in commercial arbitration, where both parties are often commercial entities or 'business people'. That may not be an appropriate approach to view States. Thus, some of the practices regarding production

[7] *International Status of South West Africa*, Judgment of 11 July 1950, ICJ Reports 1950, 146, Separate Opinion of Judge McNair, p. 148.

of evidence and adverse inference could be excessively intrusive into State sovereignty. Approaches from inter State adjudication may help achieve that balance. In some situations, the approaches may have to be treated *sui generis*, especially in relation to human rights cases or international criminal cases, where some principles of evidence would be peculiar to that regime. I am sure there would be interesting experiences in different fields.

The broader structural point is of fragmentation. The focus of the debate on fragmentation has been primarily on substantive legal provisions. The debate has not entered the procedural side yet. International law is an integrated system and not a hub of distinct hamlets that do not have any relationship with one another. Avoidance of fragmentation does not propose absolute uniformity across all fields of international law. It rather contemplates similarity of a set of principles, unless otherwise specifically altered by unique requirements of the treaty or institutional structure in a specialised field of international law. Application of different principles of evidence would be justified if there is a foundation for departure, but if there is none, then that would result in fragmentation. In the absence of similar approaches, the same situation would result in different outcomes without justification. In a system with multiple courts and tribunals, that is a potential threat.

If we do think that there is a need for similar approaches, and I am sure that during the day, we will be able to understand what approaches can be borrowed from respective specialised fields, then we should also ask the question, whose has the task to identify those rules that would remain similar across fora. International courts and tribunals certainly try to look at the decisions of each other to develop those common approaches, but the restriction is that their mandate is limited to the question of evidence that arises in the proceedings before them. They may not comment generally, despite the desirability of such an exercise. The rules of procedure, especially those that are prepared by the court or tribunal itself, can address purely procedural issues. There may be some problems if issues of evidence that have an implication on the substantive rights of the parties are identified under these rules of procedure. The international criminal courts have detailed rules of evidence, unlike other courts and tribunals. The rules of other courts and tribunals make a limited reference to evidence and are silent on specifics. Scholars have a large role to play. Some have, and we are lucky to have few of them here with us today. The International Law

Commission could be one forum to identify these common rules or practices. The Commission has the benefit of receiving comments and getting approval to its product from States. In this case, even an effort to receive comments from courts and tribunals or international institutions, such as the Permanent Court of Arbitration, or International Centre for Settlement of Investment Disputes, which administers investment arbitration cases, is welcomed. The topic is currently on the Long Term Programme of Work, but yet on its active agenda.

In recent years, we have seen not only the proliferation of courts and tribunals, but also a substantial increase in their caseload. It is not that disputes have suddenly arisen. Disputes always existed. It is not just about the creation of new fora for adjudication. It is due to the greater willingness of States to resort to adjudication as a method of pacific settlement of disputes. Recent times have seen greater participation from all parts of the word. The increased confidence of States in international courts and tribunals is a step towards strengthening the international rule of law.

International law has made major progress in the direction of strengthening of the rule of law through the development of substantive legal provisions. As was well articulated by Lauterpacht in his book called 'The Development of International Law by the International Court'[8], courts and tribunals in the process of adjudication make an immense contribution towards the development of the law. They are not only deciding a dispute, but strengthening the overall architecture of the international community. Through their contributions on the substantive law, they have strengthened the rule of law. The area that needs further development is procedural law, with a focus on evidence. As the clarity about the rules and principles of evidence that are applied by international courts and tribunals increases, the faith amongst its users will enhance. The project of identifying similar approaches across distinct fora will be a major contribution to the rise of international rule of law. I am confident that today's event of 'collective thinking' on evidence is a step in that direction. I very much look forward to the discussion that would follow today and express my gratitude towards you all and the organisers.

[8] H. Lauterpacht, 'The Development of International Law by the International Court'. London, Stevens & Sons, Ltd., New York, Frederick A. Praeger, 1958.

# Дискуссионная панель 1: Доказательства в межгосударственных судебных спорах / Panel 1: Evidence in Inter-State Litigation

*G. Eiriksson**

## Introductory Remarks

I have the honour to moderate the discussion in the first Panel, on Evidence in Inter-State Litigation.

We are well served by the Keynote Statement by Aniruddha Rajput. I am pleased to be with him here in Moscow. Aside from our Indian connections, Aniruddha is a successor of one of my closest colleagues in the United Nations International Law Commission, P.S. Rao. I already know from other members of the Commission that Aniruddha has made a significant contribution to the Commission's work, while only a 'newcomer'. He has already served ably as Chairman of its Drafting Committee.

I am also pleased to follow on from the Welcome Address of Judge Kolodkin, my colleague in the International Tribunal for the Law of the Sea, where I am now serving as a Judge *ad hoc*. I had the privilege of serving for six years on the Tribunal with his distinguished father. The case on which we are serving is very fact-specific, and it can be expected that the Tribunal's Judgment will deal extensively with the matters we will be discussing in this panel.

Very recently, Judge Peter Tomka, Former President and now Senior Judge on the International Court of Justice, and Professor Vincent-Joël

* Judge *ad hoc* in the M/V "Norstar" case, member of the Panel of Conciliators and Panel of Arbitrators at the ICSID, the Panels of Conciliation and Arbitration under the UNCLOS, Professor and Executive Director at the Centre for International Legal Studies of Jindal Global Law School, Fellow of King's College London, Professor Emeritus at the University for Peace.

Proulx published an illuminative article, 'The Evidentiary Practice of the World Court'[1]. They wrote:

> [I]t must be emphasised that the [International Court of Justice] differs in some regards from domestic tribunals, in that the rigidity of evidentiary rules found in some municipal legal systems has not been transposed integrally to the international legal order. Quite the contrary, the 'rule of thumb' for evidentiary matters before the Court is flexibility. … In principle, there are no highly formalised rules of procedure governing the submission and administration of evidence before the Court, nor are there any restrictions about the types of evidentiary materials that may be produced by parties appearing before it[2].

This Panel will explore the special circumstances, which prevail in inter-State litigation. The panellists will reflect on their experience with what we could call the three pillars of the international legal community: the judiciary, the practitioners and academia.

I look forward to our exchanges.

[1] Peter Tomka and Vincent-Joël Proulx, 'The Evidentiary Practice of the World Court', in *Liber Amicorum: In Honour of a Modern Renaissance Man His Excellency Gudmundur Eiriksson*, New Delhi, Universal Law Publishing (Lexis Nexis) 2017, pp. 361–382.

[2] *Ibid.*, p. 363.

*Ph. Couvreur**

# Evidence before the International Court of Justice

Although the general legal framework governing questions of evidence before the International Court of Justice (ICJ, or 'the Court') is quite well known, it is worth recalling its most peculiar features. I will do so briefly, before examining a few specific questions of proof, which have been the subject of discussions recently.

## The evidential system before the Court: general remarks

Broadly speaking, municipal courts can long be said to have utilized two rival systems of evidence: on the one hand, the 'accusatorial' or 'adversarial' system, in which the parties play a preponderant role; and, on the other hand, the 'inquisitorial' system, in which the court predominates. In regard to the International Court of Justice, President Lachs considered, and summed it up in a well-known formula, that 'the Statute and the Rules of Court ... [have] taken ... the best from both systems'[1]. The 'Court [always] aim[s] to hold a middle course between those two systems'[2].

When the first Rules of the Permanent Court were being prepared in 1922, it was pointed out that the evidential system created by the Statute was broad and liberal, based on the freedom of the parties to present their own evidence. Accordingly, the gathering of evidence by the Court itself was purely ancillary, and the Court remained fully at liberty to decide what weight should be given to the evidence provided by the parties[3]. Thus, despite the difficulties which arose in a number of cases, for example, in regard to the presentation of certain documents at the hearing (and in

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[1] La Preuve en droit, Studies published by Ch. Perelman and P. Foriers, Brussels, Bruylant, 1981, p. 114.

[2] M. Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court', in *Essays in honour of Judge Taslim Olawale Elias*, Martinus Nijhoff, 1992, p. 265.

[3] See *PCIJ, Series D, No. 2*, p. 142; *Series D, No. 2, Add.*, pp. 117 et seq.

particular of secret documents), the Permanent Court consistently declined to lay down stricter rules for the production of evidence[4].

The Statute of the present Court has remained virtually unaltered as regards the issues, which concern us here. Although signs have been seen of a somewhat more '*dirigiste*' approach in this respect, in particular during the 1978 revision of the Rules of Court, there can be no doubt that the taking of evidence in the International Court of Justice continues to partake of a liberal regime. The parties enjoy great freedom in relation to the production of evidence, as does the Court in evaluating it. I shall return to selected aspects of this regime in a few moments.

Another important and general aspect of the present topic has to do with the specific nature of the ICJ as the principal judicial organ of the United Nations, its universal composition and the ensuing requirements for the sound administration of international justice. In accordance with the Statute (Art. 25), it is the full Court, which has in principle to perform its functions and exercise its powers in cases submitted to it, including those for evidentiary matters. All the judges composing the Court in a particular case in effect participate, on an equal footing, in all the decisions. When the first Rules of the Permanent Court were adopted in 1922, it was decided not to adopt a rapporteur system, whereby one Member of the Court would be tasked with studying a case in depth and preparing a draft decision to submit to his or her colleagues[5]. Subsequent proposals to that effect were always rejected on the grounds that Article 9 of the Statute made it necessary to ensure representation of all the principal legal systems of the world, and that 'under the régime which that article was intended to establish, all members of the Court should in effect be rapporteurs'[6]. Such a principle, undoubtedly, also applies for every aspects of the conduct of the case. Any decision connected with the taking of evidence has to be made

[4] See *Stauffenberg, Statut et Règlement de la Cour permanente de Justice internationale — Eléments d'interprétation*, Berlin, Carl Heymans, 1934, pp. 365 et seq.

[5] See *PCIJ, Series D, No. 2* (*Preparation of the Rules of Court*), pp. 78, 419. It was, however, agreed that the Court would remain free, in a special instance, to appoint one of its Members to draw up a draft judgment, *ibid.*, p. 78.

[6] *PCIJ, Series D, No. 2, second addendum* (1931), p. 223; see also pp. 222–223.

by the full Court[7], ensuring that all its members take part in the decision on terms of complete equality. It is indeed a guarantee that, in evidentiary matters as well, justice can be done impartially, in full respect of the variety of legal cultures and equality of the States appearing before the Court. For this reason too, in keeping with the responsibility of the Bench as a whole for the proper administration of justice, the Court has so far excluded the practice when the task of taking of evidence in a particular case is entrusted to a limited number of judges, not to say to a single judge, even if such a solution could appear as being faster or more practicable.

Among the general principles governing the question of evidence before the Court, mention has also to be made of the classic definition of proof, which, according to municipal courts, is essentially a matter of establishing facts, which create consequences in law. The ICJ explicitly referred to the principle *jura novit curia*, in affirming that '[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court'[8]. The application of this principle to the

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[7] *See* Art. 48 of the Statute: 'The Court shall make orders for the conduct of the case, (…) and make arrangements connected with the taking of evidence'; cf. also Articles 49 and 50 of the Statute.

[8] *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*) and (*Federal Republic of Germany* v. *Iceland*), Merits, Judgment, ICJ Reports 1974, p. 9, para. 17, and p. 181, para. 18, quoted *in Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, pp. 24–25, para. 29. See also, *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*), Judgment, ICJ Reports 1992, p. 547, para. 311.
From its very beginnings, the Permanent Court sought to assert its responsibility for establishing the rules of international law, which were relevant to its decisions. In this respect, general pronouncements have been made by the Permanent Court in the *Lotus* case: '[I]n the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement.'(*PCIJ, Series A, No. 10,* p. 31); and in the case concerning *Free Zones of Upper Savoy and the District of Gex*: '[I]t cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties,

international order may have raised some doubts, and questions of proof have also arisen in connection with customary law[9].

Be it as it may, I shall limit my further observations to questions of proof in relation to the evidence of facts only, by addressing, first, that of the burden of proof, second, that of the methods of proof and forms of evidence, and third, that of the 'standard of proof' applicable before the Court.

## Burden or onus of proof

Turning to the question of the burden of proof, the principle is well established, in the jurisprudence of the Court, that

> '…the applicant must establish its case and that a party asserting a fact must establish it; as the Court observed (…), "it is the litigant seeking

none of which may correspond to the opinion at which it may arrive',(*PCIJ, Series A/B, No. 46,* p. 138).

[9] See, for example, L. Ferrari Bravo, 'La prova nel processo internazionale', Naples, Jovene, 1958, pp. 70 *et seq.*

Without being hostage to the parties' arguments, the Court has very often benefited from their assistance, in particular in proving facts on which the existence of a customary rule depended, cf. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 25, para. 29: 'Nevertheless the views of the parties to a case as to the law applicable to their dispute are very material, particularly (…) when those views are concordant.' See also, for example, the *Corfu Channel case* (Judgment, ICJ Reports 1949, pp. 28–29) and the *Asylum case* (Judgment, ICJ Reports 1950, pp. 276–277). See further *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Merits, Judgment, ICJ Reports 1997, pp. 39–40, para. 50: 'In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States.'

Questions of law (other than customary international law *stricto sensu*) may also be the subject of proof, as, for example, when the Court is requested to determine that there was a tacit agreement between the parties establishing a boundary. 'The Court, recognizing that "[t]he establishment of a permanent maritime boundary is a matter of grave importance", underlined that "[e]vidence of a tacit legal agreement must be compelling." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), Judgment, ICJ Reports 2007, II, p. 735, para. 253)', *Maritime Dispute* (*Peru* v. *Chile*), Judgment, ICJ Reports 2014, p. 38, para. 91.

to establish a fact who bears the burden of proving it". (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 437, para. 101)'[10].

Irrespective of the status of the parties as Applicant or Respondent[11], or in the absence of such formal position in cases submitted to the Court by way of a special agreement, the Court has pointed out that the burden will lie on the party asserting certain facts in support of its claims[12].

The *actori incumbit probatio* principle (together with its corollary, *reus in excipiendo fit actor*), may certainly be considered as a general principle of law in accordance with Article 38 of the Statute of the Court[13]. This principle, as has been aptly submitted, proved to allow 'sufficient flexibility [for the Court] to cope with the demands of the wide variety of disputes coming before [it]'[14]. Whatever problems have sometimes been raised in connection with the allocation of the burden of proof, 'a question which is for the Court to decide'[15], 'the Court has developed a pragmatic and effective approach to

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro),* Merits, Judgment, ICJ Reports 2007, p. 128, para. 204. See also *Frontier Dispute (Burkina Faso/Republic of Mali),* Judgment, ICJ Reports 1986, p. 587, para. 64; *Avena and Other Mexican Nationals (Mexico* v. *United States of America),* Judgment, ICJ Reports 2004, p. 41, para. 55; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Judgment, ICJ Reports 2010, p. 71, para. 162; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia),* Merits, Judgment, ICJ Reports 2015, p. 73, para. 172.

[11] The principle 'applies to the assertions of fact both by the Applicant and the Respondent', *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Judgment, ICJ Reports 2011, p. 71, para. 162.

[12] *Minquiers and Ecrehos (France/United Kingdom),* Judgment, ICJ Reports 1953, p. 9; *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand),* Merits, Judgment, ICJ Reports 1962, p. 15.

[13] See for example, J.-F. Lalive, op. cit., p. 78; Bin Cheng, 'General Principles of Law as Applied by International Courts and Tribunals', Grotius Classic Reprint Series, Cambridge, 1987, pp. 302 et seq.; A. Riddell, B. Plant, 'Evidence before the International Court of Justice', London, British Institute of International and Comparative Law, 2009, p. 87.

[14] A. Riddell, B. Plant, *op. cit.*, p. 88.

[15] *Minquiers and Ecrehos (France/United Kingdom),* Judgment, ICJ Reports 1953, p. 47.

[them]'[16]. Indeed, we can here recall the words of Lauterpacht, for whom 'in the international sphere (…) flexibility is the guiding principle' when one turns to the question of evidence and burden of proof, 'because the importance of the interests at stake precludes excessive or decisive reliance upon formal or technical rules'[17].

A few remarks may be made on this aspect of the practice of the Court. First, the Court has adopted a nuanced approach to the principle *actori incumbit probatio*, stating that:

> 'This principle is not an absolute one (…), since "[t]he determination of the burden of proof is in reality dependent on the subject matter and the nature of [the] dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case". (*Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), Merits, Judgment, ICJ Reports 2010, II, p. 660, para. 54). In particular, the Court has recognized that there may be circumstances in which the Applicant cannot be required to prove a 'negative fact' (*ibid.*, p. 661, para. 55)[18].

Accordingly, in the particular circumstances of the *Ahmadou Sadio Diallo* case, it was alleged by the Applicant that the individual concerned had not been afforded, by a public authority of the Respondent, certain procedural guarantees to which he was entitled, the Court found that 'neither party is alone in bearing the burden of proof' and linked that question with its own responsibility 'to evaluate all the evidence produced by the two Parties and duly subjected to adversarial scrutiny'[19].

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[16] *Ibid*.

[17] H. Lauterpacht, 'The Development of International Law by the International Court of Justice', London, Stevens and Sons, 1958, p. 366.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Merits, Judgment, ICJ Reports 2015, p. 73, para. 172.

[19] *Republic of Guinea* v *Democratic Republic of the Congo,* Merits, Judgment, ICJ Reports 2010, p. 661, para. 56. See also *id.*, para. 55: 'A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law – if such was the case – by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in

At the same time, the Court has avoided reversing too easily the burden of proof from the Applicant to the Respondent, owing to the alleged exclusive control of the latter on the production of certain evidence, and has refrained from drawing direct consequences as to the proof of disputed facts in such circumstances.

In the *Corfu Channel* case, the Court observed that

> '…it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein (…). This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof'[20].

In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court decided that

> '…neither the subject matter nor the nature of the dispute [made] it appropriate to contemplate a reversal of the burden of proof. It [was] not for Serbia to prove a negative fact, for example the absence of facts constituting the *actus reus* of genocide… Consequently, it [was] for Croatia to demonstrate the existence of the facts put forward in support of its claims, and the Court [could] not demand of Serbia that it provide explanations of the facts alleged by the Applicant'[21].

Rather than shifting 'mechanically' the burden of proof, the Court has emphasized the duty of the parties to cooperate 'in the provision of such evidence as may be in [their] possession that could assist the Court in resolving the dispute submitted to it' (*Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*), Judgment, ICJ Reports 2010, I, p. 71, para. 163)[22].

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question; some obligations normally imply that written documents are drawn up while others do not.'

[20] *Corfu Channel* Case (*United Kingdom/Albania*), Merits, Judgment, ICJ Reports 1949, p. 18.

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Merits, Judgment, ICJ Reports 2015, pp. 73–74, para. 174.

[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Merits, Judgment, ICJ Reports 2015, p. 73, para. 173 ('In

It also considered that a 'more liberal recourse to inferences of fact and circumstantial evidence' should be allowed to the State, which is unable to furnish direct proof of facts giving rise to responsibility when it cannot have access to such proof[23].

Thus, in this context as well, it may be said that the Court puts a greater emphasis on leaving a large freedom to the parties to present their evidence (*i.e.* a wide array of 'methods of proof') and, as a corollary, on its own independent assessment of this evidence[24], than on 'formal or technical rules' on the burden of proof.

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this regard, the Court recalls that, between September 2010 and May 2011, Serbia provided Croatia with approximately 200 documents requested by the latter.').
See also, *Avena and Other Mexican Nationals (Mexico* v. *United States of America),* Judgment, ICJ Reports 2004, pp. 41–42, para. 57: 'The Court cannot accept that, because such information may have been in part in the hands of Mexico, it was for Mexico to produce such information. It was for the United States to seek such information, with sufficient specificity, and to demonstrate both that this was done, and that the Mexican authorities declined or failed to respond to such specific requests. At no stage, however, has the United States shown the Court that it made specific enquiries of those authorities about particular cases and that responses were not forthcoming. The Court accordingly concludes that the United States has not met its burden of proof in its attempt to show that persons of Mexican nationality were also United States nationals.'

[23] *Corfu Channel* Case (*United Kingdom/Albania*), Merits, Judgment, ICJ Reports 1949, p. 18.
See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Merits, Judgment, ICJ Reports 2007, pp. 128–129, paras. 205–206: in response to the contention from the Applicant that in certain respects the onus should be reversed, given the refusal of the Respondent to produce the full text of certain documents (documents of the Supreme Defence Council of the Respondent), and that the Court should draw its own conclusions from the failure of the Respondent to produce complete copies of the documents, the Court observed that 'the Applicant ha[d] extensive documentation and other evidence available to it' and had made very ample use of it, and that 'although the Court ha[d] not agreed to either of the Applicant's requests to be provided with unedited copies of the documents, it ha[d] not failed to note the Applicant's suggestion that the Court may be free to draw its own conclusions'.

[24] Referring to the rule affirmed by the Court in the *Corfu Channel* case, according to which 'the proof may be drawn from inferences of fact [or "by means of indirect evidence"], provided that they leave *no room* for reasonable doubt' (emphasis from the Court). J.-F. Lalive observed that it 'confirmed the system of inner conviction, applied

### Methods of proof, forms and administration of evidence

With regard to the question of the methods of proof and forms of evidence admissible before the Court, a question, the solution of which in the international order reflects the varying choices, which have been made in municipal systems, concerns the hierarchy of different forms of evidence. Oral evidence, by far the oldest, has remained of fundamental importance in Anglo-Saxon systems of law. Continental courts, on the other hand, traditionally regard it with suspicion; as has been said in the context of civil law, 'of all the various kinds of evidence, it is written evidence in which the law places the greatest trust'[25].

It is generally the case that although the Court, and most arbitral tribunals, have been influenced primarily by continental law in this respect – written evidence having always been more common in the Court than witness evidence – the Statute does not as such establish a formal hierarchy 'as to the respective value of these forms of evidence'[26]. The greater weight of documentary evidence is also readily explicable by the fact that written pleadings constitute from far the most substantial part of the Court's proceedings and that, in practice, the bulk of evidence is produced at that stage.

At all events, in the liberal evidential regime, which prevails in the Court, the notions of 'document' and 'witness evidence' must be construed broadly: their boundaries are not defined with precision.

A further point of note in this respect is that on many occasions the Court has agreed to the production of 'sworn statements' (*affidavits*), a hybrid form of evidence common in Anglo-Saxon law. It consists in the evidence being taken by a public official and recorded by him in a formal

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from the beginning by the Permanent Court', *loc. cit.*, p. 87 ('Cette règle confirme le système de la conviction intime, appliqué dès le début par la Cour permanente').

[25] Baudry-Lacantinerie, Précis de droit civil, Sirey, 1910, Vol. II, Part 2, No. 1159. It is of interest to note that the preference given to written evidence under Article 1341 of the Code Napoléon goes back to the famous *Ordonnance de Moulins* of 1566 (as supplemented in 1667), whose authors had attempted, on the one hand, to reduce the number and length of proceedings and, on the other, to protect disputed rights against evidence given by witnesses of sometimes questionable honesty and independence.

[26] J.-F. Lalive, *op. cit.,* p. 88.

instrument drawn up in accordance with the provisions of his national law. Although the author of such a statement can be required to confirm or amplify his evidence at the oral stage, nonetheless, in principle, this form of evidence has the advantage of being both economical, because the declarant is not normally required to appear in court, and convenient, since, generally speaking, any problems which might arise in connection with the calling of a witness, who is not a national of a State party to the proceedings, will be avoided[27]. It can be said that, globally, these 'sworn statements' have been of little weight in the practice of the Court.

In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), the Court recalled

> '…that neither its Statute nor its Rules lay down any specific requirements concerning the admissibility of statements which are presented by the parties in the course of contentious proceedings, whether the persons making those statements were called to give oral testimony or not. The Court leaves the parties free to determine the form in which they present this type of evidence. Consequently, the absence of signatures of the persons who made the statements or took them does not, in principle, exclude these documents. However, the Court has to ensure that documents, which purport to contain the statements of individuals who are not called to give oral testimony, faithfully record the evidence actually given by those individuals. Moreover, the Court recalls that even affidavits will be treated "with caution" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), Judgment, ICJ Reports 2007, II, p. 731, para. 244). In determining the evidential weight of any statement by an individual, the Court necessarily takes into account its form and the circumstances in which it was made. The Court has thus held that it must assess "whether [such statements] were made by State officials or by private persons not interested in the outcome of the proceedings

[27] In the *South West Africa* cases, however, the Court refused the Applicants' request that the Respondent should be required to employ this form of proof, and allowed the latter to present witnesses at the hearing (ICJ Pleadings, Oral Arguments, Documents, Vol. VIII, p. 42).

and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events" (*ibid.*). On this second point, the Court has stated that "testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, [is not] of much weight". (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 42, para. 68, referring to *Corfu Channel,* ICJ Reports 1949, p. 17) Lastly, the Court has recognized that "in some cases evidence which is contemporaneous with the period concerned may be of special value" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), Judgment, ICJ Reports 2007, II, p. 731, para. 244)'[28].

It should also be stressed that when, as is the case with the Court, the written rules tend generally to confine themselves to certain specific forms of evidence (such as mainly documents, but also witness evidence, expert opinions, investigations and inspections), other forms (for example, presumptions), nevertheless, remain acceptable in principle, the freedom of the parties to resort to them being counterbalanced by that of the Court to assess their value in each case[29].

In practice, and in accordance with the Statute and the Rules of Court, the initiative with regard to the production of evidence will come mainly from the parties, which enjoy a great deal of freedom to

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Merits, Judgment, ICJ Reports 2015, pp. 77–78, paras. 196–197.

[29] *See*, for example, A. Aguilar 'Evidence before the International Court of Justice', Essays in honour of Wang Tieyer, Dordrecht, Nijhoff, 1993, p. 539.
It should be added that, in certain circumstances, the Court itself has not hesitated to rely directly on items such as 'matters of public knowledge'. In the Judgment of 24 May 1980, in the case of the *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*), the Court stated that '[t]he essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press' (ICJ Reports 1980, p. 9, para. 12), and it went on to find that '[t]he information available . . . is wholly consistent and concordant as to the main facts and circumstances of the case' (*ibid.*, p. 10, para. 13). See also, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 40–41, paras. 62–64.

that effect. That in no way precludes the Court from being itself able, in addition, to call for particular evidence. The Court stated that '[a] s to the facts of the case, in principle [it] is not bound to confine its consideration to the material formally submitted to it by the parties,'[30] subject to their procedural rights.

Indeed, and this is essential to underline, the system of evidence before the Court is mainly directed, as it is the case in continental law procedure, at the establishment of an objective truth[31]. This system can in no way be assimilated or reduced to a pure contest between the parties, in which the Court, exercising a limited and passive role, would appear as a mere 'referee', whose role would only be to ensure the observance of technical rules of presentation and admissibility of evidence[32]. In this respect, the Statute (Articles 48 to 50) and the Rules of Court furnish it with ample means at every stage of the proceedings, both of procuring evidence *stricto sensu* and more generally of obtaining information.

In practice, the Court's role may vary, from an attitude of restraint, leaving the administration of evidence almost entirely in the hands of the parties, to a more direct role. To illustrate this, I shall only make very brief remarks regarding some aspects of the administration of evidence before the Court, which attracted particular attention recently, namely: the use and role of experts in proceedings before the Court. Before doing so, let me just recall that, as a general matter, the use of experts may be necessary for different purposes and in different circumstances, namely: 1) when

[30] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 25, para. 30. The principle may hold true even in cases where both parties appear before the Court.

[31] In the *Corfu Channel* case, the Court referred to the need 'to obtain any technical information that might guide it *in its search for the truth*' (emphasis added), and to commission an expert opinion to that end. *Corfu Channel*, Merits, Judgment, ICJ Reports 1949, p. 20.

[32] G. Guillaume, ' Preuves et mesures d'instruction devant les juridictions internationales', in *La Cour internationale de Justice à l'aube du XXIème siècle*. Le regard d'un juge, Pedone, Paris, 2003, p. 88. In this regard, the system stands in marked contrast with that of municipal courts in countries of common law, where the role of the court and the technical rules of evidence are linked with the system of jury trial, *ibid*. (with references to similar views expressed by Rosenne and Sandifer).

the establishment or assessment of facts of a technical or scientific nature, which are disputed between the parties, is a pre-condition for the decision that the Court has to make as a matter of law (*a* and *b*); and 2) as a means permitting a better understanding of technical or scientific information, and/or as a tool enabling the Court in framing its decision in technical terms (*a*, *b* and *c*).

a) First, while leaving most of the time for the production of evidence, including recourse to expert opinions, to the exclusive responsibility of the parties, the Court may exercise control over the forms and procedure through which such evidence should be presented. In this connection, the Court has emphasized, in the case concerning *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*)[33], that a more stringent demarcation should be adopted between the use of technical experts appearing as counsel on behalf of the parties and members of their delegations before the Court, and that of 'independent' experts called upon by a party to give evidence at the hearings.

It may however be pointed out that, whenever doubts had arisen in the past as to the capacity in which a counsel for one party was addressing the Court at the hearings, the matter was resolved without great difficulty. Thus, the Rules of Court allow sufficient flexibility, taking into account the freedom, which each of the parties should enjoy in selecting their representatives at hearings before the Court, to address any practical difficulty, which may arise in each specific case.

In some cases, it was the mutual understanding of the parties that a member of one party's delegation would speak as counsel and not as an

[33] *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*), Judgment, ICJ Reports 2010, p. 72, para. 167: 'it would have found more useful [if the experts who had appeared before it as counsel at the hearings had been] presented by the parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations'. The Court, indeed, considered 'that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court'. See also the separate opinion of Judge Greenwood, *ibid.*, p. 231, para. 27.

expert or a witness within the meaning of Article 57 of the Rules of Court[34]. In another instance, a representative of the applicant who appeared to give evidence from his own personal experience was requested by the President to make the solemn declaration, under Article 64 of the Rules of Court, and was subsequently treated as a witness whom the other party could cross-examine[35].

The precedent of the *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*) case also prompt the question of the actual difference between the 'experts members of a party's delegation' and the 'experts called by the parties'. Indeed, they all take part in the adversarial process, notwithstanding the different formalities that are applied, and are called upon to reply, in a more or less direct way, to questions put by the judges, with the parties always having the opportunity to comment on the answers given. It is generally emphasized that the experts, called by the parties to give evidence in the oral proceedings, make a solemn declaration and are therefore to be considered as 'independent'. Whereas experts appearing before the Court as members of a delegation are acting as 'counsel' for one party, whose statement may be given the same treatment as is given by the Court to the statement made by any other counsel or advocate.

In the recent cases between Costa Rica and Nicaragua concerning *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa*

[34] See the clarification requested by Professor Crawford, counsel for the other Party, and the confirmation given by the President, regarding the statement made by a Slovakian expert on hydrology and groundwater in the case concerning the *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Public Sitting held on 25 March 1997, CR 97/8, p. 39. See also, in the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), the statement made by the President of the Court whereby he reiterated that the presentation made by a representative of Uganda, drawing on his direct involvement in the disputed facts, had been made in his capacity of counsel and advocate, and that the Court would consider that the presentation had been made not in his own capacity, but in the name of the Republic of Uganda, and would be given the treatment as is normally given to the statements made by any other counsel and advocate (Public sitting held on 18 April 2005, CR 2005/7, p. 53).

[35] *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America* v. *Italy*), I.C.J. Pleadings, Oral Arguments, Documents, Vol. III, Public sitting held on 27 February 1989, pp. 301–304.

*Rica* v. *Nicaragua*) and the *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*), the Court invited the Parties to call experts at the hearings, and the reports had been annexed to their written pleadings. Hence, these experts, initially hired by the Parties, were eventually considered as 'independent' experts, within the meaning of Article 57 of the Rules of Court, by making the solemn declaration required under Article 64 of the same Rules, and were accordingly submitted, in that capacity, to questioning by the other party and the Court.

Indeed, the examination and cross-examination of experts called by the parties may prove useful to test experts' statements or opinions, and thus strengthen their objectivity. However, one may doubt that such a formal distinction bears such significance that it would, in any circumstances, drastically transform the actual nature of the evidence submitted.

b) The Court may indeed appoint its own experts, under Article 50 of the Statute, when it cannot merely rely on the evidence and expert opinions submitted by the parties. In this respect, the Court may exercise its powers, either at the request of the parties or *proprio motu*, 'at any time' during the proceedings in a case[36]. In such an event, the Court would most certainly always take great care of not impairing the equality of the parties and their respective burden of proof.

The Court has had only seldom recourse to such experts in practice[37], and it has been sometimes characterized as being reluctant to do so. It should, however, be kept in mind that the purpose of an independent expert opinion 'must be to *assist* the Court in giving judgment upon the

[36] At the oral stage of the proceedings, the Court can also examine witnesses and experts, either at the request of the parties or on its own initiative. The hearing of witnesses and experts is provided for in Article 43, paragraph 5, of the Statute, which defines the oral proceedings as consisting 'of the hearing . . . of witnesses, experts, agents, counsel, and advocates'. This provision is supplemented by Article 51 of the Statute. It provides that during the hearing, the Court may put 'any relevant questions . . . to the witnesses and expert'.

[37] *See* Ph. Couvreur, 'The Use of Experts by the International Court of Justice for Disputes Concerning the Law of the Sea', in *New Approaches to the Law of the Sea (in Honour of Ambassador José Antonio de Yturriaga-Barberan)*, 2017, pp. 111–123.

issues submitted to it for decision'[38]. In this respect, the Court necessarily enjoys a broad discretion, and the Members of the Court may often have diverging views about the sufficiency of the evidence provided by the parties, the added-value and the need of any additional expert opinions, or, even, the relevance of any expert assessment in determining the question or issue to be decided by the Court[39]. Although one may identify several scenarios in which the Court may need to appoint its own experts[40], it is doubtful that any rigid standard should apply in this matter. Be it as it may, as far as the procedural aspects of the appointment of experts by the Court are concerned, the Statute and the Rules of Court appear to provide a well-suited framework, offering both the flexibility and the guarantees needed.

c) On another point, some commentators, and indeed Members of the Court, have questioned the Court's practice of sometimes having recourse to technical experts by seeking the assistance of individuals hired by the Registry[41]. According to such views, it would in fact be contrary to the basic principles of the sound administration of justice if the Court were to decide, on the basis of advice given by such 'experts', questions of fact or law which had not been sufficiently discussed by the parties in the course of the proceedings. One may doubt, however, that the Court would in any event overlook such a fundamental rule. In fact, the recourse to such 'experts' (whom it would be better to call 'consultants') has never been more than a useful and legitimate means for Judges, in practice, to gain a better understanding of technical or scientific aspects of the evidence discussed by the parties, and/or of assisting

[38] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf,* (*Tunisia* v. *Libyan Arab Jamahiriya*), Judgment, ICJ Reports 1985, p. 228, para. 65 (emphasis added). See also *Frontier Dispute* (*Burkina Faso/Mali*), Order, ICJ Reports 1987, p. 10.

[39] See *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand intervening*), Judgment, ICJ Reports 2014, p. 257, para. 82.

[40] See the address of the President of the Court, H.E. Judge Abdulqawi Ahmed Yusuf, to the Sixth Committee of the General Assembly, on 26 October 2018, available at <https://www.icj-cij.org/en/statements-by-the-president>.

[41] Out of concerns for 'transparency, openness, procedural fairness, and the ability for the Parties to comment upon or otherwise assist the Court in understanding the evidence before it', *Pulp Mills on the River Uruguay* (*Argentina* v. *Uruguay*), Joint Dissenting Opinion of Judges Simma and Al Khasawneh, ICJ Reports 2010 (I), p. 114, para. 14.

them in framing their own decision in technical terms. It has certainly never happened that 'experts' of this kind have been called upon to pronounce on the scientific arguments made by the parties or to express views which could in any way influence the Judges' own appraisal. The role of these consultants, always strictly defined, is identical to that of the Registry staff. As such, it is not only very useful, but also an unavoidable one. It is very telling that the use of the so-called 'experts' is a longstanding and well-known practice.

### 'Standard of proof'

It is only recently that the Court referred explicitly to such a concept as that of a 'standard of proof', in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*)[42]. It is doubtful, however, that there exists a proper 'standard of proof', as it is known in common law countries, applicable as such before the Court.

It is indeed a long established general principle in the international jurisprudence that international Courts or Tribunals have 'freedom in estimating the value of the various elements of evidence'[43]. The drafters of the first Rules of Court of the PCIJ rejected a proposal to reaffirm this principle for, as it was said on this occasion, 'the rule (…) hold good whether actually expressed or not'[44]. It has thus been widely acknowledged that, in

[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 120, para. 181, pp. 127–130, paras. 202–210.

[43] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 40, para. 60: referring to the need for the Court, under Article 53 of the Statute, to satisfy itself whether the submissions of the applicant State were well-founded in fact and law, it indicated 'that its role [was] not a passive one; and that, within the limits of its Statute and Rules, it ha[d] freedom in estimating the value of the various elements of evidence, though it [was] clear that general principles of judicial procedure necessarily govern the determination of what can be regarded as proved'.

[44] PCIJ, Drafting of the Rules of Court (1922), Series D, n°2, p. 148 (the Court rejected the draft rule 55 ['The Court shall estimate the value of the various elements of evidence'], p. 467). See also: *Certain German Interests in Polish Upper Silesia,* Merits, PCIJ Series A, No. 7, p. 73 ('The Court is entirely free to estimate the value of statements made by the Parties'/'La Cour a toute liberté d'apprécier les allégations faites par les parties').

respect of the evaluation of evidence, the Court belongs largely to the civil law system or legal tradition[45]. The rule ultimately applicable is in reality the rule of the judge's own conscience, '*l'intime conviction*'[46],

Notwithstanding this general principle, the Court has indeed set out several criteria based on which it would usually ascertain the value of certain evidence or materials. In its judgments in the *Congo* v. *Uganda* case, or in the *Genocide* cases (*Bosnia-and-Herzegovina* v. *Serbia* and *Croatia* v. *Serbia*), and following its practice in previous cases[47], the Court dealt extensively with the weight to be given to particular items of evidence (*e.g.* materials prepared for the case, or emanating from a single source; contemporaneous evidence from persons with direct knowledge; statements against interest; evidence obtained by examination of persons directly involved and subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information).

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[45] However, in continental law systems, and for civil law matters, some categories of 'legal proof' (*preuves légales*) remain applicable and may be binding on the judge (*actes authentiques, serments, aveu*), subject to the absence of contradicting evidence put forward by the other party.

[46] 'The only rule applicable . . . in the case of a High Court like yours is the rule of the judge's own conscience, i.e. in reality, the confidence which the international community places in the Judges of the International Court of Justice. The adoption of this rule without reserve or limits is evidently a tribute to the dignity of the Court', CR 49/1 [Cot], *Corfu Channel* case, Pleadings, vol. III, p. 353.

A very telling evocation of such principle may be found in the instruction read by the President to the jurors and judges sitting in criminal courts, as provided for in the French Code of criminal procedure (article 353): 'Subject to the requirement to state the reasons for a decision, the law does not ask [the Court] to account for the means by which [it] became convinced, nor does it impose any rules by which [it] must specifically determine the completeness and sufficiency of evidence; the law requires [it] to question [itself], in silence and reflection, and to ascertain, in the sincerity of [its] conscience, what impression has been made on [its] mind by the evidence brought against the accused and the arguments in defence. The law asks [it] but one question, which encompasses the full extent of their duties: "Are you inwardly convinced?"'

[47] *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports 1980, pp. 9–10, paras. 11–13; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, pp. 39–41, paras. 59–73.

In the case concerning *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), the Court stated the following:

> 'The Court will treat with caution evidentiary materials specially prepared for [the] case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Merits, Judgment, ICJ Reports 1986, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains. The Court moreover notes that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention. The Court thus will give appropriate consideration to the Report of the Porter Commission, which gathered evidence in this manner. The Court further notes that, since its publication, there has been no challenge to the credibility of this Report, which has been accepted by both Parties.'[48]

In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), the Court added that:

> 'The fact-finding process of the ICTY falls within this formulation, as "evidence obtained by examination of persons directly involved", tested by cross-examination, the credibility of which has not been challenged subsequently.'[49]

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[48] Judgment, ICJ Reports 2005, p. 35, para. 61. See also paras. 78–79, 114 and 237–242. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Merits, Judgment, ICJ Reports 2007, pp. 130–131, para. 213.

[49] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Merits, Judgment, ICJ Reports 2007, p. 131, para. 214.

'The Court was also referred to a number of reports from official or independent bodies, giving accounts of relevant events. Their value depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral); (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process); and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

'One particular instance is the comprehensive report, "The Fall of Srebrenica", which the United Nations Secretary-General submitted in November 1999 to the General Assembly (United Nations doc. A/54/549). It was prepared at the request of the General Assembly, and covered the events from the establishing by the Security Council of the 'safe area' on 16 April 1993 (Security Council resolution 819 [1993]) until the endorsement by the Security Council on 15 December 1995 of the Dayton Agreement. Member States and others concerned had been encouraged to provide relevant information. The Secretary-General was in a very good position to prepare a comprehensive report, some years after the events, as appears in part from this description of the method of preparation: (…).

'The care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it. As will appear later in this Judgment, the Court has gained substantial assistance from this report.'[50]

Obviously, the indications thus provided by the Court cannot by themselves be determinative as regards the 'standard of proof' to be met by the parties in each particular case. Rather, they appear as being informal directions or guidance from the Court, which may assist the parties in selecting the evidence they wish to present to the Court.

As far as the question of the 'standard of proof' is concerned, the few statements made by the Court in the *Genocide* cases fell short of establishing a clear-cut approach to that matter. The Court, indeed, noted that 'claims against a State, involving charges of exceptional

[50] *Ibid.*, pp. 135–136, paras. 227–230.

gravity, must be proved by evidence that is fully conclusive', whereas other claims, it found, only require 'proof at a high level of certainty':

'The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel* (*United Kingdom* v. *Albania*), Judgment, ICJ Reports 1949, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.

'In respect of the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.'[51]

Nevertheless, it remains difficult to interpret these, or other statements from the Court in light of, let alone assimilate them to, the concepts used in the common law system[52], be it the standard of proof 'beyond reasonable

[51] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Merits, Judgment, ICJ Reports 2007, pp. 129–130, paras. 209–210. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Merits, Judgment, ICJ Reports 2015, p. 74, paras. 177–178

[52] President Higgins acknowledged that '[t]here have been some curious comments by observers as to this ["fully convincing evidence" standard] being a "higher" or "lower" standard than "beyond reasonable doubt". It is simply a *comparable* standard, but employing terminology more appropriate to a civil, international law case'. *Address to the Sixth Committee of the General Assembly, on 2 November 2007,* p. 5 (emphasis by the author), available at <https://www.icj-cij.org/en/statements-by-the-president>. See also J.-M. Grossen, 'A propos du degré de la preuve dans la pratique de la Cour internationale de Justice', in *Perspectives du droit international au XXIème siècle* (Liber Amicorum Christian Dominicé), Leiden/Boston, Martinus Nijhoff, 2012, p. 266.
It is interesting to note that the *dictum* of the Court, in the *Corfu Channel* case, regarding evidence of allegations of an exceptional gravity, was in fact advocated by the Counsel for Albania (Cot), in the following terms: 'le demandeur doit aussi bien prouver l'existence de la règle de droit qu'il invoque que le manquement du défendeur à cette règle, et, dans les deux cas, sa preuve doit être assez complète pour convaincre le juge, c'est-à-dire pour faire jaillir la vérité. C'est en effet la vérité qu'il s'agit d'établir, et non pas

doubt' (as used in criminal matters) or the balance of probabilities/ preponderance of evidence (as used in civil matters)[53].

une approximation ou des probabilités. La preuve doit tendre à la vérité. Ce principe s'impose avec d'autant plus de rigueur au juge international qu'on lui demande de prononcer une condamnation plus importante. Une décision qui risquerait de ruiner un Etat et, surtout, de le déshonorer doit évidemment se fonder sur des certitudes. La preuve que le demandeur doit faire en ce cas doit satisfaire les plus exigeants, et l'exigence du juge en cette matière est une garantie à laquelle ont droit tous les Etats', *Pleadings*, vol. III, p. 352.

The Court observed that 'The statements attributed by the witness Kovacic to third parties, of which the Court has received no personal and direct confirmation, can be regarded only as allegations falling short of conclusive evidence [*des allegations sans force probante suffisante*]. A charge of such exceptional gravity against a State [*i.e.* that the minefield was laid with the connivance of the Albanian Government] would require a degree of certainty that has not been reached here', ICJ Reports 1949, pp. 16–17.

The Court referred to the proof 'beyond reasonable doubt' in connection with indirect evidence that Albania had knowledge of minelaying in her territorial waters: 'This indirect evidence [by way of inferences of fact and circumstantial evidence] is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion. The Court must examine therefore whether it has been established by means of indirect evidence that Albania has knowledge of minelaying in her territorial waters independently of any connivance on her part in this operation. The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt. The elements of fact on which these inferences can be based may differ from those which are relevant to the question of connivance' (emphasis by the Court in the English version), *ICJ Reports 1949*, p. 18. In this connection, however, the Court arguably did not require a standard of proof as stringent as that applied to establish Albania's direct participation in the minelaying, and relied on 'a series of facts linked together and leading logically to a single conclusion' (*id.*, pp. 18–22); cf. K. Del Mar, 'The International Court of Justice and standards of proof', in *The ICJ and the Evolution of International Law — The enduring impact of the Corfu Channel case*, ed. K. Bannelier *et al.*, London, Routledge, 2012, p. 114.

[53] See *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*), Judgment, ICJ Reports 1992, p. 434, para. 121 ('This hill, which lies on the correct bearing and close to a settlement marked on those maps as Santa Rosa, appears to the Chamber to be, *in all probability*, the "Santa Rosa hillock" referred to in the 1829 survey.'); p. 456, para. 155 ('The Chamber considers that it is impossible to reconcile all the landmarks, distances and directions given in the various 18th century surveys in this region: the most that can be achieved is a line which harmonizes with such features as are identifiable *with a high degree of probability*, corresponds more or

Therefore, the Court certainly retains the liberty to address in each case the degree of proof it deems adequate, taking into account the subject matter of the dispute, or the specific types of claims put forward by the parties.

Leaving aside the difficulties, which would most certainly arise, one should endeavour to define with precision any relevant 'standard of proof' applicable before the Court, the opportunity of such an endeavour may be questioned. The Court is not only a judge of first and last instance, whose judgments cannot be subject to any appeal or review. It is also a collective body, whose authority derives from the careful and intensive deliberations carried out by its 15 members (and possibly Judges *ad hoc*) in each case. It is for that reason that the system of '*l'intime conviction*', which has been said to be a 'tribute to the dignity of the Court', and the mark of 'the confidence, which the international community places in the Judges of the International Court of Justice'[54], has long been recognized as well-adapted to the highest judicial organ of the United Nations and to the rich diversity of cases submitted to it.

As long as the concept of 'standard of proof' itself entails a degree of subjectivism and discretion of judgment[55], its comparative advantage with regard to the system of the judges' 'inner conviction' is at least debatable. In the end, the real issue might not be that of defining in the abstract clear-cut standard(s) or degree(s) of proof, but rather of 'even-handedness and transparency in the treatment of evidence'[56], and of proper drafting and reasoning provided by the Court in its Judgments.

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less to the recorded distances, and does not leave any major discrepancy unexplained.'); p. 506, para. 248 ('Accordingly the Chamber considers, *on a balance of probabilities*, there being no great abundance of evidence either way, that the river Las Cañas was the provincial boundary, and hence the *uti possidetis* line, downstream as far as the point where it turns southwards, to merge eventually with the river Torola.') [emphasis added].

[54] See *supra*, Cot, in the *Corfu Channel* case, note 45.

[55] *See* J.-M. Grossen, *op. cit.*, p. 267, and the references to G. Niyungeko, 'La preuve devant les juridictions internationales', Bruxelles, Bruylant, 2003, p. 441, and M. Kazazi, 'Burden of Proof and Related Issues', The Hague, Kluwer Law International, 1996, pp. 343-344.

[56] Separate Opinion of Judge Higgins, *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), Merits, ICJ Reports 2003, p. 235.

## Concluding observations

To conclude, it must be emphasized that the Court generally endeavours to resolve any problem regarding evidentiary matters without undue formality and with the co-operation of the parties. Indeed, the Statute and the Rules of Court provide a general framework and lay down only general principles, leaving sufficient leeway for the Court to decide the procedural questions, which may arise in each specific case, in the best interests of the sound administration of international justice.

Taking into account the general principles to which I referred in my introduction, and the way in which the Court usually works, I would therefore express a word of caution towards a recent tendency to design, *in abstracto*, new rules or fact-finding mechanisms, which may trigger more difficulties in practice, than those that they are supposedly addressing. Such a cautious attitude does not mean, however, that the Court should not consider reviewing its working methods where necessary, nor that the practice of other jurisdictional bodies at the international level cannot be a source of inspiration for future improvements in the Court's own practice.

*K. Parlett**

# Evidence before the ICJ — Reflections on Recent Challenging Cases

Over the past 10-15 years, the number of fact-intensive disputes that have been referred to the International Court of Justice has been on the rise, including cases where there are technical or scientific issues that are critical to the parties' claims. As noted in the keynote this morning, evidence can play a decisive role in the outcome of a dispute. Most cases are won or lost on the evidence.

The Court has been heavily criticized in the past on fact-finding and for expert evidence. But, in several recent cases, the Court appears to have taken a more robust and thorough approach to both fact evidence and scientific evidence.

The recent cases I will examine are the cases between Costa Rica and Nicaragua. They are two sets of two joined cases. First, the *Certain Activities* and *Construction of a Road* cases, which resulted in a judgment on the merits in 2015, followed by a judgment on compensation in February 2018[1]; and second, *Maritime Delimitation* and *Land Boundary in the Northern Part of Isla Portillos*[2]*; which were resolved by a judgment also in February this year. The final case I will mention is the Bolivia* v.

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[1] *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*), Judgment, ICJ Reports 2015, p. 655; and *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), *Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica,* Judgment, 2 February 2018.

[2] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica* v. *Nicaragua*) and *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica* v. *Nicaragua*), Judgment, 2 February 2018.

*Chile* case, on which there was a judgment on the merits in October 2018[3].

## The *Costa Rica /Nicaragua* cases

There were four recent cases involving Costa Rica and Nicaragua before the Court: they were dealt with in two proceedings, each involving two joined cases.

*1. Party appointed experts in Certain Activities and Road*

The first two cases, *Certain Activities* and *Construction of a Road*, both concerned activities carried out close to or in the border area between the two States to the north east of Costa Rica, near or in the San Juan River. Both States complained about others' activities in the vicinity of the boundary and alleged breaches of obligations with respect to transboundary environmental harm. Both parties appointed independent experts to provide evidence to the Court. The expert evidence was several hundred pages, with lead experts referring to supporting studies carried out by other experts. It covered the impact of activities on river flows, geomorphology, microbiology, fisheries, and water quality. Both parties' experts gave oral evidence to the Court on a wide range of issues, such as river impacts, morphology, hydrology, fisheries, and aquatic ecology.

There are four points to note about the expert evidence in these cases.

- First, the Court was confronted with lengthy, technical and complex reports on complex questions of environmental impact[4]. In advance of the merits hearing, the Court requested that the testifying experts

[3] *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v Chile*), Judgment, 1 October 2018. The author was counsel to Costa Rica and to Chile respectively in these cases. All views expressed herein are the views of the author and all information, which is referred to in this article, is in the public domain.

[4] The Court described the expert evidence as 'vast': *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*), Judgment, ICJ Reports 2015, para. 174.

provide 20-page summaries of their evidence[5], which replaced examination in chief. This gave both experts an opportunity to distil the significant issues, as well as to cast a spotlight on points of agreement and disagreement.

- Second, the parties were given an opportunity to cross-examine experts at the hearing, and the parties both sought to draw conclusions from evidence that came out of those cross-examinations. This process is of crucial importance. The parties must have an opportunity to test and challenge the evidence. However, one of the critical issues here is time. Cross-examination requires a lot of time. There is a variety of issues that counsel may need to explore, by reference to documentary evidence that the witness must be taken to. In future cases the parties and the Court may need to consider whether an extension of the standard time for oral hearings is appropriate where there is complex expert evidence.
- Third, following the cross-examinations, several judges put questions to the experts. The questions demonstrated that the judges had digested the written expert evidence, and that they were across much of the technical detail.
- Finally, the Court's final judgment referred to scientific evidence in some detail. Thus it appears to have been helpful, and indeed, critical to the outcome of the cases.

In the past, some commentators have suggested that the Court would be wise to admit that other dispute resolution mechanisms are better equipped to handle highly technical matters[6]. In the survey of Counsel that was conducted in 2015, it was suggested that the Court was too passive in its approach to the conduct of parties, resulting in circumstances where it 'is not in a position adequately to assess and weigh complex scientific

[5] Referred to in *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua* v. *Costa Rica*), Judgment, ICJ Reports 2015, para. 34.

[6] A. Riddell and B. Plant, 'Evidence before the International Court of Justice' (BIICL, 2009), p. 255.

evidence'[7]. My view is that the Court has moved a long way to alleviate these concerns by its approach to the evidence in the *Certain Activities* and *Road* cases[8].

*2. Court appointed experts in Maritime Delimitation and Land Boundary*

The second set of cases are the *Maritime Boundary* and *Land Boundary* cases also between Costa Rica and Nicaragua.

There was an issue in both cases involving to the last part of the land boundary between the two States from the San Juan River to the Caribbean Sea. Although part of that territory had been disputed in the *Certain Activities* case, the Court had not dealt with the precise location of the land boundary in that final segment.

The Court has power to appoint its own experts, under Article 50 of its Statute, together with Article 67 of its Rules[9]. The ICJ had not exercised this power in more than 30 years[10].

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[7] L. Malintoppi, 'Fact Finding and Evidence before the International Court of Justice (Notably in Scientific-Related Disputes)' 7 (2016), JIDS, p. 421.

[8] As has been observed by others, the Court showed itself to be highly engaged with the evidence, carefully questioning the experts at the oral hearing, and facilitating vigorous cross-examination of the experts: L. Malintoppi, op, cit., p. 421.

[9] Statute of the International Court of Justice, Article 50. The same power was contained in Article 50 of the PCIJ Statute. It has also been suggested that the Court has inherent powers to appoint an expert: see A Riddell and B Plant, 'Evidence before the International Court of Justice' (BIICL 2009), 333. Rules of the International Court of Justice (1978, as amended in 2005), Article 67. Provisions similar to Article 50 of the Court's Statute are also to be found in the rules of procedure of both ITLOS and the Iran-US Claims Tribunal: ITLOS Rules of Procedure, Article 82; Rules of Procedure of the Iran-US Claims Tribunal, Article 27. See also Article 27 of the PCA Optional Rules for Arbitrating Disputes between Two States (reprinted in ILM 32 [1993], 572); and Article 18 of the ILC Model Draft Rules on Arbitral Procedure (ILC Yearbook [1958-II], 85).

[10] See discussion in L. Malintoppi, op.cit., pp. 421, 435–438; D. Peat, 'The Use of Court-Appointed Experts By the International Court of Justice' (2014) 84 BYBIL 271, 276–288; A. Riddell, 'Evidence, Fact-Finding, and Experts' in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication,* Oxford University Press, 2014, p. 848; and J.G. Devaney, 'Fact-Finding Before the International Court of Justice', Cambridge University Press, 2016, pp. 150–178, esp. pp. 158–176 on the appointment of experts by inter-State arbitral tribunals in the UNCLOS Annex VII

In the recent *Costa Rica* cases, however, after consulting the parties, the Court appointed two experts to provide an opinion on the state of the coast on the Caribbean Sea. The Court posed a series of questions to the experts to be answered in an opinion, following site visits by the experts[11]. The parties' representatives participated in the site visit. Both parties provided written comments on the experts' opinions and were given the opportunity to address questions to the experts at the hearing (although neither elected to do so)[12]. In its judgment, when it addressed issues relating to the state of the coast, the Court relied heavily on the experts' opinion, noting that it 'dispels all uncertainty about the present configuration of the coast'[13].

It appears that the approach of the Court in appointing experts in these cases enabled it to deal with confidence and efficiency with a disputed issue

arbitration between *Guyana and Suriname* and the *Abyei* arbitration administered by the Permanent Court of Arbitration.

The PCIJ appointed experts at the indemnities stage of the *Chorzów Factory* case, although the parties agreed on the amount of compensation before the experts' opinion was rendered: *Factory at Chorzów* (Claim for Indemnity) (Germany/Poland), Order of 13 December 1928, PCIJ, Series A, No. 17, p 99. See C.J. Tams, 'Article 50' in A Zimmerman et al (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd ed., Oxford, 2012, pp. 1291–1292.

The ICJ appointed two sets of experts in the *Corfu Channel* case: see *Corfu Channel Case* (*U.K.* v. *Albania*), Order of December 17, ICJ Reports 1948, p. 124; and *Corfu Channel* Case (*U.K.* v. *Albania*), Order of November 19, ICJ Reports1949, p. 237.

In the *Gulf of Maine* case, the Parties, in their Special Agreement, asked the Chamber to appoint a technical expert to assist it. The Chamber appointed an expert under Article 50. See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada* v. *US*), Appointment of Expert, Order of 30 March 1984, ICJ Reports 1984, p. 165; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada* v. *US*) Merits, ICJ Reports 1984, pp. 246, 253, Article II.3 of the *Compromis*; see also 'Technical Report' annexed to the Judgment: *ibid*., 347–352.

[11] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica* v. *Nicaragua*), Order of 31 May 2016, para 10. See also G. Gaja, 'Assessing Expert Evidence in the ICJ' 15 (2016) in *The Law and Practice of International Courts and Tribunals* 409, pp. 416–417.

[12] This is apparent from the transcripts of the oral hearings, available at http://www.icj-cij.org/en/case/157/oral-proceedings.

[13] *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia* v. *Chile*), Judgment, 1 October 2018, para. 71.

as to the situation on the ground. There are two points to be emphasized here.

- First, when the Court appoints an expert, it is essential that the parties be given a proper opportunity to engage with that evidence through the provision of comments, through questioning, and also through putting forward competing expert evidence to challenge the Court appointed expert. None of those options was taken up here, but one could envisage cases in which parties would be inclined to do so.
- Second, an expert opinion will not be the right approach in every case. The Court cannot delegate its fact-finding function to experts. But, in this particular case, it appears that the Court's use of appointed experts was both efficient and helpful.

### The Court's judgment on the merits in *Bolivia* v. *Chile*

I come then to the Court's judgment on the merits in *Bolivia* v. *Chile*. This case did not involve any relevant expert evidence but it was fact- and document-intensive.

The case had its roots in the War of the Pacific between Chile, Bolivia and Peru. That war resulted in Bolivia losing its territory adjacent to the Pacific coast.

Following their post-war Peace Treaty in 1904, the two States had intermittent interactions over whether Chile would be willing to grant to Bolivia sovereign access to the Pacific Ocean. Bolivia claimed that these interactions created a legal obligation on Chile to negotiate 'sovereign access' to the sea for Bolivia. It said that this obligation to negotiate arose from agreements, unilateral declarations, resolutions of the OAS General Assembly, and various acts and conduct taken cumulatively.

Bolivia's claims covered a period of more than 114 years, with multiple exchanges, statements and documents relied upon. The documentary evidence relied upon by both parties was voluminous. The question whether any of the numerous interactions on which Bolivia relied created or confirmed a legal obligation to negotiate is one, which required detailed examination of the evidence.

In its judgment on the merits, the Court addressed the evidence in some detail, analyzing the language used, the context of the exchanges and declarations. It addressed most of the exchanges and declarations in close detail. Inevitably, some of the detail and the nuance of the arguments and the documents were not fully addressed in the reasoning of the judgment. This is not to say that the Court did not grapple with those issues, but only that the detail is not always apparent from the text of the judgment.

Nevertheless, the Court has gone some way, in this recent judgment, to addressing concerns that it is not capable of deciding complex factual disputes.

The Court's recent cases suggest that States can have increased confidence in the capacity of the Court to engage with sophisticated and nuanced questions of fact and technical and complex questions of evidence.

*J.G. Devaney**

# Certain Questions Concerning Documentary Discovery

The following contribution explores certain questions regarding documentary discovery that have arisen in the context of the *M/V 'Norstar'* case between Panama and Italy, which is currently before the International Tribunal for the Law of the Sea ('ITLOS'). Whilst the practice of discovery, through which one party requests a court or tribunal to order the other party to produce evidence, is most commonly found in domestic (and mostly common law jurisdictions), it has been an issue before a number of other international courts and tribunals in recent times. It is this recent practice, which present contribution draws upon in order to highlight a number of options open to ITLOS in the context of the *'Norstar'* dispute. Specifically, the advantages and disadvantages of three distinct, if related, models are considered below.

## The *M/V 'Norstar'* dispute

On 17 December 2015, Panama filed an application with ITLOS in a dispute with Italy regarding the arrest and detention of a Panamanian-flagged vessel, the *M/V 'Norstar'*[1]. Panama claims compensation for the illegal arrest of this vessel, which Italy alleges has supplied oil to mega yachts in contravention of Italian tax legislation. In the course of proceedings in this case, Panama has sought access to a number of documents in the possession of Italy, including logbooks, which it claims Italy has refused to produce[2]. Italy, for its part, has claimed that Panama's requests for certain documents demonstrate that it has failed to meet the request standard of proof, that it bears as the party bearing the burden in the context of the

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[1] ITLOS, *M/V 'Norstar'*, *Republic of Panama* v. *the Italian Republic*, Application of the Republic of Panama, 16 November 2015.

[2] See ITLOS, *M/V 'Norstar'*, Public Sitting, Friday 14 September 2018, Verbatim Record, ITLOS/PV.18/C25/9, at 22 et seq.

dispute[3]. Italy argues that Panama's request for the documents is in fact an attempt 'to shift the burden of proof on to the defendant'[4]. Panama, on the other hand, accepts that it has the burden of proof in this case, which it has sought to discharge through both documentary and testimonial evidence[5].

The most contentious issue in this regard relates to certain documents, which are solely in the possession of one party, namely Italy. Panama claims that, by refusing to accede to its requests for documents in this case, Italy is failing in its duty of collaboration with the Tribunal. In response to Italy's claims that Panama is embarking on a 'fishing expedition', Panama argues that it has been as specific as it can possibly be in this context, given the fact that the documents it requests (which Panama claims it has 'continuously and tirelessly tried to obtain')[6] are solely in Italy's possession.

As such, the issue of documentary discovery has become one with which ITLOS will necessarily have to engage with. How it will respond to Panama's arguments in the context of these ongoing proceedings remains to be seen, but it is suggested that the practice of other courts and tribunals provides a number of models upon which to draw.

## The International Court of Justice (ICJ)

Before turning to address specific models, a word on the practice of the World Court may be useful. The practice of the ICJ reveals that issues of documentary discovery have never been a common occurrence. In fact, such issues have only ever arisen in a small handful of cases. It is suggested that this may be due to the Anglo-American nature of the concept of discovery itself, coupled with the consistently reactive approach of the Court to issues of evidence and fact-finding[7].

This having been said, despite the fact that the ICJ has not been traditionally proactive in terms of fact-finding, it does possess significant

[3] *Ibid.*
[4] *Ibid.*, at 23.
[5] *Ibid.*, at 24.
[6] *Ibid.*
[7] See J. G. Devaney, 'Fact-Finding Before the International Court of Justice', CUP, 2016 at 27 et seq.

fact-finding powers. These fact-finding powers include Article 49 of its Statute (and Article 62(1) of its Rules), which endow the ICJ with the power to request information from the parties. It is through this provision that the ICJ has the ability to actively involve itself in the fact-finding process and seek whatever information it deems necessary from the parties[8].

In contrast, a party to a dispute before the ICJ does not have the right to request information from, or even put questions to, the other party to the dispute[9]. Instead, in accordance with the constitutive instruments of the ICJ, requests for information or questions must go through the Court itself. In effect, this means that no right of documentary discovery exists before the ICJ. Of course, there is nothing to prevent the ICJ from playing the role of 'an intermediary between the parties to a dispute in order to produce evidence, which is only in possession of one of the two parties'[10]. But one must bear in mind that the ICJ has complete discretion as to whether or not to do so, and practice shows that it has been rather reluctant to do so to date, save from a select number of cases[11].

One such case was the *ELSI* case in which Italy alleged that the United States, in referring to a particular document, which it had not put before the ICJ, had breached Article 56(4) of the Rules of Court, which states that '[n]o reference may be made during the oral proceedings to the contents of a financial statement which had not been produced in accordance with Article 43 of the ICJ Statute or this Article, unless the document is part of a publication readily available'[12]. In order to obtain the document in question, Italy made a request of the ICJ that it utilizes its powers, referred to above, under Article 49 of its Statute and 62(1) of its Rules to request that the United States hand over the document. In a noteworthy turn of events, the President agreed to accede to Italy's request and the United

[8] See C. J. Tams & J. G. Devaney, 'Article 49' in Andreas Zimmermann et al, *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, forthcoming 2019.

[9] See *Haya de la Torre* case, Pleadings, part II, p. 151.

[10] See Tams & Devaney, *supra* note 8.

[11] See M. Benzing, 'Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten' (2010), pp. 309–313.

[12] ICJ, Pleadings, *ELSI* case, Verbatim Record C 3/CR 89/8 of 23 February 1989, 19.

States promptly produced the document in question[13]. It is this practice that led some commentators to talk of a practice of 'indirect discovery', and even to suggest that this practice could serve as a model for future cases[14]. However, the *ELSI* case remains to date the only example of this kind of 'indirect discovery' before the Court. Of course, one may speculate why there has not been further practice of this sort. For instance, parties may have doubts about the effectiveness of such a procedure given that there would be little that the ICJ could do in the event the request for information was not complied with, other than taking 'formal note' under Article 49 of its Statute.

Whatever the reason may be, it remains the case that the *ELSI* model is an outlier in this regard. In fact, in subsequent cases the ICJ has refused to make use of its fact-finding powers in response to similar discovery requests. For instance, in the *Bosnian Genocide* case, ICJ refused a request from Bosnia to seek the disclosure of certainly (allegedly key) documents in the possession of Serbia, that Bosnia alleged would be critical to establishing Serbia's responsibility for genocide in these proceedings. Despite Bosnia's claims regarding the significance of these documents, the ICJ demurred, stating that it was not necessary to seek disclosure in this case, since it 'has extensive documentation and other evidence available to it'[15]. Given the fact that, ultimately, the ICJ found that with respect to the allegations of participation in genocide, Bosnia had failed to meet the burden of proof, the ICJ's decision not to seek disclosure has been the subject of debate among commentators and Members of the Court themselves[16].

Similarly, during the preliminary objections phase of the *Croatian Genocide* case, the ICJ refused to grant a similar request for documents

[13] *Ibid*., at 45.

[14] K. Highet, 'Evidence, the Chamber, and the ELSI Case', in *Fact-Finding Before International Tribunals*, Lillich, R.B., ed., 1992, pp. 33–8060.

[15] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 129, para. 206.

[16] *Bosnian Genocide* case, *ibid.*, Dissenting Opinion of Judge Al-Khasawneh, ICJ Reports 2007, p. 254, para. 35; Dissenting Opinion of Judge *ad hoc* Mahiou, ICJ Reports 2007, pp. 415–21, paras. 56–63; R. Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice', LPICT 6 (2007), pp. 130–134.

which had been made by Croatia, again stating that it was unnecessary for it to do so, owing to the fact that it was 'not satisfied that the production of the requested documents was necessary for the purpose of ruling on preliminary objections'[17].

In short, parties have not often made requests for documentary evidence before the ICJ, and the ICJ itself has not looked positively on such requests when they have been made, save for in the *ELSI* case. It is for these reasons, namely the lack of relevant practice, that the ICJ cannot be seen as providing a helpful model that ITLOS could replicate in the current proceedings before it. As such, in the search of more helpful guidance from the practice of other international courts and tribunals, it is to the recent practice of inter-State arbitral tribunals that we need to look. In the following sections, it is suggested that there are three models that ITLOS could consider, drawing on the practice of the *Guyana* v. *Suriname, Indus Waters* and *Chagos* arbitrations. Each of these examples provides different approaches to the issue of documentary discovery that could be adopted, depending on the circumstances of the particular arbitration.

### Model 1: *Guyana* v. *Suriname*: an independent expert

In 2004, in the course of arbitral proceedings between Guyana and Suriname, Guyana alleged that Suriname had objected to its requests for access to a number of files located in the archives of the Netherlands Ministry of Foreign Affairs[18]. Accordingly, Guyana requested the Tribunal to 'require Suriname to take all steps necessary to enable the parties to have access to historical materials on an equal basis and immediately advise the Netherlands that it withdraws its objection to disclosure…'[19]. Suriname justified its objection, saying that they related to matters of national security and that it was the policy of the Netherlands to restrict material

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Preliminary Objections, Judgment, ICJ Reports 2008, pp. 416–417, paras. 13–15.

[18] *Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea, in the Matter of Arbitration Between: Guyana and Suriname*, Award, 17 September 2007, para. 16.

[19] *Ibid*., para. 17.

relating to ongoing boundary disputes[20]. After extended disagreement over access to documents, the Tribunal issued Order No. 1, stating that it would not consider any document from the archives of the Netherlands to which Guyana had been denied access[21].

Crucially for our purposes, and in contrast to practice before the ICJ described above, the Tribunal in this case took the significant step of referring to the parties as having a right to seek information from each other. However, the extent of this right should not be overstated, as the Tribunal took care to closely circumscribe such a right, specifying that it applied only to 'documents, identified with reasonable specificity, that are in the possession or under the control of the other party'. In doing so the Tribunal sought to place limits on any potential right to documentary discovery, in order to prevent so-called 'fishing expeditions' by placing two specific conditions on it. Specifically, this right would apply only to (i) information within the possession or under the control of the other party, and (ii) information that has been 'identified with reasonable specificity'[22].

Perhaps most significantly for our purposes, in considering potential models for ITLOS to consider in the context of the *M/V 'Norstar'* dispute, the Order of the Tribunal in the proceedings between Guyana and Suriname also provided for the establishment of an independent expert to assist with issues of documentary discovery. This innovative practice of appointing an individual expert marks the Tribunal out as a potential model for the current ITLOS proceedings. The expert operated as follows: after a request had been made by one of the parties seeking discovery of certain information, the expert would review the request, consider its merits, and examine any requests made by a party to 'remove or redact parts of that file or document'[23] in accordance with any genuine right they may have not to disclose the information[24]. A further duty of the expert was to deal with any refusal to produce a document made by either party, whether that be in

[20] *Ibid*., para. 18; letter to the President 27 December 2004.
[21] Order No. 1, Operative Paragraph 1.
[22] Order No. 1, Operative Paragraphs 3.
[23] Order No. 1, Operative Paragraphs 4 and 5.
[24] See Separate Opinion of Judge Jessup in *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections,* Judgment, ICJ Reports 1964, p. 6, para. 97 and *Bosnian Genocide* Case, *supra* note 15 at para. 205.

whole or in part. In the event of any failure, the expert was to find a consult with the party to find a compromise solution, reminding the parties of the duty to co-operate under the Tribunal's Rules of Procedure[25].

In taking a step back to consider the effectiveness of the establishment of such an expert, it can be said that in practice this was a successful experiment. Both parties expressed satisfaction with the procedure, and there were no disclosure issues, that the expert was unable to resolve. Of course, this does not automatically mean that this model would necessarily work well in every context. For instance, there is still a large degree, to which an independent expert would be powerless in the fact of a non-cooperating party. Nevertheless, the independent nature of the expert seems to have allowed the parties to place a certain degree of trust in them, in dealing with sensitive disclosure issues, which facilitated the ultimate compromises that were reached. One wonders whether the same benefits could be achieved in other contexts — an issue to which we will return in the final section. A slightly different approach was adopted in the *Kishenganga Indus Waters* arbitration, constituted in accordance with the Indus Waters Treaty of 1960 between India and Pakistan.

### Model 2: *Kishenganga Indus Waters* arbitration: review *in camera*

Important issues related to documentary discovery also arose in the *Indus Waters* arbitration between India and Pakistan[26]. In the course of proceedings, both parties made a number of requests for documents and additional information[27]. For instance, Pakistan requested that one particular letter, which it claimed was absolutely central to its case, be disclosed in full[28]. India disputed the importance of this letter, and, whilst citing the Official Secrets Act of 1923 (which was in force in respect of both parties), argued that its disclosure would cause 'prejudice to India'[29]. In addressing such issues in the course of proceedings, the Tribunal

[25] Order No. 1, Operative Paragraph 7.
[26] On 27 May 2012 and 23 November 2011 respectively.
[27] See Devaney, *supra* note 7, p. 170.
[28] *Indus Waters Kishenganga* Arbitration (*Pakistan v. India*) case, Procedural Order No. 8.
[29] *Ibid*.

necessarily had to become actively involved. The process that the Tribunal adopted was to prompt the party in question, in this case, India, to provide a full and unredacted copy of the letter in question along with a copy of the Official Secrets Act 1923 that was applicable in both India and Pakistan[30]. In an attempt to find a compromise between the two positions taken by the parties, namely that the letter ought to be disclosed in full and that there were legitimate reasons not to disclose the letter, the Tribunal proposed to, first of all, examine the document *in camera* after it had been submitted by India, but crucially before it was shared with Pakistan[31]. In this way, the Tribunal itself would play the role played by the independent expert in the arbitration between Guyana and Suriname.

This was a solution, which found agreement with both parties, and ultimately the Tribunal found that the document was not directly relevant to the dispute and that 'the non-disclosure of the redacted passages will not hamper Pakistan's ability to respond to the arguments made in India's Counter-Memorial'[32]. As such, this represents another seemingly successful model that could serve as inspiration for ITLOS in the *M/V 'Norstar'* dispute, which would avoid the formal appointment of an independent expert to deal with issues of documentary disclosure. A final model that is worth considering is another variation of the *Indus Waters* model and is that adopted in the context of the *Chagos* arbitration to which we now turn our attention.

### Model 3: *Chagos* Marine Protected Area Arbitration

A final arbitration, which is relevant for our purposes, is the *Chagos Islands* arbitration brought by Mauritius against the United Kingdom.[33] In the course of these proceedings Mauritius raised an issue regarding certain redactions that the UK had made of a number of pertinent documents[34]. As a result, Mauritius asked the arbitral tribunal to order the UK to produce

[30] *Ibid*. on 7 and 9 February 2012.
[31] Procedural Order No. 8, para. 3.4.
[32] Procedural Order No. 8, at para. 3.5.
[33] PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration* (*Mauritius* v. *United Kingdom*), Award (18 March 2015), paras. 35–49.
[34] *Ibid*.

full, unredacted versions of the documents in question[35]. In agreeing to do so the Tribunal introduced an innovative solution whereby the UK could deposit the documents in question with the British Consul-General in Istanbul where the tribunal could then inspect the documents.

The President (with the Registrar) of the Tribunal then conducted a preliminary review of the grounds for non-disclosure offered by the United Kingdom. Upon reporting back to the rest of the Tribunal, the Tribunal agreed to the President's finding that the reasons for the redactions made by the United Kingdom were justified, and that as such would not be subject to disclosure by the Tribunal[36]. This process, whereby only the President of the Tribunal, rather than the Tribunal as a whole, examined the contested documents, has both advantages and disadvantages, compared to, say, the approach taken in the *Indus Waters* arbitration. In terms of positives, such an approach limits the number of arbitrators exposed to the contested document, perhaps limiting any kind of prejudice caused by viewing the documents, conscious or otherwise. A potential downside, however, may come in the form of fellow arbitrators having to rely on the judgment of the President, which, if there was any suggestion of lack of impartiality, could affect the legitimacy of the arbitration as a whole.

## Summary

Of course, much more could be said about these particular cases, and about the issue of documentary discovery before international courts and tribunals as a whole. The brief examination of the arbitrations conducted above highlights that, in practice, decision-makers have taken different (if not altogether unrelated) approached to issues of documentary disclosure that have arisen in disputes that they have been asked to address. For those members of ITLOS currently considering which path to take, these alternative models obviously act as inspiration, at least to a certain extent. Each, of course, has its advantages and disadvantages. It is suggested here that the first model examined, that of appointing an independent expert to deal with requests for disclosure of documents is the most attractive model overall.

[35] *Ibid*.
[36] *Ibid*.

This is due to the fact that it takes the decision as to disclosure out of the hands of the ultimate decision-makers, who, try as they might, could be influenced one way or another by what they discovered in the course of being asked to recommend disclosure or not. Of course, the appointment of an independent expert brings its own issues, in terms of time and cost, and this may ultimately be the reason why ITLOS decides to deal with the disclosure request in *M/V 'Norstar' in camera* without the appointment of an independent expert. It is suggested, nevertheless, that taking a moment to consider the successful process utilised in *Guyana* v. *Suriname* may provide the Tribunal with some useful guidance.

# Дискуссионная панель 2: Доказательства в региональных судах по правам человека / Panel 2: Evidence before Regional Courts of Human Rights

*А.И. Ковлер**

## Проблема объективности доказывания и доказывания в региональных судах по правам человека

Симпозиум по проблемам доказательств в международных судах и трибуналах, организованная Центром международных и сравнительно-правовых исследований, отвечает настоятельной потребности всех, кто причастен к международному правосудию, чётко представлять критерии доказывания и доказательств в ходе разбирательства в международных судах и трибуналах. Это очевидно как на примере межгосударственных судебных споров, так и в судах, рассматривающих в основном индивидуальные жалобы.

В мою бытность судьёй Европейского Суда по правам человека я довольно часто при рассмотрении жалоб сталкивался с ситуациями, когда изложение фактов заявителем, сопровождаемое, как ему представлялось, неопровержимыми доказательствами вины государства в нарушении его прав, решительным образом и не менее убедительно опровергалось представителями государства-ответчика. Нередко Суд прибегал к испытанному приёму: сначала излагал картину, представленную заявителем, а затем — факты, сообщённые государством-ответчиком. Презюмировалось при этом, что обе стороны, действуя

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*bona fide,* предоставили достоверные факты, а вот выявление вины государства в лице его органов или должностных лиц, как и отсутствие таковой, становилось трудной задачей Суда. Надеюсь, наши уважаемые докладчики А. Арутюнян, А. Остин, Х. Гаджиев и Ф. Сандберг поделятся своими знаниями и навыками методологии и процессуальных правил доказывания в Европейском Суде, а наш коллега А. Матуш расскажет о подходах Африканского суда по правам человека и народов в отношении процесса доказывания, особенно интересны в этом плане правила распределения бремени и средства доказывания, применяемые этим судом. Остаётся сожалеть об отсутствии представителя Межамериканского суда по правам человека, в котором применяются оригинальные правила доказывания. К слову, весьма показательно стремление этих трёх региональных судов по правам человека к координации своей деятельности и обобщению практики друг друга, о чём свидетельствует принятие и подписание председателями трёх судов Декларации Сан-Хосе 18 июля 2018 г., которая предусматривает, в частности, создание Постоянного форума институционального диалога (*Permanent Forum of Institutional Dialogue*). Надеюсь, это позволит выработать также общие принципы доказывания в процедурах трёх судов, которые могут быть полезны и другим международным судам.

Особенно остро стоит проблема доказывания вины, вменяемой государствам за события и факты, имевшие место за пределами его территории, когда вместо «территориальной юрисдикции» применяется весьма экзотичное понятие «*extra-territorial jurisdiction*», впервые апробированное в делах «*Loizidou v. Turkey*» (23.03.1995) и «*Cyprus v. Turkey*» (10.05.2001), несущей конструкцией которого стала концепция «эффективного контроля» (*effective control*) этой территории и её администрации со стороны другого государства. В силу этой концепции Суд счёл доказанной «вину» России за продолжающееся использование в Приднестровье кириллицы в местных молдавских школах или за задержание местной таможней грузовика с луком на продажу. А вот дело об ответственности государств — членов НАТО за бомбардировки Белграда, повлекшие человеческие жертвы и разрушения, не было принято к рассмотрению

в силу того, что Федеративная Республика Югославия в то время не входила в так называемое правовое пространство (*legal space*) государств-ответчиков (*Bankovic and Others v. Belgium and 16 Other Contracting States*. 19.12.2001).

Весьма спорными остаются позиции Суда и по межгосударственным жалобам или по так называемым чувствительным делам, в которых особенно ощутимо проявляются оценочные суждения (*value judgments*). Здесь мы сталкиваемся и с явлением «судейского активизма».

Словом, у нас есть немало поводов к откровенной и честной дискуссии, ибо, как известно, в спорах рождается истина. Некоторые вопросы методологии подхода ЕСПЧ к проблеме юрисдикции государств.

## *А. Арутюнян**

У каждого суда есть своя задача, свой предмет и, исходя из этого, своя компетенция. Задача Европейского Суда по правам человека (ЕСПЧ) не геополитическая. Толкование ЕСПЧ соответствующих вопросов зиждется на трёх принципах: характер Конвенции как договора в области прав человека; необходимость избегать «серых зон» — зон, не охваченных защитой Конвенции; фактические реалии на местах. Следует очень чётко различать стандарты и задачи Международного Суда и Европейского Суда по правам человека.

Стандарты ЕСПЧ направлены на то, чтобы определить, кто несёт позитивные обязательства на той или иной территории за защиту конвенционных прав. Поэтому ЕСПЧ развил некоторые свои особенности. Так, критерий установления юрисдикции согласно ст. 1 Конвенции никогда не приравнивался к критерию установления ответственности государства за международно-противоправные действия в соответствии с международным правом[1]. Стандарты ЕСПЧ по юрисдикции и присвоению ответственности не совпадают со стандартами Международного Суда (МС). Эта методология направлена на то, чтобы не оставить «серых зон» по защите прав человека. Если бы ЕСПЧ использовал стандарты МС по признанию юрисдикции и присвоению ответственности, то ряд дел оказался бы вне юрисдикции. Соответственно, все дела, которые подпадают под стандарты МС, попадают и под стандарты ЕСПЧ[2].

Однако есть дела по эффективному контролю ЕСПЧ, которые не подпадают под стандарты МС. Это значит, что термины остались те же («эффективный контроль»), но содержание другое. Более того, под

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[1] См.: Спано Р. Вопросы юрисдикции государств: тенденция в прецедентной практике Европейского Суда по правам человека в свете международного права // Прецеденты Европейского Суда по правам человека. 2018. Спецвыпуск «Экстерриториальная юрисдикция: в поиске решений». С. 38–48.

[2] См.: *Loizidou* v. *Turkey*. 1996.

«эффективный контроль» ЕСПЧ могут подпадать и действия, никогда международным сообществом не охарактеризованные как незаконные, в то время как МС эти дела и не рассматривает. Поэтому ЕСПЧ регулярно напоминает, что его подходы должны интерпретироваться сугубо в контексте Европейской конвенции по правам человека[3].

Для МС критерий массового военного присутствия *(boots on the ground)* — необходимый критерий[4], а для ЕСПЧ он необязателен.

МС в отличие от ЕСПЧ рассматривает генезис конфликта. МС применяет нормы об ответственности государств за противоправные деяния, определяет, с чем имеет дело. Речь идёт о международно-противоправном действии, или речь идёт о возможности защитить своё право на существование? Индикатором является политика бывшего центра по отношению к региону.

Международное публичное право разделяет эти две ситуации через объявление одних действий международно-противоправными, например, когда в действиях бывшего центра нет и не было политики, заставляющей думать, что отделение — единственная возможность сохранить себя как этнос или часть этноса, защитить своё право на жизнь и свою идентичность. В этих случаях международное публичное право использует институт коллективного непризнания, адресованного международному сообществу.

Для ситуаций же, где сформирована уверенность, что речь идёт о политике, не оставляющей соответствующему бывшему региону другого пути сохранения себя как отделения, действует институт *"remedial cession"*[5] (отделиться, чтобы выжить).

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[3] См.: *Catan and Others* v. *Moldova and Russia,* 2012; *Chiragov and Others* v. *Armenia,* 2015; *Mozer* v. *Republic of Moldova and Russia,* 2016; Rooney. J. 'The Relationship between Jurisdiction and Attribution' After *Jaloud* v. *Netherlands* // The Netherlands International Law Review. 2015. 62: 407–428. p. 421.

[4] См.: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* Merits, Judgment, ICJ Reports 1986, p. 14 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina* v. *Serbia)*, Judgment, ICJ Reports 2007, p. 43.

[5] Примером первой ситуации является вопрос северного Кипра, примером второй — вопрос восточного Тимора.

Соответственно, только на уровне МС и Совета Безопасности ООН можно определить, с чем мы имеем дело: с территориальным спором или правом на самоопределение как единственной мерой сохранить себя как этнос или часть этноса.

Поэтому и стандарты определения юрисдикции и эффективного контроля для МС абсолютно иные. Они «более высокие» и, как правило, совпадающие с оккупацией.

Абсолютным стандартом для признания МС юрисдикции соответствующего государства является наличие однозначных фактов:

1) присутствие вооружённых сил данного государства на территории другого государства *(presence)*;

2) присутствие должно быть массовым *(in position of exercise of effective control)*;

3) наличие контроля определённого уровня над лицами или органами.

Только при наличии этих фактов можно говорить об обязательном стандарте наличия юрисдикции, то есть для признания юрисдикции для МС абсолютно необходимым порогом-стандартом является неоспоримый факт наличия массового военного присутствия. Поэтому критерий установления юрисдикции МС приравнивается к критерию установления ответственности государства за международно-противоправные действия в соответствии с международным правом.

А ЕСПЧ имеет целью не оставить «серых зон» с точки зрения позитивных обязательств государств-членов для защиты прав человека. Поэтому в отличие от МС ЕСПЧ может определить наличие юрисдикции на основании эффективного контроля и в случаях, когда речь не идёт о признанном международно-противоправном действии. Другими словами, логический процесс у ЕСПЧ действует наоборот: установление юрисдикции, а потом оценка соответствия с Конвенцией. Тогда как МС сначала определяет наличие того или иного противоправного деяния, а потом только решает вопрос ответственности государства за это противоправное деяние. И стандарт-порог у ЕСПЧ, соответственно, заметно «ниже». Достаточна лишь военная, экономическая и финансовая

поддержка. Это было сделано во всех приднестровских делах и в деле «*Чирагов и другие против Армении*».

Та же самая картина прослеживается в вопросе присвоения ответственности. Для МС критериями являются управление или контроль *(direction or control)*[6]. А для ЕСПЧ, как мой коллега, Роберт Спано, в прошлом году отметил, «фактологические выводы ЕСПЧ по вопросу о решающем влиянии государства на местный административный орган означают в реальности, что, если государство-член захочет изменить свою общую политику поддержки по отношению к местному органу…, последний не сможет существовать самостоятельно. С этим связано использование понятия "подчинённость" в прецедентной практике Европейского Суда»[7]. Но и этот термин нельзя путать с термином «*complete dependence*», используемым Международным Судом ООН (*Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *Bosnia and Herzegovina v. Serbia and Montenegro*, 2007).

Следует отметить, что присвоение действий и юрисдикция являются разными предметами. Вопрос о юрисдикции предшествует вопросу о присвоении действий. Если нет контроля или управления по международному праву, то нет и присвоения действий *(attribution)*. Однако и тут, как мы видим, стандарты ЕСПЧ по сравнению с МС более «низкие». В этом вопросе ЕСПЧ использует критерии «решающего влияния», «выживания в силу военной, экономической, финансовой и политической поддержки». Это критерии по сравнению с «управлением или контролем» устанавливают более «низкий» порог требований.

Для МС очень важно выяснить в процессе присвоения:

1) может ли местная администрация квалифицироваться как фактический орган рассматриваемого государства *(direction or control)*;

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[6] См.: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* Merits, Judgment. ICJ Reports 1986, p. 14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina* v. *Serbia)*, Judgment, ICJ Reports 200, p. 43.

[7] Спано Р. Указ. соч.

2) должен ли быть акт или доказательство, что команды шли непосредственно от рассматриваемого государства; были чёткие инструкции от последнего *(clear instructions).*

Для ЕСПЧ достаточно определить, что местная администрация не выживет без комплекса помощи от соответствующего государства. Но тут, на мой взгляд, остаётся открытым вопрос об условиях выживания. Если есть постоянная угроза уничтожения населения региона — это одно, мирные условия — это другое. В первом случае многие признанные государства также не могут выжить без помощи. Кроме того, постановка под сомнение любой помощи в этих условиях может поставить под вопрос само существование тех, кто получает помощь. Поэтому ЕСПЧ не всегда увязывает вопросы юрисдикции с присвоением действий. И это с точки зрения определения адресата позитивных обязательств за нарушение конвенционных прав объяснимо.

Логична и концепция МС — высокие стандарты юрисдикции и присвоения действий, поскольку они устанавливают ответственность государств за международно-противоправные действия.

ЕСПЧ не отходит от обычного международного права, а применяет его через призму своей компетенции и своих задач определения позитивных обязательств по защите конвенционных прав. Исходя из его особенностей, можно сказать, что ЕСПЧ фактически создал свой собственный режим *"lex specialis"* ответственности государств согласно Европейской конвенции по правам человека.

*A. Austin**

# Evidence Before International Courts and Tribunals

## Introduction

I am grateful to the International and Comparative Law Research Centre for the opportunity to participate in this important and timely discussion. Relatively little comparative work has been done on the various approaches to the assessment of evidence by the growing number of international courts, tribunals and other bodies, gaining influence in international society. Whether the comparative exercise will reveal common procedural principles or confirm a need for diversity, and whether it would disclose a need for flexibility in applying rules or for more certainty in that respect (favoured by parties and important to the authority of a tribunal) remains to be seen. I will use the short time available to me to describe the broad lines of the approach of the Strasbourg Court to the assessment of evidence before it, which I hope will afford a useful basis for the Panel's comparative discussions.

The vast majority of cases before the Court do not require the resolution of complex factual disputes. The facts are either not contested or, most commonly, have been determined by the national courts. As we know, the Court is, within the Convention scheme of things, subsidiary to the national systems safeguarding human rights: States are obliged to provide effective remedies (Article 13), and applicants are required to exhaust them (the rule on exhaustion of effective domestic remedies and Article 35 of the Convention). The Court can, therefore, as a general rule rely on the facts set out in the leading national judgment and, indeed, attaches great weight to the first-instance assessment

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of evidence[1] requiring 'cogent elements' before departing from such findings[2]. Consequently, in most of the cases decided by the Court there is therefore no reference to the issue of proof. Where cases have survived the admissibility hurdle of the single judge the Court is usually able to reach conclusions without having recourse to any evidentiary techniques whatsoever.

Be that as it may, issues of fact remain a permanent feature of international human rights adjudication and often figure crucially in the Strasbourg Court's judgments. Such is the accumulated experience of the Court over the last 60 years in dealing with a notoriously long and varied docket of individual applications, that the former Commission and Court have been confronted with an impressive array of evidential challenges. In addition, the inter-State cases present a new level of complexity in terms of the assessment of evidence and establishing facts: the facts are complex and always disputed, they will not have been established by any national court, and their resolution is central to the result of the case. Arguably therefore the Convention organs have as much, if not more, experience in fact-gathering and evaluation than most other international tribunals.

The key to understanding the Court's approach to issues of proof and evidence is obvious: it is an international human rights court. As such, its approach to evidence cannot be that of applying rigid formulae, but rather it has regard to the context of the case, to the vulnerability of the parties, to the seriousness of the allegations, to difficulties the applicant might experience in adducing evidence, to the inequality of arms between the individual applicant and a respondent Government with considerable resources, and to the stigma attaching to the finding of certain breaches of the Convention. The adjudication of evidence by the Strasbourg Court is directly informed by these concerns of fairness and equity.

As a result, in the first place, the Court takes a flexible approach to matters of proof, allowing itself a broad discretion on issues concerning the admissibility and evaluation of evidence[3]. The Court's assessment of evidence is governed by the general principle of the free evaluation of the

[1] *Klaas* v. *Germany*, 1993, § 30.

[2] *Austin* v. *United Kingdom*, 2012, § 61.

[3] Neither the Convention nor the Rules of Court regulate in a detailed fashion how evidence is to be assessed by the Court, although the Rules of Court do contain

evidence[4], the Court enjoying absolute freedom in determining not only whether items of evidence are admissible, but also their value or importance in the particular case. The balance between certainty and flexibility is resolved in the Strasbourg Court in favour of the latter in the interest of fairness.

The second consequence of the Court's human rights mission is that, as a general rule, the Court will not rely on the concept that the burden of proof is borne by one or other of the parties as is usually the case before other international tribunals with an adversarial procedure: this applies to individual and inter-State cases[5]. Thirdly, there are no procedural barriers to the admissibility of evidence and few specific rules of evidence, as such, apart from a duty to cooperate with the Court and to submit any evidentiary materials that may be requested. Thus, there is no prohibition of hearsay evidence and no fixed rules concerning the admissibility of illegally obtained evidence, privileged documents or perjured testimony. Such evidential issues will be decided on a case-by-case basis against the background of the case as a whole.

Fourthly, the forms of evidence relied upon by the Court are varied with few limits: decisions of national courts, witness affidavits, medical reports and testimony, official investigation files/reports and other documentary evidence such as video or photographic evidence. Moreover, the Court regularly draws on a wide variety of international fact-finding reports. In cases, for example, concerning conditions of detention it is established

detailed provisions concerning investigatory measures, including fact-finding and the obligation of the parties to participate in them (discussed below).

[4] *Merasbishvilli* v. *Georgia* [GC] 2017, § 315.

[5] *Ireland* v. *United Kingdom*, 1978, § 160; and *Artico* v. *Italy*, 1980, § 30. In practical terms, this general rule (that the burden of proof is not always borne by a particular party) applies post-admissibility. Pre-admissibility, a large number of applications are likely to be rejected by a single judge for failure to satisfy the admissibility criteria. It is incumbent on the applicant to substantiate his complaint by submitting at least a 'beginning of proof' (*commencement de preuve*) in support of his/her allegations. There should be sufficient factual elements to enable the Court to conclude that the allegations are not groundless or 'manifestly ill-founded' under Art 35, § 3 of the Convention. In practice, arguably this is tantamount to a requirement to demonstrate that there is a *prima facie* issue to answer under one of the provisions of the Convention in order to pass the admissibility stage.

practice for the Court to rely on reports of the Committee for the Prevention of Torture and Inhuman and Degrading Treatment of the Council of Europe[6]. In its first rendition case[7] the Court took into account a wide range of such sources including international reports to reach conclusions about the CIA's rendition program.

While this flexible approach to issues of proof continues to be re-affirmed by the Court as its default position, in practice the Court has developed a series of evidential techniques so that in certain defined contexts, the Court will make presumptions, draw inferences (mostly adverse, but also positive) and will distribute the burden of proof between the parties, with each side being required to carry the burden of proving or disproving particular segments of the case.

## Standard of proof

Before turning to those techniques, a word about the Court's standard of proof. Interestingly, for a Court intent on evidentiary flexibility, its standard of proof is fixed: 'beyond reasonable doubt'. It dates back to 'the Greek case'[8]; it was confirmed in the first inter-State case[9] and remains a constant of the Court's case-law[10]. Such proof may follow from 'the coexistence of sufficiently strong, clear and concordant inferences or of similar un-rebutted presumptions of fact.' It is not co-extensive with or borrowed from national (or indeed international) legal systems that use that standard: its role is not to rule on criminal guilt or civil liability, but on a Contracting State's responsibility under a human rights Convention. As applied by the Court, it has an autonomous meaning. An exception is the alleged risk on expulsion where a 'real risk' has to be substantiated[11].

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[6] For ex., *Vasilescu* v. *Belgium*, 2014, §§ 99–102.

[7] *El-Masri* v. *the former Yugoslav Republic of Macedonia,* 2012, §§ 98, 103, 106–27, 160.

[8] *Denmark, Norway, Sweden and the Netherlands* v. *Greece*, 5 November 1969, former European Commission of Human Rights.

[9] *Ireland* v. *the United Kingdom*, 1978.

[10] *Merasbishvilli* v. *Georgia,* 2017.

[11] *Othman (Abu Qatada)* v. *the United Kingdom*, 2012, §§ 273–276; *J.K. and Others* v. *Sweden*, 2016, §§ 85–90.

This standard has given rise to controversy, criticism, support and, indeed, some commentaries in the Judges' separate opinions to the Court's judgments, an analysis of which is beyond the time available. Suffice it to say for the moment that this precise level of proof is best understood when one has assessed the workings of the other evidentiary techniques assisting the Court's establishment of the facts to this standard of proof, to which I will now turn.

## Shifting burdens

The first such technique is shifting the burden of proof. In order to ensure fairness and equality between the parties, the Court regularly shifts the burden of proof from the applicant to the Government in certain particular circumstances. In *Bouyid* v. *Belgium,* 2015, the applicants complained that they were slapped in the face by policemen in a police station. It was undisputed that they had no bruises before entering the station. Medical certificates, established soon after they left the station, showed facial bruising. The Grand Chamber reiterated that it is well-established approach to ill-treatment in detention to the effect that 'where the events in issue lie wholly, or in part, within the exclusive knowledge of the authorities, as in the case of persons in custody, strong presumptions of fact arise in respect of injuries occurring during such detention'. The burden of proof shifted to the Government to provide a 'satisfactory and convincing' explanation of how the bruising came about, which would cast doubt on the applicants' account. In the absence of such explanation, the Court could draw inferences, which could be unfavourable for the Government, inferences justified by the fact that persons in custody are in a vulnerable position and the authorities are under a duty to protect them.

In cases concerning conditions of detention, the Court acknowledges the difficulties of gathering evidence while in prison, so that the applicant is merely expected to provide an elaborate and consistent account of conditions of detention following which the burden shifts to the Government to rebut that account[12].

[12] *Ananyev and Others* v. *Russia*, 2012, §§ 121–130.

In *Baka* v. *Hungary,* 2016, the applicant, a former judge of the Strasbourg Court, alleged that his removal as President of the Supreme Court was because of statements he had made criticising Government planning to reform the judicial system. The Grand Chamber studied the sequence of events leading to his dismissal and found that there was a *prima facie* case in favour of his version of events. The burden of proof to show that his removal was necessary in the context of judicial reform then shifted to the Government since the reasons behind the termination lay within their exclusive knowledge and had never been reviewed by a court. Having failed to discharge that onus of proof, the Court concluded that his removal had indeed been prompted by his expressed views and criticisms. The Court will also shift the burden of proof to the Government where the evidence reveals strong indications of racial discrimination[13].

So shifting the burden of proof in this way, a common evidential technique, reflects the realities of human rights litigation and the differing strengths and knowledge of the parties and, more generally, the Court's objective to be fair and achieve equality of arms.

### Shared burdens

The relatively recent judgment of the Grand Chamber in *J.K. and Others* v. *Sweden* demonstrates another tool — sharing the burden of proof in accordance with the proofs accessible to the respective parties. An Iraqi family complained that there would be a breach of Article 3 of

[13] *D.H. and Others* v. *the Czech Republic*, [GC] 2007, concerned allegations of racial discrimination in the field of education with a high percentage of Roma children being required to attend special schools of lesser quality. The Grand Chamber reiterated that no difference in treatment based on, or to a decisive extent on, a person's ethnic origin was capable of being objectively justified in a democratic society. In the area of racial discrimination, once the applicant had shown a difference in treatment, it fell to the Government to show that it was justified. The Court went on to consider whether the statistics of special school attendance were sufficient to constitute *prima facie* evidence of discrimination. It took into account the nature of the allegations made by a vulnerable community observing that it would be extremely difficult in practice for the applicants to prove indirect discrimination without a shift in the burden of proof. It concluded that the evidence was sufficiently reliable and significant, so as to give rise to a strong presumption of indirect discrimination.

the Convention if the family members were sent back to Iraq. The Grand Chamber considered that the burden of proof of risk in such cases was a shared one, the Court basing itself on standards developed by both the United Nations High Commission for Refugees and the European Union. On the one hand, the burden of proof remained on asylum-seekers as regards risks relevant to their own personal circumstances. While taking into account all of the difficulties an asylum-seeker might encounter in collecting evidence and giving him or her the benefit of the doubt when seeking international protection, an asylum-seeker has not discharged that burden of proof until he or she provides a substantiated account of an individual, and thus a real risk of ill-treatment upon deportation, in which case the burden would shift to the Government to dispel any doubts about that personal risk. On the other hand, the general situation in the country of destination, including the ability of its authorities to protect against ill-treatment, had to be established *proprio motu* by the competent domestic immigration authorities, because they have full access to information concerning the situation in other countries.

### Adverse or negative inferences

If a respondent Government does not heed a request to provide information/materials, the Court cannot force them to comply, but the Court can — if the Government does not duly account for their failure or refusal — draw adverse inferences[14].

In the rendition cases, where the cooperating States had attempted to maintain their involvement in a rendition program secret, the Court relied heavily, in order to establish the facts, on well-attested circumstantial evidence and adverse inferences drawn from the Government's behaviour[15]. The applicants claimed they had been handed over to the CIA and sent to secret detention centres. The respondent Governments denied any involvement. A flexible approach was employed by the Court in evaluating the evidence before it. In the *El-Masri* case, for example, the Court reiterated that its approach to the distribution of the burden of proof was linked to the specificity of the facts (an essentially secret rendition

[14] *Merabishvili* v. *Georgia* [GC], 2017, §312.
[15] *EIMasri* v. *the former Yugoslav Republic of Macedonia* [GC], 2012.

program), the nature of the allegations made (multiple allegations of torture and incommunicado detention) and the Convention rights at stake (Articles 3 and 5 being amongst the most important provisions of the Convention). The Court considered that the mostly circumstantial evidence (indirect, but multi-layered and sourced) adduced before it, by and on behalf of the applicant, amounted to a *prima facie* case in favour of the applicant's version of events so that the burden of proof shifted to the Government. However, the Government failed to provide a 'satisfactory and convincing' explanation of how the events in question occurred or a credible and substantiated rebuttal of the presumption of responsibility for what had taken place. In addition, they had not provided the Court with documents from the applicant's file or sought to contest an expert's report to which reference had been made. In such circumstances, the Court drew adverse inferences from the available material and the authorities conduct and concluded that the applicant's allegations were sufficiently convincing and established beyond reasonable doubt[16].

### Fact-finding

Where no national proceedings have taken place or when the facts are contested by the parties, the Court may decide to carry out fact-finding or take other investigative steps[17]. In such a situation, it finds itself in the uncomfortable position of a first-instance court with the responsibility of establishing the relevant facts. The former Commission carried out approximately 75 fact-finding missions, whereas the present Court has only carried out approximately 20 missions. Most of the Commission's missions concerned cases about alleged extrajudicial killings, disappearances, torture, and village destruction in southeast Turkey. Most recently, the Court has preferred to conduct fact-finding closer to home by holding witnesses hearings in Strasbourg in exceptional cases[18]. This option is

[16] In *Al Nashiri* v. *Poland*, 2014, an investigation report was requested by the Court and refused by the Government. This was found to amount to hindering the Court's task within the meaning of Article 38 of the Convention so that the Court could draw negative inferences against the Government (*Al Nashiri*, § 375).

[17] Rule A1(1), Annex to the Rules of Court.

[18] For ex., *Al Nashiri* v. *Poland*, 2014, § 14; *Husayn* (*Abu Zubaydah*) v. *Poland* 2014, § 12; and *Abu Zubaydah* v. *Lithuania*, 2018 § 10.

less costly and more convenient administratively. So while the Court has relatively extensive fact-finding powers and has done so rather successfully in the past, its current case-load (and the associated pressure on resources) means that fact-finding missions and on-site investigations, successfully deployed by the Commission, and during the early days of the Court, have now become an exception, the Court preferring to reach conclusions on matters of fact by placing the responsibility on the parties to produce the evidence and by relying on adjudicatory techniques some of which have been outlined above.

## Conclusion

Its identity as a human rights court has directly dictated the Strasbourg Court's approach to the adjudication of evidence. It has maintained its pragmatic flexibility in defence of equality and fairness when assessing evidence. This is an approach, which has also been proven useful when examining matters, which purposely have taken place out of sight and in secret. This mind-set lies at the heart of the Court's approach to its search for truth, and is one that is especially fitting for the evidentiary challenges facing a human rights tribunal.

*Х.И. Гаджиев**

# Доказательства в региональных судах по правам человека

Обоснованно отмечается, что процесс доказывания представляет собой сердцевину судопроизводства, так как основные юридически значимые решения и действия осуществляются на основе собирания и оценки доказательств, которые важны для принятия решений судом.

Одной из наиболее важных особенностей понимания юридической аргументации является то, как закон определяет и процедурно рассматривает доказательство[1]. Процессуальные нормы в международном праве разработаны в меньшей степени, чем в национальных правовых системах, что послужило причиной появления не потерявшего свою актуальность утверждения, что процесс в международных судах отличается своей гибкостью и в некоторой степени неформальностью.

Как известно, Европейская конвенция по правам человека (далее — Конвенция) не устанавливает особенных правил в отношении доказательств. Если обратиться к Регламенту Европейского Суда по правам человека (далее — Суд), то можно обнаружить, что существует ряд положений, имеющих значение для обеспечения его работы. Так, ст. 44А предусматривает обязанность сторон сотрудничать с Судом в ходе производства по делу, в частности, в рамках своих полномочий предпринимать такие действия, какие Суд сочтёт необходимыми. Такая обязанность возлагается и на Договаривающиеся государства, которые не являются стороной по делу, когда подобное

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[1] См.: Walton D. 'Legal Argumentation and Evidence', The Pennsylvania State University, 2002, p.15.

сотрудничество является необходимым. В Регламенте Суда указана также возможность принятия любых мер, если сторона не выполняет его указаний (ст. 44B), или, как предусмотрено в ст. 44C Регламента, не представляет доказательства или информацию либо скрывает её по личным мотивам, или иным образом уклоняется от эффективного участия в производстве по делу.

Следует уточнить, что упомянутыми нормами по существу исчерпывается круг регламентированных вопросов доказывания Европейским Судом по правам человека. С учётом этого целесообразно обратиться к практике Суда и показать, как он в течение многих лет создавал свои подходы. Суд при этом выводил необходимые элементы из интерпретации ст. 6 Конвенции, одновременно обогащаясь огромной практикой двух систем права — общего и континентального.

Изложенное в целом гарантирует осуществление правосудия Судом. Он учитывает требования ст. 6 §2 о презумпции невиновности, соотнося свой подход с прочтением данного фундаментального принципа в европейском контексте, суть которого — в высоком требовании к уровню предъявления доказательств и бремени доказывания, рассматривая одновременно презумпцию невиновности как правило о толковании всех сомнений в пользу обвиняемого в качестве важного аспекта любой европейской юрисдикции. Все используемые Судом элементы: стандарты доказывания, разумные сомнения, бремя доказывания, презумпции права и факта — заимствованы из национальных правовых систем и развиты им последовательно на протяжении десятков лет. Мы не хотим утверждать, что все указанные элементы обязательно совпадают с подходами национальных судов, а желаем просто подчеркнуть отсутствие фундаментальных противоречий.

В соответствии с Конвенцией государства обязаны проводить расследование и судебное разбирательство посредством свободного использования доказательств. По мнению Суда, факты устанавливаются в справедливом судебном разбирательстве, с соблюдением гарантий по ст. 6 Конвенции. При этом важно придерживаться ограничивающей усмотрение Суда доктрины четвертой инстанции и не подменять работу национальных

судов, за исключением случаев очевидного произвола. Принимая преимущество национальных судов в вопросах оценки доказательств, Суд вместе с тем указывает, что в силу ч. 1 ст. 6 Конвенции в его обязанность входит должная проверка представлений, аргументов и доказательств, выдвинутых сторонами.

В деле *Ireland v. The United Kingdom* Суд отметил, что в оценке доказательств он принимает стандарт «вне разумного сомнения». Такой стандарт доказывания может следовать из сосуществования достаточно сильных, ясных и согласующихся выводов либо схожих, но не опровергнутых презумпций относительно факта. В этом контексте при таком поведении сторон доказательства могут быть приняты во внимание[2].

В постановлении *Avsar v. Turkey* Суд, ссылаясь одновременно на рассмотренные им ранее дела, подчёркивает значение субсидиарного принципа, по которому он не может брать на себя роль суда первой инстанции при определении фактов[3]. Исключением служат случаи, когда обстоятельства дела вынуждают его предпринимать определённые действия. Общая позиция Суда заключается в том, что это не его дело — переоценивать факты, установленные национальными судами, которые к тому же обязаны оценивать доказательства. Суд одновременно указывает[4], что он не связан с выводами национальных судов, но в обычных обстоятельствах требуются убедительные доводы и наличие важных элементов для отступления от выводов по установленному национальными судами факту.

В своей практике Суд при применении стандарта доказывания обращается к достижениям правовых систем. Так, стандарт доказывания, необходимый для выполнения юридического бремени, зависит от характера разбирательства: уголовное оно или гражданское.

Требованием для признания обвиняемого виновным являются доказательства вне разумных сомнений. В этом случае стандарт влияет на убеждение судей.

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[2] См.: *Ireland* v. *The United Kingdom*, 1978, §161.

[3] См.: *Avsar* v. *Turkey*, 2007, §283.

[4] См.: *Klass* v. *Germany*, 1993, §29–30.

В гражданском процессе стандартом доказывания, необходимым сторонам для выполнения юридического бремени, является доказывание, основанное на балансе вероятностей. Следует заметить, что стандарт доказывания «вне разумного сомнения» применяется и другими международными судами. Представляется возможным повторно сослаться на дело *Avshar v. Turkey*, в котором Суд указал: когда предметом рассмотрения в национальном суде уже было аналогичное уголовное дело на основании тех же обвинений, следует иметь в виду, что уголовно-правовая ответственность отличается от международно-правовой ответственности по Конвенции, на которую распространяется компетенция Суда. Ответственность по Конвенции основывается на её положениях, которые должны толковаться и применяться в целях Конвенции и в свете принципов международного права. Ответственность государства по Конвенции не следует путать с правовыми вопросами индивидуальной ответственности, рассматриваемыми национальными судами. В этом смысле Суд не устанавливает виновность либо невиновность какого-либо лица[5].

В деле *Georgia v. Russia* Суд основывал своё решение не просто на представленных сторонами документах, но и на показаниях свидетелей, заслушанных непосредственно Судом в лице судей, отобранных из состава Большой Палаты. В ходе слушания он также запросил у государства-ответчика дополнительные документы. Приняв стандарт «вне разумных сомнений», Суд отметил, что он не преследовал цель заимствования подхода национальных судов, использующих этот стандарт в рассмотрении уголовных дел. Особенности его задачи по ст. 19 Конвенции — гарантировать соблюдение государствами их обязательств по обеспечению фундаментальных прав по Конвенции, учитывать особенности подхода к вопросу доказывания. Суд повторил ещё раз, что согласно хорошо установленной практике доказательство может следовать из сосуществования достаточно сильных, ясных и согласующихся выводов или одинаковых неопровержимых презумпций факта[6].

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[5] См.: *Avshar*, §284.

[6] См.: *Georgia* v. *Russia*, 2014, §86–94.

В то же время вновь приходится подчеркнуть обращения Суда к праву и практике государств — членов Совета Европы. В их числе находится стандарт *primae facie*, к которому Суд обращается в разных ситуациях, в том числе тогда, когда между сторонами есть спор относительно самого факта. Суд характеризует названный стандарт как стройную, правдоподобную и непротиворечивую версию. Другой стандарт, который применяется Судом, — бремя доказывания и презумпции.

В деле *Merabishvili v. Georgia* Суд постарался прояснить некоторые аспекты своего подхода. Во-первых, он отметил, что, как указывалось в делах *Ireland v. The United Kingdom* и *Cyprus v. Turkey*, по общему правилу Суд не просит у сторон выполнять бремя доказывания, поскольку он рассматривает все материалы, представленные сторонами, и может при необходимости сам их запросить. Ранее Суд в деле *Artico v. Italy* утверждал, что у него единая позиция, применяемая как в межгосударственных делах, так и в других делах, где он опирался на концепцию бремени доказывания[7]. Иногда Суд признавал, что строгое применение принципа *affirmanti incubit probatio* (тот, кто утверждает, должен доказать своё утверждение), то есть бремя доказывания в отношении обвинения ложится на сторону обвинения, как общепринятая формула не всегда выглядит возможным, особенно тогда, когда это связано с конкретными трудностями доказывания, с которыми сталкивается заявитель[8]. Во-вторых, он вновь обратился к стандарту «вне разумных сомнений», подчеркнув, что его применение может не совпадать с практикой использования национальными судами. Суд считает, что уровень убеждения, требуемый для вывода, неотъемлемо связан со спецификой фактов, характером заявления и самим правом по Конвенции.

Суд обычно ссылается на представленные сторонами доказательства, однако он не связан с ними полностью и вправе подтвердить или опровергнуть их. Важным аспектом подхода Суда, на который он ссылается в *Merabishvili v. Georgia*, является свободная оценка не только приемлемости, но и ценности отдельных

[7] См.: *Artico* v. *Italy*, 1990, §30.
[8] См.: *J.K. and others* v. *Sweden*, 2016, §91–98.

частей доказательства[9]. В деле *Nachova and others v. Bulgaria* Суд прояснил, что, не будучи связанным какими-либо правилами при оценке доказательств, он придерживается свободной эволюции всех доказательств, включая такие, которые вытекают из фактов и представлений сторон. Суд в этом же постановлении подчеркнул, что доказательства могут следовать из сосуществования достаточно строгих, ясных и согласованных выводов или аналогичных неопровержимых презумпций факта. Степень убеждения необходима для достижения конкретного вывода, и в связи с этим распределение бремени доказательств неотъемлемо связано со спецификой фактов, характера утверждения и того, какое именно право по Конвенции непосредственно под угрозой[10]. Представляется, что такое отношение придаёт определённый состязательный характер применяемым Судом процедурам, где слушания проводятся в Большой Палате и в редких случаях — в Палате.

Конечно, используемые Судом общие процедуры нельзя сравнить с состязательностью процесса в общих судах, что невозможно и не предполагалось при его создании. Вместе с тем Суд стремится гарантировать равенство прав сторон, обеспечивая его как знакомством сторон со всеми материалами дела, так и обоюдным комментированием выдвигаемых аргументов.

Для достижения надлежащего баланса и в итоге справедливого решения проявляемая Судом гибкость в вопросе бремени доказывания заключается в его сдвигах, при которых оно переходит от заявителя к государству и наоборот, в зависимости от характера дела и целей, которые Суд преследует. Можно обратиться к практике Суда по делам, касающимся ст. 3 Конвенции. В них бремя порой ложится на заявителя, от которого требуется представить подтверждения того, что он был подвергнут пыткам, бесчеловечному или унижающему достоинство обращению. В случаях представлениях таких доказательств бремя доказывания сдвигается в сторону государства. В этом случае появляется серьёзная презумпция виновности

[9] См.: *Merabishvili* v. *Georgia*, 2017, §311–315.
[10] См.: *Nachova and others* v. *Bulgaria*, 2005, §147.

государства, которое должно выдвинуть доказательства или, по крайней мере, правдоподобное объяснение своей невиновности[11].

Данный пример свидетельствует о применении правила презумпции, когда факт признается в случае отсутствия доказательств обратного. Презумпции не всегда фигурируют при рассмотрении доказательств, но их можно разделить на необязательные и обязательные. Они могут быть основаны на логике, опыте, вероятности, способствовать полностью или частично справедливому распределению доказательств при их рассмотрении, стимулированию стороны, которой известно доказательство, к тому, чтобы представить его.

Презумпция невиновности является обязательной до тех пор, пока она не будет преодолена доказательствами виновности. Практика Суда показывает, что презумпция способна сдвигаться к стороне, против которой она работает, особенно когда необходимо представить доказательства для опровержения презумпции.

Презумпция — это определённое законом или судебной практикой правило, по которому факт признается установленным в отсутствие доказательства противного. Суд умело распорядился им в деле *Murzic v. Croatia*, подчеркнув, что наличие личного пространства в тюремной камере менее трёх квадратных метров не всегда означает нарушение ст. 3 Конвенции, хотя и свидетельствует о презумпции такого нарушения, что может быть опровергнуто другими аргументами. В постановлении определяются принципы и стандарты по ст. 3 Конвенции относительно допустимого минимума личного пространства многолюдной тюремной камеры[12].

Хочется добавить к сказанному, что вопросы вероятности и бремени доказывания составляют сердцевину разрешения дел о предоставлении убежища и в этом отношении представляют интерес дела, разрешённые Судом: *F.G. v. Sweden* и *J.K. and others v. Sweden* (23.03.2016, 23.08.2016). Важным в этих делах представляется возможность оценки Судом фактов *ex nunc*, то есть Суд принимает во внимание информацию,

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[11] См.: *Selmouni* v. *France*, 1999, §87.

[12] См.: *Mursic* v. *Croatia*, 2016, §116, 136–145.

которая не была известна властям при рассмотрении дела. Однако есть и возражения. Судья ЕСПЧ Д. Раварани считает такую позицию Суда по оценке фактов проблематичной с точки зрения национального права и права Европейского Союза.

Последовательно отмечая, что ст. 6 Конвенции не требует каких-либо правил о доказательствах — это вопрос предмета регулирования национального права, Суд в деле *Van Mechelen and others v. The Netherlands* указал, что допустимость доказательств есть вопрос национального права и национальные суды должны оценивать предъявленные им доказательства[13]. Суд и ранее высказывал такую позицию, когда столкнулся с проблемой совместимости требований справедливого судебного разбирательства по ст. 6 и использования доказательств, полученных незаконным путём. Практика Суда по данному вопросу постоянно развивается, корректируется и, думается, будет иметь продолжение.

Она берёт начало с дела *Schenk v. Switzerland*, где Суд указал, что не может исключить *in abstractio* допустимость такого рода доказательств и должен оценить, было ли судебное разбирательство справедливым[14]. Четверо судей в особом мнении указали: «Ни один суд не может, не нанося ущерба надлежащему отправлению правосудия, опираться на доказательство, которое было получено не только несправедливым путём, но и в первую очередь незаконно. Если он так поступает, судебное разбирательство не может считаться справедливым по смыслу Конвенции»[15]. Анализ рассматриваемого решения Суда приводит к выводу о том, что нарушение ст. 6 Конвенции не будет установлено, если в основу обвинения кроме «порочных» доказательств не будут положены допустимые доказательства, или что для целей справедливого судебного разбирательства обвинение не может основываться исключительно на незаконно полученных доказательствах.

Заметим, что Европейская комиссия по правам человека, как и Суд, несмотря на несоответствие Конвенции применённых

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[13] См.: *Van Mechelen and others* v. *The Netherlands*, 1997, §50.

[14] См.: *Schenk* v. *Switzerland*, 198,. §46.

[15] *Ibid*. Joint dissenting opinion of Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo).

гарантий в национальных процедурах, исходила из эволюции всего судебного разбирательства, рассматривая его как справедливое[16]. Бывший председатель Комиссии Стефан Трексель считает, что такая тенденция не могла быть встречена с удовлетворением, когда предпочтение отдавалось не проверке соблюдения конкретных гарантий, а их соотношению с общим правом на справедливое судебное разбирательство. Он полагает, что и отказ Суда иметь проблемы с допустимостью доказательств нельзя считать полностью необоснованным.

Рассматриваемый вопрос не только является одним из самых спорных в процессуальном праве, но и связан с неодинаковым походом в разных правовых системах. Должны быть ясные пределы допустимости доказательства, полученного в нарушение Конвенции[17]. Упомянутый подход Суда систематически совершенствовался — так, в деле *Khan v. The United Kingdom* заявитель был осуждён за торговлю наркотиками на основании доказательства, незаконно полученного полицией с использованием прослушивающих устройств. Суд пришёл к выводу о нарушении ст. 8 Конвенции ввиду отсутствия законодательства, регулирующего использование таких устройств. Одновременно Суд посчитал, что использование названного доказательства не лишило заявителя права на справедливое судебное разбирательство, указав, что незаконно полученный материал был по существу единственным доказательством. Между тем, когда нет риска ненадёжности или недостоверности такого доказательства, необходимость в наличии других доказательств существенно снижается[18]. Представляется важным вопрос о том, можно ли судебное разбирательство рассматривать как справедливое, если было использовано доказательство, полученное незаконным путём? Одни аргументы состоят в том, что справедливость в контексте Конвенции подразумевает приверженность верховенству права и невозможно говорить о справедливом судебном разбирательстве, если оно

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[16] См.: *Choudhary* v. *The United Kingdom*, 1998; *Ash* v. *Austria*, 1991; *Stanford* v. *The United Kingdom*, 1994.

[17] См.: St. Trechsel with the assistance of S.I. Summers. 'Human Rights in Criminal Proceedings', Oxford University Press, 2007, pp. 87–88.

[18] См.: *Khan* v. *The United Kingdom*, 2000, §37–38.

сопровождалось нарушением закона. Другая позиция в том, что термин «справедливость» в контексте Конвенции — это соблюдение верховенства права, предполагающего уважение прав человека, предусмотренных Конвенцией. Справедливость по ст. 6 Конвенции предполагает как соблюдение законности, так и уважение прав человека.

Хотелось бы также вкратце остановиться на трёх постановлениях Суда, которые непосредственно связаны с предыдущим анализом. Так, если проанализировать аргументы в постановлении Суда в деле *Bykov v. Russia*[19] и аргументы судей, оставшихся при особом мнении, можно сказать, что имеются основные три элемента, подлежащих учёту при оценке вопроса об использовании полученных незаконным путём доказательств: наличие процессуальных гарантий, качество рассматриваемого доказательства и важность его для осуждения.

Другие рассмотренные Большой Палатой дела — *Jalloh v. Germany*[20] и *Gafgen v. Germany*[21] — интересны тем, что Суд вновь обратился к фундаментальному вопросу уголовного процесса — допустимости доказательств. И это неслучайно. Именно от его решения может зависеть главным образом осуждение или оправдание обвиняемого. Нахождение нарушения этого права порой равносильно тому, что международный орган скажет: лицо, чьи права нарушены, необоснованно осуждено.

Суд неохотно идёт на это и повторяет формулу, что его задача не решать вопрос о приемлемости показаний свидетеля, а скорее определить, было ли судебное разбирательство в целом справедливым. Принимая во внимание различие обстоятельств всех трёх названных дел, заметим, что если в деле *Bykov v. Russia* Суд указал на незаконность использования секретного наблюдения с точки зрения ст. 8, но на соблюдение гарантий по ст. 6, то в деле *Jalloh v. Germany* он пришёл к иному выводу. По мнению Суда, применённый метод извлечения наркотического вещества из тела заявителя не запрещён по национальному праву, но противоречил

[19] См.: *Bykov* v. *Russia*, 2009.
[20] См.: *Jalloh* v. *Germany*, 2006.
[21] См.: *Gafgen* v. *Germany*, 2010.

требованиям ст. 6 Конвенции, поскольку доказательство было получено в нарушение ст. 3 Конвенции. В деле *Gafgen v. Germany* Суд принял во внимание конкретные обстоятельства дела, при которых неисключение национальными судами доказательств, полученных на основе признания, добытого посредством бесчеловечного обращения, не оказали влияния на осуждение или наказание заявителя, или на общую справедливость судебного разбирательства.

В то же время во всех трёх делах Суд разделил свои подходы, отдельно обсудив вопрос привилегии несвидетельствования против себя как гарантию справедливого судебного разбирательства. Хотя упомянутые права — хранить молчание и не свидетельствовать против себя — не предусмотрены в Конвенции в отличие от Пакта о гражданских и политических правах (ст. 14 §3), тем не менее они прочно вошли в практику Суда, начиная с дела *Funke v. France*[22]. Далее в делах *John Murrey v. The United Kingdom*[23] *и Saunders v. The United Kingdom*[24] Суд прояснил отдельные элементы рассматриваемых привилегий. Так, ценность последнего из названных постановлений Суда — в определении таких аспектов, как процедуры, в которых применяются привилегии, сами границы привилегий и, наконец, случаи их забвения, когда привилегии отменяются.

В завершение хотелось несколько слов сказать и об использовании тайных агентов или секретных методов следствия, которые сами по себе не нарушают права человека и право на справедливый суд, если имеют ясные пределы и надёжные гарантии. Практика Суда находится в постоянном развитии и уточнении отдельных элементов, хотя определённые критерии выработаны. Так, в деле *Ramauskas v. Lithuania* Суд высказал позицию, что, если национальный суд придёт к выводу, что лицо подстрекалось к совершению преступления, все доказательства, полученные в результате подстрекательства, должны быть исключены и не могут использоваться в деле[25]. Такие доказательства нельзя использовать,

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[22] См.: *Funke* v. *France*, 1993.
[23] См.: *John Murrey* v. *The United Kingdom*, 1996.
[24] См.: *Saunders* v. *The United Kingdom*, 1996.
[25] См.: *Ramauskas* v. *Lithuania*, §113–135.

если следствие не располагало достаточной правовой основой применённых методов расследования и адекватных гарантий. Наконец, Суд всегда оценивает, было ли такое доказательство единственным для признания лица виновным.

Хотелось бы также подчеркнуть, что принципы, которые должны применяться в случаях, когда свидетель обвинения отсутствовал в судебном процессе, и заявления, сделанные им ранее, были допущены в качестве доказательства, обобщены и уточнены в постановлениях Большой Палаты по делам *Al-Khawaja and Tahery v. The United Kingdom*[26] *и Schatschaschwili v. Germany*[27].

Все упомянутые рассмотренные Судом вопросы доказывания, а также те, которые в рамках одной статьи, естественно, невозможно осветить, связаны с той фундаментальной ролью, которую продолжает играть институт доказывания в современном международном и национальном правосудии.

[26] См.: *Al-Khawaja and Tahery* v. *The United Kingdom*, 2011.
[27] См.: *Schatschaschwili* v. *Germany*, 2015.

# Дискуссионная панель 3: Доказательства в международной уголовной юстиции / Panel 3: Evidence in International Criminal Jurisdiction

*Б.Р. Тузмухамедов**

## Доказательства в международной уголовной юстиции

В работе данной секции приняли участие эксперты, каждый из которых может похвастать внушительным послужным списком. Примечательной особенностью профессиональной биографии каждого из них является сочетание опыта юридической работы в национальной и международной юрисдикциях.

Йэйн Бономи служил судьёй Верховных Судов Шотландии, а также судьёй Международного трибунала ООН по бывшей Югославии. Он неоднократно назначался в высшую апелляционную инстанцию шотландской юрисдикции, является британским Уполномоченным по наблюдению за оперативно-розыскной деятельностью, членом британского Тайного совета.

Питер Кремер возглавлял секцию обвинителей в апелляционном производстве Международного трибунала по бывшей Югославии (МТБЮ) и был заместителем Главного обвинителя МТБЮ. До того он был федеральным прокурором Канады и руководил Отделом военных преступлений и преступлений против человечности Министерства юстиции Канады.

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* Судья *ad hoc* Европейского Суда по правам человека, член Комитета против пыток, кандидат юридических наук, профессор, заслуженный юрист Российской Федерации, ранее — судья первой инстанции Международного трибунала ООН по Руанде, судья Апелляционной палаты международных уголовных трибуналов ООН по Руанде и по бывшей Югославии.

Кимберли Прост в начале 2018 года была избрана судьёй первой инстанции Международного уголовного суда (МУС), а ранее она была Уполномоченным по защите прав лиц, внесённых в списки резолюциями Совета Безопасности ООН о санкциях против «Исламского государства» и «Аль-Каиды», возглавляла Секретариат Президента МУС. Кимберли Прост также была судьёй *ad litem* Международного трибунала по бывшей Югославии, а прежде занимала ответственные должности в Министерстве юстиции Канады.

Ивана Хрдличкова является Президентом Специального трибунала по Ливану. До назначения в Трибунал она была судьёй окружного, затем апелляционного и, наконец, Верховного суда Чешской Республики. Доктор Хрдличкова выступала в качестве эксперта в ряде международных проектов, в том числе проводимых под эгидой Совета Европы и Европейского Союза по таким направлениям, как защита прав человека, предотвращение отмывания денег и финансирования терроризма.

В рамках дискуссии была предпринята попытка с разных сторон с учётом опыта участников рассмотреть следующие темы.

Во-первых, это применение строгих правил приемлемости доказательств, которые предотвращали бы допуск некачественных, ненадёжных, а то и попросту сфабрикованных «фактов» и «свидетельств».

Во-вторых, возложение большего бремени ответственности за подтверждение качества доказательства на сторону, его представляющую.

В-третьих, развитие и наращивание возможностей международных судебных инстанций по выявлению и установлению фактов.

В-четвертых, установление приоритета между процедурами рассмотрения межгосударственных споров, индивидуальных жалоб и международного уголовного судопроизводства по делам, основанным на фактах и событиях, близких по времени, пространству и кругу затронутых лиц. И в связи с этим важны вопросы управления ситуацией сталкивающихся или конкурирующих юрисдикций, а также — в идеале — достижения гармонии правовых позиций, высказываемых различными международными судебными инстанциями.

Ну и, в-пятых, общий вопрос подготовки, образованности и просвещённости международных судей как условия их готовности отделять зерна от плевел при работе с доказательствами.

*I. Bonomy**

# Evidence Before International Courts and Tribunals: Distinct Fora, Similar Approaches

At the outset, I would like to thank the International and Comparative Law Research Centre and the Russian Arbitration Centre for inviting me to participate here and for their generous hospitality.

It is important that, in spite of the political tensions between states throughout the world, experts in international law and procedure continue to work towards building an authoritative and respected international justice system.

I am grateful to His Excellency Aniruddha Rajput for setting the agenda for our Workshop in his Keynote Address so eloquently.

I agree entirely with the view expressed in the Keynote Address that greater clarity about the rules and principles of evidence that are applied by international courts and tribunals will do much to enhance the authority of the International Justice System. The magnitude of that task cannot be overemphasised. This Workshop is a significant, but inevitably small step along the way.

I agree also that the experience of international criminal courts and tribunals has much to contribute to this debate, not least because they have advanced systems for handling evidence, both oral and documentary.

However, I suggest that the first step that must be taken, is to identify and address the faults and weaknesses in each of the tribunal systems that exist at present, to ensure that these are removed and not carried forward. That would involve stating principles and rules to establish the practices and procedures that are most likely to produce fair and expeditious hearings before the whole range of international tribunals.

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* Retired judge of the Court of Appeal, previously — judge in Scotland and at the International Criminal Tribunal for the former Yugoslavia, Scotland's senior prosecuting counsel.

I now want to mention some faults and weaknesses in the international criminal justice system, the system with which I am familiar. In doing so, I express only my own personal opinion.

1. The first one is that the common law adversarial system of conducting proceedings is not well suited to the conduct of war crimes trials of the nature of those, conducted since 1995. That system leaves control of the proceedings in the hands of the parties, i.e. the prosecution and the defence. The volume and complexity of the evidence involved in these cases is such that it is not realistic to explore every detail of the evidence in court in real time, leaving it to the parties to conduct their live examination and cross-examination of witnesses as they wish. The generous time-limits of some of the rules of procedure can contribute to the impression of a general lack of urgency in the conduct of proceedings.

There are also other reasons why the adversarial system is not ideal for international proceedings. It is not a feature of the majority of legal systems in the world, and so most lawyers are not familiar with it in practice. The concept of cross-examination can seem strange to witnesses from, for example, the former Yugoslavia, and many witnesses found the aggressive way, in which accusations that they were lying in their evidence were put to them, very offensive and very upsetting. It was as if the battlefield had been brought into the courtroom.

I have a number of thoughts on how to deal with this. The first is to put far greater control of the proceedings in the hands of the judges. A proactive form of judicial case management is required. That immediately raises the question of the identity of the judges. Ideally, in the criminal law field, senior judges with practical experience of the conduct and management of lengthy and complex criminal proceedings should be appointed. It has been a feature of international criminal tribunals that a substantial number of those appointed as judges have had no judicial experience, with a good number being former diplomats who happen to have a legal qualification and experience of international law. That is not an ideal qualification for the job that is required.

The judges would require the tools necessary to ensure that proceedings are both fair and expeditious. That may mean making procedural rules that are more demanding than the current rules, but which allow discretion to the judges to make concessions to the parties, where appropriate, to ensure the fairness of the proceedings. A mandatory scheme for prosecution

disclosure of relevant evidence, backed up by sanctions for non-compliance, would be a desirable development.

2. The second weakness I wish to highlight is the right of the accused to represent themselves or, as one former colleague at the ICTY described it, the right to pretend to represent themselves. There are well-known examples of this right being abused. At the very least, it should be possible for the judges to withdraw the right if it is abused. However, I would go further and remove the right for a number of reasons.

In my experience, lawyers, often in quite large numbers, have been involved behind the scenes in all the prominent cases of so-called self-representation, often paid for from the legal aid budget of the tribunal. And yet, in spite of that, the tribunal is deprived of the professional engagement between counsel and judges that is an essential element in securing the fair and expeditious conduct of proceedings. Self-representation is also an inevitable cause of significant delays in the hearing of cases.

3. The third weakness that, I believe, should be addressed is the failure of states involved in the conflicts, giving rise to criminal proceedings, to cooperate with the investigation and prosecution of alleged crimes. The problems encountered by the Office of the Prosecutor of the ICTY in securing essential documentary evidence are well-documented. Reliance was placed on co-operation by the states of the former Yugoslavia with the Prosecutor and the Tribunal in terms of Article 29 of the Statute establishing the Tribunal, which obliged those states to comply without undue delay with any request for assistance or any order issued by a trial chamber. There was no effective sanction. The only sanction available to the Tribunal was to report any failure to comply with the UN Security Council. The weakness of this system is compounded by the absence of a UN police force. This is a particularly important issue for criminal tribunals, because they differ from the other tribunals we have been discussing here in that all the parties are individuals, and the states, from whom assistance is sought, are not parties to the proceedings. I think that all the others involve one or more of the states party to the issue being before the tribunal, which should increase the prospect of the tribunal being able to secure state co-operation.

These are my observations and initial thoughts on taking forward the debate, stimulated by the excellent initiative of the ICLRC and given momentum by today's Workshop.

*P. Kremer**

# Evidence Before International Criminal Tribunals

## General comments

Modern international criminal procedure has evolved over the past three decades into a harmonized set of procedural and evidentiary rules. These rules can serve as the building blocks for a set of rules of evidence for all international law *fora*.

Starting in 1993 with the Statute of the International Criminal Tribunal for the former Yugoslavia[1] and followed in 1994 by the Statute of the International Criminal Tribunal for Rwanda[2], the judges of international criminal tribunals were entrusted the power to adopt and revise the Rules of Procedure and Evidence ('RPE') for their tribunals. Article 15 of both the ICTY and ICTR Statutes provided:

> 'The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.'

Also, Article 20(1) of the ICTY and ICTR Statutes provided guidance to the judges as to the role of the RPE in the judicial process:

> 'The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.'

Faced with the task of adopting RPE, judges coming from different legal systems and cultural backgrounds developed a functional set of standards

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[1] UNSC Resolution 827 (1993), UN Doc. S/RES/827 (1993), 25 May 1993, ICTY Statute.
[2] UNSC Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994, ICTR Statute.

for admitting, assessing and weighing of evidence in international criminal trials. The original standards at the ICTY were selected from common or civil law traditions, as they were deemed the most appropriate. The RPE were largely procedure-oriented aimed at managing the factually complex and evidence-rich international criminal trials, while at the same time respecting the statutory direction that the proceedings be as fair and expeditious as possible.

The initial procedural model for the RPE of the ICTY was later adopted as the basic model for other international criminal tribunals. In the case of the ICTR and SCSL[3], the United Nations (UN) mandated in their respective Statutes that the RPE from ICTY and ICTR be applicable[4]. The experience and precedents of the ICTY, ICTR and SCSL were later used by the International Criminal Court[5] and other *ad hoc* criminal tribunals[6],[7] in developing their RPEs.

Throughout the life of the tribunals, the judges of each tribunal actively exercised their rule-making authority by changing the RPE to address the new and pressing evidentiary and procedural challenges arising in their institution[8].

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[3] Statute of the Special Court for Sierra Leone, Agreement Between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138, SCSL Statute.

[4] Article 14, ICTR Statute; Article 14(1), SCSL Statute.

[5] Rome Statute of the International Criminal Court, signed 17 July 1998, in force 1 July 2002, UN Doc. A/Conf.183/9, 2187 UNTS 3, ICC Statute. Rules of Procedure and Evidence, adopted by the Assembly of State Parties, First Session, New York, 3-10 September 2002, Official Records ICC-ASP/13 and Corr.1, part II.A.

[6] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006); Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed 6 June 2003, entered into force 29 April 2005, 2329 UNTS 117, ECCC Statute.

[7] Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, signed 7 February 2007, entered in force 10 June 2007, and Statute of the Special Tribunal for Lebanon, annexed to UNSC Resolution 1757 (2007), UN Doc. S/RES/1757 (2007), 30 May 2007, STL Statute.

[8] The ICC judges were not given a general rule-making authority. The ICC RPE were adopted and may only be amended by the Assembly of States Parties. The judges can

## The Rules of Evidence of the ICTY

The Rules of Evidence Section in the ICTY RPE contains only 10 rules, many of which are procedural in nature. The first, Rule 89(A), provides: 'A Chamber shall apply the rules of evidence set forth in this section, and shall not be bound by national rules of evidence.' The general standard for admissibility of evidence is found in Rule 89(C), which provides: 'A Chamber may admit any relevant evidence which it deems to have probative value.' From this foundation, all other rules of evidence are formulated. The rules themselves provide little guidance as to how they are to be applied. There are two exclusionary rules: (1) Rule 89(D), which states that '[e]vidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial'; and (2) Rule 95, which makes evidence inadmissible 'if obtained by methods which cast substantial doubt on its reliability, or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings'. These exclusionary rules notwithstanding, in most instances the tribunals have resolved disputes by admitting evidence on the condition that it may be excluded, if it is deemed to violate the rules.

While the ICTY RPE generally outline how and what evidence may be admitted, the jurisprudence provides the working guidelines for the admission, evaluation and assessment of the evidence in decision-making. ICTY trial judgments in recent major cases[9] contain sections on General Evidentiary Principles explaining how the principles were applied. The trial judgments also contain references to other trial and appeal orders, decisions and judgments on general and specific evidentiary issues. In addition, the trial judgments contain rich descriptions of the application of these principles within the case. This vast body of jurisprudence offers a rich source for the formulation of similar approaches on evidence across all international law *fora*[10].

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however make provisional Rules in urgent cases. See Article 51(3), ICC Statute.

[9] *Prosecutor* v. *Radovan Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016, *Karadžić* Trial Judgment. See also, *Prosecutor* v. *Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T, Judgment, 26 February 2009, *Milutinović et al.* Trial Judgment; and *Prosecutor* v. *Popović*, *Beara*, *Nikolić*, *Borovčanin*, *Miletić*, *Gvero*, *and Pandurević*, Case No. IT-05-88-T, Judgment, 10 June 2010, *Popović et al.* Trial Judgment.

[10] My comments in this paragraph apply also to the other international criminal courts and tribunals mentioned above.

## General Evidentiary Principles from the Karadžić Trial Judgment

The *Karadžić* Trial Judgment describes the General Evidentiary Principles the Chamber applied starting at paragraph 8. I have chosen to use the Chamber's clear summary overview of the main principles from paragraphs 8 to 14, rather than attempt to describe them in my own words. They follow below:

> '8. The Chamber assessed the evidence adduced at trial in light of the entire trial record and in accordance with the Statute and the Rules. As provided for in Rule 89(B), where no guidance was given by the Rules, the evidence was evaluated in a way that would best favour a fair determination of the case and that is consistent with the spirit of the Statute and the general principles of law[11], including the principle of *in dubio pro reo*.
>
> 9. At the outset of the proceedings, for the benefit of the smooth conduct of the trial, the Chamber issued orders, which provided the parties with guidelines on the conduct of trial and the rules that would govern the admission or exclusion of evidence[12]. In accordance with the Rules, the Chamber adopted an approach that favored the admissibility of evidence, provided it was relevant and had probative value[13], and

[11] According to the principle of *in dubio pro reo*, any doubt as to the evidence must be resolved in favour of the accused. The Appeals Chamber stated in the *Limaj* case that the principle of *in dubio pro reo* 'applies to findings required for conviction, such as those which make up the elements of the crime charged', but 'is not applied to individual pieces of evidence and findings of fact on which the judgment does not rely'. *Prosecutor* v. *Fatmir Limaj, Haradin Bala, Isak Musliu,* Case No. IT-03-66-A, Judgment, 27 September 2007, para. 21.

[12] First Order on Conduct of Trial; Further Order on Conduct of Trial; Guidelines for Admission of Evidence.

[13] Hearing, T. 1953 (6 May 2010). The Chamber holding: 'In addition to relevance and authenticity, the Chamber must be satisfied as to the probative value of a piece of proposed evidence, and this requires that the witness to whom it is shown is able to confirm its content or make some other positive comment about it', as reaffirmed in Guidelines for Admission of Evidence, para. 11, specifying that 'it is desirable that a witness speak to the origins and/or content of a document to be tendered into evidence, to allow the Chamber to properly assess the relevance, authenticity, and reliability of that document, and thus its probative value, and, ultimately, be able to make use of that document in a meaningful way in its overall consideration of the evidence in the case'.

assessed the weight to be ascribed to each piece of evidence in its overall consideration of the entire trial record[14].

10. Article 21(3) of the Statute provides that the Accused shall be presumed innocent until proven guilty. The Prosecution bears the burden of establishing each element of the alleged crimes and of the mode of individual criminal responsibility with which the Accused is charged, as well as any fact, which is indispensable for a conviction beyond reasonable doubt[15]. The Chamber has therefore determined whether the ultimate weight of all of the evidence is sufficient to establish beyond reasonable doubt the elements of the crimes charged in the Indictment, and ultimately, the responsibility of the Accused. When the Prosecution relied upon proof of a certain fact such as, for example, the state of mind of an Accused by inference, the Chamber considered whether that inference was the only reasonable inference that could have been made based on that evidence[16]. Where that inference was not the only reasonable inference, it found that the Prosecution had not proved its case. The Chamber further notes that while it has not always reiterated the phrase "beyond reasonable doubt" in all of its findings, this standard

[14] Hearing, T. 10070 (13 January 2011), T. 17934 (25 August 2011). The Chamber notes that in the footnotes to this Judgment, it did not refer to all of the evidence it reviewed and considered in entering its findings, but only to the most important pieces of evidence.

[15] *Prosecutor* v. *Nikola Sainović, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić*, Case No. IT-05-87-A, Appeal Judgment, *Sainović et al.* Appeal Judgment, 23 January 2014, para. 132; *Prosecutor* v. *Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 October 2008, para. 55; *Prosecutor* v. *Sefer Halilović*, Case No. IT-01-48-A, Appeal Judgment, 16 October 2007, para. 125. *See also Prosecutor* v. *André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe,* Case No. ICTR-99-46-A, Appeal Judgment, 7 July 2006, para. 174, fn. 356 (holding that '[e]ven if some of the material facts pleaded in the indictment are not established beyond reasonable doubt, a Chamber might enter a conviction provided that having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts' and considering that 'the "material facts", which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence, have to be distinguished from the facts, which have to be proved beyond reasonable doubt').

[16] *Prosecutor* v. *Mitar Vasiljević*, Case No.: IT-98-32-A, Appeal Judgment, 25 February 2004, para. 120.

of proof was applied throughout the Judgment. The Chamber also notes that when it has made a negative finding in respect of the evidence of a witness it did not deem reliable, this does not entail that the Chamber made a positive finding to the contrary.

11. In its evaluation of witnesses testifying *viva voce* or pursuant to Rule 92 *ter*, the Chamber had regard to, *inter alia*, the demeanor of witnesses, as well as to the passage of time since the events charged in the Indictment and its possible impact on the reliability of the evidence. With regard to all witnesses, the Chamber also assessed the probability and the consistency of their evidence as well as the circumstances of the case and corroboration from other evidence.

12. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration[17]. When such a situation occurred, the Chamber examined the evidence of the Prosecution witness with the utmost caution before accepting it as a sufficient basis for a finding of guilt. Insignificant discrepancies between the evidence of different witnesses, or between the evidence of a particular witness in court and his prior statements, in general, have not been regarded as discrediting such evidence[18].

13. Hearsay evidence is any statement other than one made by a witness while giving evidence in the proceedings and which is offered to prove the truth of the matter asserted in the statement[19]. It is admissible under the case law of the Tribunal. The weight to be attributed to that evidence

[17] *Prosecutor* v. *Zejnil Delalic, Zdravko Mucic* (*aka 'PAVO'*), *Hazim Delic and Esad Landžo* (*aka 'ZENGA'*) (*'Čelebici* Case'), Appeal Judgment, *Čelebici* Appeal Judgment , para. 506 ('[T]here is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence. What matters is the reliability and credibility accorded to the testimony.'). *See also* para. 24 of the *Karadžić* Trial Judgment.

[18] *See*, for instance, *Milutinović et al*. Trial Judgment, Vol. I, para. 49.

[19] *See* Archbold, 'Criminal Pleading, Evidence & Practice', § 11-1 (2010); 'Black's Law Dictionary', 739 (8th ed. 2004); Fed. R. Evid. 801(c); Criminal Justice Act 2003 Ch. 2, Sec. 114(1). See also *Prosecutor* v. *Zlatko Aleksovski,* Appeal Decision on Admissibility, *Aleksovski* Appeal Decision on Admissibility, 16 February 1999, para. 15.

depends upon the specific circumstances and, as such, the Chamber assessed hearsay evidence on a case-by-case basis[20]. The Appeals Chamber has held that

"Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence. Since such evidence is admitted to prove the truth of its contents, a Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate; and for this purpose may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. The absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is 'first-hand' or more removed, are also relevant to the probative value of the evidence. The fact that the evidence is hearsay does not necessarily deprive it of probative value, but it is acknowledged that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, although even this will depend upon the infinitely variable circumstances which surround hearsay evidence."[21]

14. Circumstantial evidence is evidence of a number of different circumstances surrounding an event from which a fact at issue may be reasonably inferred[22]. Where an inference is drawn from circumstantial evidence to establish a fact on which a conviction relies, that inference must be the only reasonable one that could be drawn from the evidence presented.'[23]

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[20] See *Aleksovski* Appeal Decision on Admissibility, para. 15. *See*, for instance, Hearing, T. 24908, 21 February 2012 (stating that the fact that evidence may be triple hearsay is a factor to consider when assessing the weight of the evidence).

[21] *Aleksovski* Appeal Decision on Admissibility, para. 15 (footnotes omitted).

[22] See *Čelebići* Appeal Judgment, para. 458.

[23] *Prosecutor* v. *Miroslav Kvočka, Mlado Radič, Zoran Zigič, Dragoljub Prcač*, Case No. IT-98-30/1-A, Appeal Judgment, 28 February 2005, para. 237, as recalled in *Šainović et al.* Appeal Judgment, para. 995.

The *Karadžić* Trial Chamber also addressed specific evidentiary considerations concerning certain categories of witnesses, exhibits, evidence admitted in writing and judicial notice of adjudicated facts, and discussed, in varying detail, how and why its individual assessments were made[24]. Moreover, in the footnotes, the Trial Chamber identified the witnesses in each witness category and specifically referred to the application of the evidentiary considerations concerning them in the relevant parts of the Trial Judgment. These specific evidentiary considerations applied to:

a. *Certain categories of witnesses*:

   (i) Persons associated with the parties to the proceedings;

   (ii) Individuals convicted of crimes arising from events charged in the Indictment;

   (iii) Individuals whose trial is currently ongoing, at trial or on appeal;

   (iv) Expert witnesses.

b. *Certain categories of exhibits*:

   (i) Source documents;

   (ii) Third-party statements;

   (iii) Media reports;

   (iv) Intercepts.

c. *Evidence admitted in writing and the issue of corroboration.*

*d. Judicial notice of adjudicated facts.*

In his Keynote Statement, Aniruddha Rajput mentioned that there are some principles of evidence, like the standard of evidence and burden of proof, which by their very nature are influenced by the subject of the dispute. For example, the burden of proof for guilt in criminal matters is proof beyond a reasonable doubt. In inter-state litigation involving charges of exceptional gravity like genocide, the International Court of Justice (ICJ)

[24] *Karadžić* Trial, Judgment, paras. 15–31.

in the *Bosnia* v. *Serbia Genocide* Case translated this burden as 'proved by evidence that is fully conclusive'[25].

Comparing the genocide discussions in the *Karadžić* case and the *Bosnia and Herzegovina* v. *Serbia and Montenegro Genocide* case reveals that both courts evaluated the evidence carefully, thoroughly and thoughtfully in light of the applicable legal and evidential standards. Both the ICTY and the ICJ judges accounted for the serious nature of the crime of genocide and provided guidance as the applicable rules of evidence to proving this exceptionally grave crime. In the final analysis, both applied a higher burden of proof for the crime of genocide and approached the final evaluation of evidence with greater caution, but the basic rules and guidelines for the admissibility and assessment of evidence proving the components of genocide remained unchanged. In this example, the difference between the criminal and civil standard for proving genocide is semantic, not substantive. The sameness of standard may also apply to other serious crimes like fraud. In any event, the difference between criminal and civil burden of proof is not a justifiable argument to dismiss the goal of harmonizing approaches on evidence for all international *fora*.

Consolidating the rules of and guidelines on evidence from international criminal law and civil law *fora* is not only possible, it is desirable. Burden of proof aside, the principles of evidence governing issues of admissibility, evaluation and assessment of witness testimony, hearsay evidence, expert witness testimony, circumstantial evidence, etc. are in harmony across the international law tribunals.

[25] 'The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel* (*United Kingdom* v. *Albania*), Judgment, ICJ Reports 1949, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.' *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgment, ICJ Reports 2007, p. 43, para. 209.

Whether international criminal law approaches to evidence are usable by other international *fora*, may be answered by posing the following questions:

(i) Is the international criminal law rule or guideline of evidence capable of serving a judicial need in other *fora* of international law?

(ii) Is the international criminal law rule or guideline of evidence consistent with the principles and values of other international law *fora*?

In conclusion, as a former national and international prosecutor with significant arbitration and civil litigation experience, I believe that the project of identifying approaches to evidence across distinct international *fora* can make a major contribution to the rise of the international rule of law.

*K. Prost**

# The Receipt and Assessment of Evidence at the International Criminal Court

In the course of any criminal trial — whether in a domestic or international context — any number of challenging legal issues may arise. There can be substantive points of law or procedural questions, which the judges may be called upon to address. However, all of these are peripheral to the central function of any trial chamber, which is fact-finding. And at the core of that process is the essential feature of any criminal trial — the receipt and assessment of evidence.

In a national system, there are established processes and procedures — in some instances even detailed codes — designed to assist judges with this important task. Moreover, the judiciary will benefit from day-to-day practice, over many years and the experience that generates. Finally, in a national system there is generally a shared domestic culture and a common juridical tradition, which also facilitate the core task of the judges in terms of the receipt and assessment of evidence.

However, at the international level, the context can be quite different, and this is certainly the case for the International Criminal Court (ICC) as a relatively young institution.

While process and experience should develop over time, in the interim the Court must work towards consistent and predictable practice, especially in the approach to evidence. In terms of the broader theme of this meeting, there may be agreement that similarity across tribunals of a different nature would be helpful, but at the moment the far more pressing challenge for the ICC is to achieve similarity within the Court itself, across the different Chambers. In this regard, the term 'similarity' is deliberately used, as it

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represents the most realistic goal in the ICC context. However, even it will be a difficult result to achieve.

The challenges in this regard find their origin in the drafting of the Rome Statute over 20 years ago with the phenomena sometimes referenced as the 'ICTY/ICTR effect'. During the negotiations in New York and Rome, there was a tremendous backlash against the fact that the provisions of the ICTY/ICTR Statutes were drawn almost exclusively from the common law tradition. No one really disputes that. Those who were in the back rooms of the United Nations where the Statutes were drafted will confirm the overarching influence of the common law. This reality had long infuriated States of a different legal tradition, and the vow in the ICC context was that this approach would not be repeated.

As a result, much of the discussion and debate relating to procedures and other parts of the Rome Statute were focused on designing a truly hybrid system with recognition for the major legal traditions. It was a fierce battle, and there was significant time pressure especially once the negotiations reached Rome.

The result overall was highly positive in that the Rome Statute established a truly hybrid court system, one with many innovative concepts such as a unique Pre Trial Division which is neither common law nor civil law. Moreover, the detailed discussions revealed many common principles, which could be agreed and were subsequently reflected in the Statute.

But the cost — the victim if you will — was the absence of any substantial agreement on trial procedure, including the important area of evidence.

The limited achievements in this regard are best exemplified in certain provisions found in the Statute and Rules of Procedure and Evidence.

Article 64(8b) of the Statute and Rule 140 of the Rules set out essentially the whole procedural regime.

Article 64(8b) provides:

> At the trial, the presiding judge **may give directions** for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, **the**

**parties may submit evidence** in accordance with the provisions of this Statute.

Rule 140 states:

Directions for the conduct of the proceedings and testimony

1. If the Presiding Judge does not give directions under Article 64, paragraph 8, the Prosecutor and the defence shall agree on the order and manner in which the evidence shall be submitted to the Trial Chamber. If no agreement can be reached, the Presiding Judge shall issue directions.

2. …a witness may be questioned as follows:

(a) A party that submits evidence in accordance with Article 69, paragraph 3, by way of a witness, has the right to question that witness;

(b) The prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters;

(c) The Trial Chamber has the right to question a witness before or after a witness is questioned by a participant referred to in sub-rules 2(a) or (b);

(d) The defence shall have the right to be the last to examine a witness.

These minimalistic provisions were designed to ensure that the Statute adopted a neutral position that was neither common law nor civil law in nature. While the vague provisions provide for this flexibility, they do little to ensure consistency and predictability for the proceedings. It is especially problematic in terms of the receipt and assessment of evidence, since that issue is at the heart of the difference between common law and civil law systems.

In very simplistic terms, in the common law — primarily because of jury system — the quality of evidence is protected by strict rules of admissibility, applicable to each piece of evidence and testing through an aggressive adversarial approach.

In civil law jurisdictions, professional judges (sometimes aided by lay authorities) are responsible to assess the evidence and find the truth, and thus there is no need for the evidentiary safeguards of the common law. The judicial search for the truth involves an assessment of the totality of evidence, without the need for exclusionary rules. Both systems have their checks and balances but the challenge in the ICC context is how to merge the two approaches effectively and in a manner suitable to the types of cases heard at the ICC.

The issue is not in any way a new one for international criminal courts and tribunals. Despite the common law leanings of the Statutes, over time both the ICTY and the ICTR introduced procedural concepts from the civil law tradition. The judges of both tribunals, who came from a rich variety of legal backgrounds, used the rule making power to introduce changes to the system particularly in light of the large and complex nature of the cases. This included the adoption of provisions to allow for the use of witness statements under certain conditions without the need for the witness to appear before the Tribunal or to reduce the time of their testimony. And even though both Tribunals had very detailed procedural rules, the approach and atmosphere within individual Chambers would differ significantly in terms of judicial activism depending on the legal background particularly of the presiding judge.

In these and other respects the Tribunals faced similar issues as to the differences between legal traditions as does the ICC. However, the important distinction relates to the evidence regime — or lack thereof — under the Rome Statute.

On the positive side, some consistent practice has developed to date in terms of the evidentiary procedure. Chambers have adopted the practice of examination in chief by the party calling the witness and cross-examination by the other parties, albeit the rules as to the form of questioning might vary. In addition, judges are able to intervene to ask questions though the level of intervention will depend on the Chamber.

The much more difficult question relates to the procedure for the submission and admission of evidence and the rulings of the Chamber on the same.

In terms of the Statute and the Rules, the scheme again was designed to provide for maximum flexibility.

The sole provisions of relevance in the Statute are found within Articles 64 and 69.

Article 64(9a) provides:

The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the **admissibility** or **relevance** of evidence; …

Article 69 in relevant parts states as follows:

(3) The parties **may submit evidence** relevant to the case, in accordance with Article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

(4) The Court **may rule** on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence…

(7) Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

(a) The violation casts substantial doubt on the reliability of the evidence; or

(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

There are two rules (Rules 63 and 64) which address admissibility.

Rule 63 provides in relevant part:

2. A Chamber **shall have the authority**, in accordance **with the discretion** described in Article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with Article 69.

3. A Chamber **shall rule** on an application of a party or on its own motion, made under Article 64, subparagraph 9(a), concerning admissibility when it is based on the grounds set out in Article **69, paragraph 7.**

Rule 64 states in relevant part:

1. An issue relating to relevance or admissibility must be raised at the time when the evidence is submitted to a Chamber. Exceptionally, when those issues were not known at the time when the evidence was submitted, it may be raised immediately after issue has become known. The Chamber may request that the issue be raised in writing. The written motion shall be communicated by the Court to all those who participate in the proceedings, unless otherwise decided by the Court.
2. …
3. Evidence ruled irrelevant or inadmissible, shall not be considered by the Chamber.

The cumulative effect of these provisions is that the judges freely assess all evidence submitted and, except in the case of allegations of Statute or human rights violations, the power to rule on admissibility and relevance is a discretionary one. In this way, maximum discretion is accorded to the individual Chambers as to the system that will be utilized with respect to admitting evidence.

Not surprisingly, this had led to variations in proceedings from the use of strict common law assessments of each piece of evidence to cases with almost no admissibility rulings at all.

That these different approaches can be utilized has been recognized by the ICC Appeals Chamber in its recent decision in the case of *Bemba et al*[1]. In that case, the Trial Chamber elected not to rule on the admissibility of individual pieces of evidence. Rather the Chamber restricted its evidentiary rulings to instances of requests for exclusion under Article 69(7) and verification that statutory requirements were met before admitting prior recorded testimony. For the remainder of the evidence the Chamber simply

[1] ICC Appeals Chamber, *Prosecutor* v. *Bemba et al*, ICC 01/05-01/13, 8 March 2018.

recognized the submission of the evidence. It went on to assess the oral and documentary evidence in its determination of the guilt or innocence of the accused.

In its judgment, the Appeals Chamber noted the unique nature of the ICC system categorizing it as a 'distinctive workable balance of different procedural models'[2]. The Appeals Chamber analysis considered various key provisions of the Rome Statute in reaching its conclusion. It was noted that Article 74(2) of the Statute requires that the decision on the guilt or innocence of the accused be based solely on evidence submitted and discussed in the trial proceedings — there is no mention of evidence admitted[3]. On the question of admissibility rulings, the Appeals Chamber concluded that the Statute and rules are structured to compel admissibility rulings only where there is a specific exclusionary rule, such as that set out in Article 69(7)[4]. In terms of ruling on the general relevance or admissibility of particular evidence based on a consideration of probative value and any prejudice to fair trial or fair evaluation, the Appeals Chamber noted that Article 69(4) is permissive rather than obligatory[5]. It empowers the trial chamber to make such rulings, but it does not mandate that this be done with respect to individual pieces of evidence. While acknowledging that these factors of probative value and possible prejudice should be considered with reference to evidence submitted, the Appeals Chamber determined that the timing of that consideration is left to the Trial Chamber to determine. The Appeals Chamber referenced the drafting history of the evidentiary provisions in the Statute and Rules as supporting this flexible interpretation of the requirements[6]. In essence, the Appeals Chamber recognized what was envisaged by the drafters — an evidentiary procedure which allows for different approaches to the submission, receipt and assessment of evidence, thus reflecting various legal traditions.

The Appeals Chamber ruling is evidently consistent with both the provisions and intent of the Statute and the Rules. It makes clear that not one

[2] *Ibid.*, para. 574, p. 259.
[3] *Ibid.*, para.607, p. 275.
[4] *Ibid.*, para.586, p. 264.
[5] *Ibid.*, para.607, p. 275.
[6] *Ibid.*, paras. 584–601, pp. 264–272.

evidentiary approach is required, and different alternatives are acceptable, provided the key provisions of the Rome Statute are respected.

However, on a practical level this means that, if there is to be progress in terms of consistency and predictability of process across different Chambers, it will be for the judiciary to agree on common practices.

While the importance of such consistency is obvious, it will not be easy to achieve. As indicated, rather than aiming for sameness, similarity is a more realistic goal. This is a very difficult issue with strong advocates from both traditions. It is made more complicated by the fact that there are 18 independent judges, coming from different systems, with different ideas, and with six of the judges rotating in and out every three years.

In order to progress, there will need to be recognition across the judiciary that it is highly unproductive to advance arguments in favour of one legal tradition or the other. Instead, there needs to be an atmosphere of tolerance and a commitment to understanding the different legal traditions. The ICC judiciary should work to draw the best from these traditions in order to develop a truly hybrid system that is well suited to the kinds of cases the Court handles, and which is consistent with the drafter's intent.

As indicated, it does not appear realistic to pursue a situation, where the same approach is adopted in each Chamber. In fact, there is great value in having the flexibility envisaged at Rome Statute. It gives judges — particularly presiding judges — the comfort of running a court case with a system, which has some familiarity. This is of particular importance that judges are often thrown into trial proceedings shortly after their arrival at the Court.

The problem is how to retain that flexibility and yet achieve certainty and consistency. Perhaps, the most prudent approach is to focus on what the goals of the procedural system should be and not on the individual procedures which achieve them.

To begin with, the most fundamental principle, which must be adhered to, is whichever process is adopted, it must be made clear to the parties from the commencement of the proceedings. The gravest threat to fairness is not from the use of a particular evidence approach, but rather from a lack of clarity and transparency as to what system is being used or worse yet an inconsistent approach within the proceedings. As a result, it is essential that

the Trial Chamber has comprehensively considered the evidentiary system to be used and has communicated its approach clearly to the parties well in advance of the start of the hearings.

Secondly, what the Appeals Chamber has made clear and what is evident from the Rome Statute, is that where a specific exclusionary rule set out in the Statute or Rules applies, the Trial Chamber must make a specific ruling on the issue. Further, evidence ruled inadmissible or irrelevant, must be excluded from consideration by the Trial Chamber as provided for in Rule 64(3).

The Appeals Chamber decision in *Bemba et al* also makes it clear that at some point the Trial Chamber must consider the relevance, probative value and potential prejudice of the evidence before it. Whatever system is adopted, therefore, it must allow for such evaluation to take place. However, what is discretionary is the timing of that consideration, and whether explicit rulings will be issued on these issues with reference to individual pieces of evidence. In this respect, there may be variance in the procedures which individual Chambers use, but the fundamental principle of considering these factors must be respected.

The check and balance in this regard is that Article 74 of the Statute mandates that the Trial Chamber's judgment must contain a full and reasoned statement of its findings on the evidence and conclusions. In so far, as a party is concerned, if the Trial Chamber failed to consider relevant evidence or took into account irrelevant or prejudicial evidence, it will have a remedy by arguing those issues on appeal based on the reasons provided by the Chamber.

Finally, each Chamber will want to be satisfied that the approach it adopts towards evidence will be fair to the parties in terms of organizing their case and at the same time will allow for a full and fair assessment of the evidence in its totality. If a trial chamber elects to defer the assessment to the final stage, it should give consideration to whether any rulings — beyond those which are mandated — need to be made earlier particularly for the sake of the defence and its decisions as to the calling of evidence.

In the case of a system where rulings are being made as the trial progresses, there needs to be flexibility as to the timing of those decisions

to guard against pre-mature decisions on certain pieces of evidence which are best assessed in light of a full evidentiary record.

In my view, if the focus shifts to the underlying principles for the evidence system and away from the details, it will be possible to maintain flexibility while at the same time achieving similarity.

My personal experience as a judge at the ICTY supports this thesis. I sat on the case of *Popovic et al*[7], which was the largest case that the Tribunal handled with seven accused. During the course of four years, we heard over 300 witnesses and received almost 90,000 pages of documents. In a case of that magnitude, despite the pre-dominance of common law principles at the Tribunal, it was not pragmatic to proceed with the classic assessment of each document submitted with reference to general admissibility criteria of relevance and probative value. For that reason, the Chamber adopted an approach where all evidence submitted by the parties was admitted, unless there was a specific challenge made to it. In addition, some challenges were not ruled upon at the time of submission but rather later — at the end of the prosecution case or in the course of final judgment. In deciding on the timing of the decisions, the factors, which guided the determination, were the need to assess the challenged evidence with the totality of the record available; and whether the delay of the decision would unduly prejudice the parties — particularly the defence — in their determination as to the evidence they wished to call. All the evidence admitted was still subsequently assessed in a holistic manner for the purpose of the ultimate legal and factual findings set out in the judgment.

In my view, while the procedures differ in some respect, the *Popovic et al* and *Bemba et al* approaches are not dissimilar in terms of underlying principles and effect. In both instances, the time consuming process of assessing each individual piece of evidence, as the trial proceeded, was avoided, and admissibility challenges and rulings were made as necessary to comply with the Statute requirements or to address specific issues in the case. The timing of those rulings varied according to the nature of the issues. Ultimately, aside from any evidence excluded by virtue of an admissibility

[7] ICTY, *Prosecutor* v. *Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Case No. IT-05-88-T.

ruling, all the evidence adduced was able to be considered by both Trial Chambers in light of the totality of the trial record.

What this comparison demonstrates is that it is possible to achieve the goal of increasing the similarity of the evidence processes employed by different Chambers, provided there is a willingness on the part of the judges to show the same flexibility as was reflected in the Rome Statute.

The recent practice of judges of the International Criminal Court of addressing practice issues at retreats with a view to possible agreements is highly encouraging in that regard. Significant advances have been made with respect to the pre-trial practice, and these have been captured in a Chambers Practice Manual. While some of the issues related to evidence may prove more challenging, this progress evidences that it is possible to reach agreement on practice, and, hopefully, that will ultimately be the case when it comes to approaches to the introduction and assessment of evidence at the ICC.

*I. Hrdličková**

# Evidence at the Special Tribunal for Lebanon

## Introduction

Even amongst its contemporaries, the Special Tribunal for Lebanon (STL) represents a particularly unique institution. Established by the treaty between the United Nations and Lebanon[1], the STL was created as a direct response to a request by the Lebanese government for an international criminal tribunal to investigate and try perpetrators of the car bomb explosion of 14 February 2005 that killed the former Lebanese Prime Minister, Rafiq Hariri and 21 other persons, and injured 226 more.

The STL already stands apart from its contemporaries in that it was granted jurisdiction to address crimes directed against particular individuals — the assassination of the former Prime Minister, and presently three other high-profile politicians who were the victims of separate assassinations or attempted assassinations connected to the Hariri attack[2].

From an evidentiary standpoint, the STL's unique features stem not only from the subject matter of the crimes within its jurisdiction, but from

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[1] *See* SC Res. 1757, UN Doc. S/RES/1757 (2007). The agreement between the United Nations and Lebanon is attached as an annex to the Resolution.

[2] *See* Art. 1 STL St.; STL, STL-11-02/D/PTJ, F0004, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr. Marwan Hamadeh on 1 October 2004 to Defer to the Special Tribunal for Lebanon, 19 August 2011, p. 2; STL, STL-11-02/D/PTJ, F0005, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr. George Hawi on 21 June 2005 to Defer to the Special Tribunal for Lebanon, 19 August 2011, p. 2; STL, STL-11-02/D/PTJ, F0006, Order Directing the Lebanese Judicial Authority Seized with the Case Concerning the Attack Perpetrated Against Mr. Elias El-Murr on 12 July 2005 to Defer to the Special Tribunal for Lebanon, 19 August 2011, p. 2.

the legal framework, the STL applies. The Tribunal is a hybrid institution, bringing together not only international and national judges, as the Extraordinary Chambers of the Courts of Cambodia do, but promoting hybrid approaches in the law it applies.

As to substantive law, by virtue of Article 2 of its Statute, the STL applies the domestic criminal law of Lebanon with respect to crimes of terrorism and related crimes, interpreted in accordance with the highest international standards of criminal justice[3]. Whereas, on the one hand, most contemporary international tribunals were created to prosecute and try alleged perpetrators of war crimes in both international and non-international armed conflicts, as well as crimes against humanity and genocide, the STL, on the other hand, is mandated to investigate and try perpetrators of a terrorist bombing, and is the only international tribunal dealing specifically with the Middle East.

Inevitably, as shall be seen, the nature of the crimes before a Tribunal has an impact upon the nature of the evidence and related legal issues that arise. But so does the evidentiary procedure a court follows. The STL applies international criminal procedural law — rules of procedure and evidence drafted by the Judges, who by virtue of Article 28 of the Statute were guided, as appropriate, by the *Lebanese Code of Criminal Procedure*[4]. The resultant procedural law reflects a mix of common and civil law traditions, often taking close inspiration from the rules of procedure and evidence of the *ad hoc* tribunals, but also differing from them in many respects. Indeed, whereas the procedural rules of other *ad hoc* tribunals expressly specify that they 'shall not be bound by national rules of evidence'[5], Rule 149 of the Special Tribunal's Rules of Procedure directs the Court to the *Lebanese Code of Criminal Procedure* in the

[3] Art. 2 STL St.; STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/I, F0936, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras. 33–41.

[4] Art. 28 STL St. (setting forth, in relevant part, that the judges 'shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial').

[5] *See, e.g.*, Rule 105 MICT RPE; Rule 89 ICTY RPE.

case of a lacuna[6]. Perhaps the most unique procedural feature of the Special Tribunal — and one which also has an impact upon evidentiary processes — is the use of *in absentia* trials.

In light of these distinctive features, this article aims to provide further context by considering the nature of the evidence presented before the Tribunal and, principally, the unprecedented use of telecommunications evidence on the international stage. Further, it examines some of the legal evidentiary issues that have arisen in the proceedings before the STL to date, with particular focus on two key decisions of the Appeals Chamber: one relating to telecommunications evidence, and the other, relating to another distinguishing feature of the Special Tribunal, its use of *in absentia* proceedings to try perpetrators of the crimes within its jurisdiction. Finally, it closes by emphasizing yet another unique feature of the Special Tribunal — and a very important one at that — the role of victims in the Special Tribunal's evidentiary procedures.

## Evidence in the *Ayyash et al.* case

The hypothesis of this article is a simple one: that the key characteristics of the Tribunal and its work directly influence the nature of the evidence presented, and the legal issues that arise before it. Before delving into these issues, however, a brief overview of the *Ayyash et al*. case is set forth for context.

### *Case theory*

The investigation into the attack against former Prime Minister Hariri — which was condemned by the United Nations Security Council on the day following the attack as a 'terrorist bombing' — led to the commencement of *in absentia* trial proceedings against five individual Accused: Salim Jamil Ayyash, Hassan Habib Merhi, Hussein Hassan Oneissi, Assad Hassan Sabra and Mustafa Badreddine. Mr. Badreddine has since been found to

[6] Rule 149 STL RPE (providing in relevant part that, 'In cases not otherwise provided for in these Rules or in the Lebanese Code of Criminal Procedure, a Chamber shall apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the highest standards of international criminal procedure.').

be deceased[7], giving rise to some novel legal issues that I will return to later. The Accused were charged with conspiracy to commit a terrorist act, along with a number of other related charges[8]. On 20 September 2018, the Parties and counsel acting on behalf of victims participating in the proceedings finished the presentation of their closing arguments, and the Trial Chamber adjourned to deliberate before rendering a judgment.

At this point, it must be emphasized that the Trial Chamber has not yet issued a final judgment: any trial judgment that is issued may be the subject of an appeal, which I would preside over as a member of the Appeals Chamber. Therefore, this article is limited to summarizing our current understanding of the Prosecution's case theory and the evidence that it has advanced in support of its case.

According to the Prosecution, the Accused are alleged to have participated in a highly sophisticated and covert operation, which involved surveillance of the former Prime Minister in the weeks and months leading up to the bombing, and great effort to remain anonymous from authorities[9]. They achieved this, it is alleged, through the use of five inter-related networks of mobile phones, which the Prosecution has dubbed the Green, Red, Blue, Yellow and Purple networks[10]. This alleged conspiracy had two principal aspects: the surveillance, planning and execution of the attack on the one hand, and, on the other, the coordination and execution of a false claim of responsibility[11].

According to the Prosecution, both components of the conspiracy were coordinated through Badreddine using a dedicated phone network, the so-called Green network of phones, which sat at the top of a hierarchy of networks, and linked Badreddine to two other phones[12]. The Prosecution

[7] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0019, Decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings', 11 July 2016, p. 21.

[8] *See, e.g.*, STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/TC, F2720, Redacted Amended Consolidated Indictment, (Indictment), para. 1.

[9] *See, e.g.*, Indictment, para. 3.

[10] *See, e.g.*, Indictment, paras 14–15.

[11] *See, e.g.*, Indictment, para. 3.

[12] *See, e.g.*, Indictment, para. 19.

contends that those two other phones can be attributed to Ayyash and Merhi[13], and were, in turn, allegedly used to prepare and coordinate the attack and the false claim of responsibility[14]. The Prosecution centers its case around telephone communications evidence, it alleges that the Green network users communicated exclusively with each other: a so-called covert, 'closed network'[15]. Separate closed networks of phones — Blue, Yellow and Red — were, allegedly, used by co-conspirators acting in concert with Ayyash. The Red network is alleged to consist of eight 'mission' phones used by the 'Assassination Team' consisting of Ayyash and five, as yet unidentified individuals, to surveille Hariri and coordinate the attack[16]. This Red network, allegedly, ceased all activity moments before the bomb blast took place[17]. The Blue and Yellow Networks, each consisting of eighteen phones, belonging to Ayyash and other members of the assassination team, were allegedly used during the surveillance of Hariri and in the preparation for the attack, including the purchase of the vehicle used to carry the explosive device[18]. Finally, the Prosecution alleges that a Purple network of phones was used by Merhi, Oneissi and Sabra to coordinate the false claim of responsibility[19].

*Changing nature of evidence in international trials*

The nature of evidence presented to support these allegations differs greatly from the kind of evidence presented before other international military and criminal tribunals, contributing to an observable phenomenon, whereby, as the system of international tribunals has evolved to respond to different crimes, it has borne witness to an evolution in the type of evidence being presented. For example:

- The International Military Tribunals in Nuremberg was heavily reliant upon documentary evidence, with Allied-Prosecutors determined to convict Nazi criminals using the words of the Nazis

[13] *See, e.g.*, Indictment, para. 18.
[14] *See, e.g.*, Indictment, para. 15(b).
[15] *See, e.g.*, Indictment, para. 15(b).
[16] *See, e.g.*, Indictment, para. 15(a).
[17] *See, e.g.*, Indictment, para. 15(a).
[18] *See, e.g.*, Indictment, para. 15(c)-(d), 32.
[19] *See, e.g.*, Indictment, para. 19(d).

themselves[20]. The United States Holocaust Memorial Museum estimates that nearly 3,000 tonnes of physical records were produced at the Nuremberg trial[21]. This was supplemented with footage taken by the Germans themselves, and photographs and films taken by the US Army Signal Corps contemporaneously with the liberation of various concentration camps by the US troops in the final months of the war[22].

- Prosecutions at the ICTY were heavily reliant upon witness testimony, military and government records, and in some instances physical and forensic evidence to identify and demonstrate the civilian status of victims. Meanwhile, expert historians, diplomats, and civil society actors offered eyewitness accounts of events on the ground and were called to give evidence. These sources of written and oral evidence — military, governmental, diplomatic, and political — were significant in demonstrating the policy elements of the international crimes under the ICTY's jurisdiction and the joint enterprises that were alleged to exist between senior civilian, military and paramilitary leaders.
- Similar evidence was also led at the ICTR, a tribunal, which, in certain cases, held trials that turned on the reliability of eyewitness identification evidence, where the identity of particular perpetrators was in dispute.
- The Prosecutor of the International Criminal Court has looked to such sources more and more, for example, exploring the use of forensic accounting evidence in order to shore up its case, and seeking to obtain the financial records of the former accused in the *Kenyatta* case.

It is a truism that the nature of the crimes, both in substance and in law, will be a key factor in determining the nature of the evidence presented. But

[20] United States Holocaust Memorial Museum, 'Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremburg', Holocaust Encyclopedia, https://encyclopedia.ushmm.org/content/en/article/holocaust-denial-evidence-of-the-holocaust-presented-at-nuremberg (last accessed 10 January 2019).

[21] *Ibid.*

[22] *Ibid.*

with ever more complex international prosecutions, and accused persons seeking to evade prosecution, prosecutors today are not necessarily in the same position as those at Nuremburg, who had the relative luxury of choosing the most impactful evidence around which to structure their case.

*Telecommunications evidence in the* Ayyash et al. *case*

In the *Ayyash et al.* case at the Special Tribunal for Lebanon, the Prosecution has presented three main phases of evidence, around which it bases its case:

- Phase One consisted of forensic evidence on the cause of the 14 February 2005 explosion, and evidence related to the death and injury of the victims of this attack.
- Phase Two consisted of evidence of preparatory acts for the attack and the alleged false claim of responsibility; and
- Phase Three of evidence concerned the identity of the accused and their respective roles in the attack.

Phases Two and Three were based heavily, though not exclusively, on highly technical telecommunications evidence. This evidence begins with Call Data Records (CDRs) that the Prosecution contends are routinely generated and maintained in the ordinary course of mobile phone service providers' business activities. These CDRs contain metadata — information about the communications (date, time, whether they were outgoing or incoming, the handset used, the duration of a call, the cell — that is, the mobile phone tower — used at the beginning of the call or for sending or receiving an SMS, and in certain circumstances the cell used at the end of a call)[23]. However, the raw CDRs are largely unintelligible without further analysis: imagine rows of numbers, semi-colons, dashes and code that are undecipherable to the untrained eye.

As a result, the Prosecution has offered the further analysis required to understand this metadata, extracting relevant information from CDRs and placing it into documents called 'Call Sequence Tables'. Together with information about the cells, including their names, locations and areas of

[23] Indictment, para. 14(a).

best coverage, the Prosecution has painstakingly pieced together a theory of the case based on observable patterns of usage by phones it contends must be operating in covert networks (the coloured networks). And that lead the Prosecution to believe these phones were used in the plot to assassinate Mr. Hariri and lay the false claim of responsibility.

From this point, the Prosecution has relied upon various types of evidence to link the coloured network phones to particular users. This includes witness testimony and statements, records of telecommunications companies (to identify users of particular phone numbers and/or handsets), and co-location — a process whereby the Prosecution attempts to demonstrate evidence of personal phones moving in patterns so similar to one of the coloured network 'mission' phones, that the only believable forensic outcome is that user of the two phones is the same individual.

## Legal issues

It might seem self-evident to observe that complex investigations may result in more complex cases theories, and therefore more complex evidence. But the ramifications for international courts and tribunals ought not to be understated. There is, rightly, an expectation that international tribunals ought to move swiftly and efficiently to bring perpetrators of alleged crimes to justice — and often there is lament when these bodies are viewed as moving too slowly, both for the sake of victims and the international community. The pace of international proceedings cannot be considered without concurrently examining the challenges associated with the new forms of evidence being presented before international courts and tribunals, and the corresponding issues that can cause international criminal proceedings to be protracted.

*General issues*

While the use of telecommunications evidence at the Special Tribunal is held out as unique at the international level — and, indeed, it is — the same kind of evidence already plays a major role in complex criminal trials in many domestic jurisdictions[24]. Nonetheless, the *Ayyash et al.* case has

[24] Goran Sluiter *et al.* (eds.), 'International Criminal Procedure: Principles and Rules', Oxford University Press, 2013, p. 1070.

brought this class of evidence to the international level for the first time. As a result, it is not perhaps a surprise that its use has given rise to a number of novel legal issues.

A case based predominantly on technical telecommunications evidence relies on masses of such data being pieced together in order to build a case theory. To do this, the Prosecution at the Special Tribunal relied heavily on the written reports and oral testimony of experts and trained analysts.

Not surprisingly then, one of the key issues that has emerged between the litigating Parties, is the qualifications and credibility of these witnesses, as well as the reliability of the data underlying their conclusions. An expert may be testifying in relation to what he or she believes to be true, yet rely upon assumptions grounded in evidence that itself lacks sufficient probative value[25]. Conversely, if the Trial Chamber is convinced that significant weight can be attached to the underlying data, it is the testimony of these key witnesses — relied upon to fit the pieces of the puzzle together — that becomes a central issue.

The Prosecution's case theory has also given rise to argument amongst the Parties, which was evident in their final trial briefs and closing submissions, contesting whether the Prosecution's case can be substantiated essentially on the basis of circumstantial evidence, in the absence of physical evidence linking the accused to the alleged crimes.

*Transfer and receivability of telecommunications data*

Turning to one of the more notable issues surrounding the use of telecommunications data, one particularly contested legal issue between the Parties was the question of the legality of the transfer and receivability of telecommunications evidence: an issue that was the subject of an interlocutory appeal in 2015[26].

Defence Counsel for — at the time — all five accused challenged the admission of the Prosecution's Call Sequence Tables (CSTs) into evidence.

[25] *Ibid*., p.1025.

[26] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/AC/AR126.9, F0007, Decision on Appeal by Counsel for Mr. Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records, 28 July 2015 (Appeal on Legality of CDRs).

The CSTs were based on CDRs — the original data sets of which contained metadata relating to every mobile phone call and text message in Lebanon between 2003 and 2010.

The CDRs were transferred from Lebanese telecommunications providers to the United Nations International Independent Investigation Commission (UNIIIC) and the Tribunal's Prosecution.

In its decision, the Trial Chamber held that while the collection of telephone metadata may constitute a restriction on the right to privacy, the transfer of the CDRs was neither unlawful nor arbitrary[27]. This was because Security Council Resolutions 1595 and 1757 establishing the UNIIIC and the Tribunal, provided the necessary legal authorization for the transfer[28]. Moreover, it considered the transfer necessary and proportionate to the legitimate aim of investigating the attack of 14 February 2005[29].

Two issues arising from this decision were certified for appeal:

- Whether the Trial Chamber erred in concluding that the UNIIIC and the Prosecutor could legally request and obtain CDRs from Lebanese telecommunications companies without either Lebanese or international judicial authorization[30]; and
- Whether the Trial Chamber erred in concluding that the absence of judicial control does not violate any international human rights standard on the right to privacy, which would justify the exclusion of the call data records under Rule 162[31].

With respect to the question of judicial authorization, the Appeals Chamber held that the Trial Chamber was correct in finding that the UNIIIC and the Prosecutor could legally request and obtain the CDRs without judicial authorization, because such authorization was not required

[27] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/TC, F1937, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution 6 May 2015 (Decision on Legality of CDRs).

[28] Decision on Legality of CDRs, para. 109.

[29] Decision on Legality of CDRs, para. 109.

[30] *See* Appeal on Legality of CDRs, para. 8.

[31] *Ibid.*

under their respective governing legal instruments[32]. In its reasoning, the Appeals Chamber noted that the Security Council resolutions establishing the UNIIIC and the Tribunal did not demonstrate any intention on the part of the Security Council to subject the UNIIIC or the Prosecution to the jurisdiction of judicial or other authorities in their investigative endeavours[33]. It also considered that the Lebanese government had requested the establishment of both the UNIIIC and the Tribunal precisely to create independent external organs to conduct investigations into the attack of 14 February 2005 and others of a similar nature, which by their very nature were not intended to be subjected to the authority or direction of the Lebanese state or institutions[34].

With respect to the right to privacy, the Appeals Chamber held that there is a compelling case for considering the transfer of CDRs in the absence of judicial control as inconsistent with international human rights standards[35]. However, the Appeals Chamber concluded that the transfer did not violate the right to privacy in the *Ayyash* case, because their transfer was provided for by law, was necessary, and was proportionate[36].

The Appeals Chamber noted that, judicial authorization — which the Defence complained was absent in this case — is but one means of ensuring that restrictions on the right to privacy remain proportionate[37]. In this respect, it considered that the precise requirements necessary to adequately safeguard human rights depend on the circumstances of each case[38]. The majority of the Appeals Chamber further reasoned that the collection of the CDRs was lawfully carried out, not by any State, but by Lebanese companies for billing and customer management purposes, rather than for the purpose of investigating future indeterminate and unspecified criminal conduct[39]. These companies also played a role in demonstrating the provenance of the evidence, as they were also responsible for the storage

[32] *Ibid.*, para. 36.
[33] *Ibid.*, para. 31.
[34] *Ibid.*, para. 32.
[35] *Ibid.*, para. 47.
[36] *Ibid.*, paras 48–58.
[37] *Ibid.*, paras 53–54.
[38] *Ibid.*, paras 53–54.
[39] *Ibid.*, para. 56.

of the CDRs. The Appeals Chamber concluded that in the case before it, potential concerns regarding the right to privacy were negated by the fact that the *transfer* of the CDRs took place to facilitate the investigation of concrete and specific crimes, which had already been committed[40].

*Legal issues unique to* in absentia *trials*

A further legal issue arises from the *in absentia* nature of the *Ayyash et al*. proceedings. Although the fact that the proceedings are *in absentia* does not change the applicable evidentiary rules, in practical terms, the absence of the accused does make a difference in the courtroom and certainly has an indirect effect on evidentiary matters. For example, each of the accused naturally has first-hand knowledge of his own whereabouts on the day and month leading up to the attack on 14 February 2005, and should they have an alibi, it is highly unlikely that the Defence teams assigned on their behalf would have access to such information without their cooperation. Moreover, the accused are sometimes in a more knowledgeable position to guide and advise their Defence counsel on the cross-examination of certain witnesses. Notwithstanding, the Tribunal has done and is doing everything within its capacity to uphold the accused's fair trial rights despite the absence of the accused. Importantly, this includes providing the right to a retrial, should the accused appear in person before the Tribunal[41].

But this does not mean that *in absentia* trials do not present challenges relating to evidence by their very nature. The most notable example in the context of the *Ayyash et. al.* case followed the death of the former accused, Mr. Badreddine. While Badreddine's case was not the first example of the death of an accused during the course of international criminal proceedings, it gave rise to unique questions of evidentiary procedure.

The ICTY was required to address the death of an accused on several occasions following the death of the accused pending the outcome of proceedings[42]. But, in contrast to the question before the STL, when the ICTY

[40] *Ibid.*, para. 56.

[41] Rule 109 STL RPE.

[42] *See, e.g.*, ICTY, *Prosecutor* v. *Hadžić*, IT-04-75-T, Order Terminating the Proceedings, 22 July 2016; ICTY, *Prosecutor* v. *Delić*, IT-04-83-A, Decision on the Outcome of the Proceedings, 29 June 2010.

was faced with the death of former Serbian President Slobodan Milošević, for example, the death was easily verified through medical statements and death certificates easily produced in the context of Milosevic's detention at UN facilities in the Netherlands[43].

In the case of Mr. Badreddine being tried *in absentia*, however, no such records could be produced. On 31 May and 1 June 2016, the Trial Chamber heard evidence and legal submissions from the Prosecutor, Legal Representative for Victims and Badreddine Defence in relation to the alleged death of Mr. Badreddine and found, by majority that it 'd[id] not believe that sufficient evidence ha[d] yet been presented to convince it that the death of Mustafa Amine Badreddine ha[d] been proved to the requisite standard'[44].

The issue was ultimately certified for appeal, with the Appeals Chamber required to consider the same issue[45]. The Tribunal was required to evaluate the standard of proof applicable to the assessment of the evidence regarding the death of an accused[46]. The STL's Statute and Rules did not offer guidance in this regard and the jurisprudence of other international courts and tribunals on termination proceedings was consistently silent on the standard to be applied in making the relevant factual finding[47]. Accordingly, the STL was seized of an entirely unique legal question, in no small part due to the *in absentia* nature of its proceedings.

The Trial Chamber considered that the applicable standard of proof should not be the same standard as that required for a conviction, a

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[43] *See* ICTY, *Prosecutor* v. *Slobodan Milošević*, IT-02-54-T, Order Terminating the Proceedings, 14 March 2006 (noting the partly confidential submission of the Registrar on the accused's death).

[44] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/TC, Transcript of 1 June 2016, p. 56.

[45] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/TC, F2620, Certification for Interlocutory Appeal of 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings', 9 June 2016.

[46] *Ibid.*

[47] *See* STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/AC/AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings', 11 July 2016 (Appeals Chamber Decision on Death of Badreddine), paras. 37, 42. Appeals Chamber Decision on Death of Badreddine, para. 42.

position with which the Appeals Chamber agreed[48]. Other than stating that 'a high standard' of proof is required, and that it could not 'safely' conclude that the accused had died, the Trial Chamber did not further articulate the applicable standard[49]. The Appeals Chamber considered this approach to be erroneous, finding that the applicable standard was the balance of probabilities, not in terms of a mere quantitative or statistical probability, but a requirement that the 'formation of a [belief] in the truth of the fact at issue based on the evidence specific to the particular case'[50].

It reached this conclusion by looking to the jurisprudence of other international courts and tribunals as it related to the standard applicable to findings other than those going to the guilt of the accused[51]. The Appeals Chamber further explained that this 'balance of probabilities' standard requires sufficiently convincing evidence to satisfy the judges that the matter is proven[52].

Ultimately, the Appeals Chamber considered the various evidence before it, submitted by both Parties: obituary notices by Hezbollah and Badreddine's family members, *communiqué* from Hezbollah announcing Badreddine's death, a statement by the Vice President of the Shiite Islamic Superior Council, and various other evidence of Hezbollah announcements of Badreddine's passing; video excerpts of Badreddine's funeral ceremony, and evidence of condolence ceremonies — the entirety of which pointed to the death of Mr. Badreddine[53]. Having holistically reviewed the evidence on the record and considering the precise succession of events (from the announcement of death to the funerals and the condolence ceremonies), the evidences concordance, and the fact that it was not disputed, the majority considered that Mr. Badreddine's death had been sufficiently proven on the balance of probabilities[54].

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[48] *See* Appeals Chamber Decision on Death of Badreddine, para. 42.
[49] Appeals Chamber Decision on Death of Badreddine, paras. 42–45.
[50] Appeals Chamber Decision on Death of Badreddine.
[51] *Ibid.*, paras. 43–44.
[52] *Ibid.*
[53] *Ibid.*, para. 51.
[54] *Ibid.*, para. 53.

## Victims and evidence

At this juncture, I will change tracks entirely and address the role and importance of victims in the presentation of evidence and participation of the proceedings at the STL.

The right of victims to participate in the proceedings — not only on a symbolic level, but in a way that is both effective and meaningful, — is something the STL has always taken very seriously. The goal of victims' participation is to prosecute crimes in a way that ensures that victims' rights are vindicated, in an effort to ensure that those victimized by crimes are not excluded from the legal processes in which that victimization is addressed.

Along with the International Criminal Court and the Extraordinary Chambers of the Courts of Cambodia, the STL has contributed to pioneering meaningful victims' participation in international criminal trials. There are a number of key features at the Tribunal, which relate, directly and indirectly, to issues of evidence.

First, it should be noted that the *Ayyash et al.* proceedings have enabled some 72 participating victims, represented by the independent Legal Representative of Victims to participate in the proceedings, including the trial phase where evidence is presented. This number of victims is considerably smaller than in some cases before the ICC, which in turn has made their participation, in many ways, more manageable.

Second, a number of provisions of the STL's Rules relate expressly to participating victims, and of these, some address issues of evidentiary procedure. Rule 112 *bis*, for example, gives the Trial Chamber broad discretion to determine the disclosure regime applicable to participating victims[55]. Rule 87, meanwhile, sets out the modes of victims' participation, providing general entitlements to the provision of documents at the Pre-Trial stage, to present evidence (or request the Trial Chamber to), examine and cross-examine witnesses, to be heard on the personal impact of the crimes against them at the sentencing stage, and participate in appellate proceedings in a manner deemed appropriate by the Appeals Chamber[56].

[55] Rule 112 *bis* STL RPE.
[56] Rule 87 STL RPE.

Third, while many of the rules governing victims' participation before the ICC and STL are similar, the way that these rules have been interpreted and applied at the STL is quite unique.

For example, the STL has taken a progressive approach with respect to granting access to material and evidence in the case file and allowing victims to make submissions during judicial proceedings. Interpreting our Rules of Procedure and Evidence in a progressive manner, STL judges have granted the Legal Representatives of Victims access to documents in the case file, including confidential materials[57].

This can be contrasted with the approach taken at the ICC, which has been somewhat less consistent and more restrictive in this regard. Of course, the right to access materials and evidence in the case file is foundational to the victims being able to understand and engage in the proceedings at every level. STL judges have also permitted victims' counsel to file submissions on key issues, helping to make victims' voices heard and positions known on critical issues throughout the proceedings[58].

Moreover, the Tribunal has been cautious in relation to victims' ability to hold dual status as both a victim and a witness to key events — and source of evidence in their own right — an issue, which can serve to interfere with victims' participatory rights. In the words of the Pre-Trial Judge in his decision on victim participation, '[t]he fact that a person may act in the capacity of a witness during the trial shall not ... serve to deprive that person of his rights to participate in proceedings as a victim'[59].

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[57] *See, e.g.*, STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/PT/PTJ, F0256, Decision on the VPU's Access to Materials and Modalities of Victims' Participation in Proceedings before the Pre-Trial Judge, 18 May 2012.

[58] *See, e.g.*, STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/TC, F2746, Observations of the Legal Representative of Victims on the Possible Appointment of an *Amicus Curiae*, 30 September 2016; STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/T/AC/AR126.11, F0012, Submissions of the Legal Representative of Victims on the Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings', 27 June 2016.

[59] STL, *Prosecutor* v. *Ayyash et al.*, STL-11-01/PT/PTJ, F0236, Decision on Victims' Participation in the Proceedings, 8 May 2012, para. 102.

In practice, the *Ayyash et al.* proceedings have resulted in a number of victims presenting evidence in their own right as victims: six participating victims provided live testimony, while the statements of 24 others were admitted during the Victims' case, in addition to the live testimony and expert report of a victimologist. The Tribunal has, where possible, made use of video conference links to enable victims both to follow proceedings live from Beirut, and to give evidence themselves in real-time, in a manner that enables the Trial Judges to assess the presentation and testimony of witness, and provide for the examination and cross-examination, without requiring their physical presence.

## Conclusion

As this article has touched upon a wide range of evidence-related issues at the STL, I conclude with a few observations.

First, the intersection of technology and international criminal law, which is so evident in the highly technical *Ayyash et al.* proceedings, is hardly new, as the focus on films as a form of evidence in the Nuremburg trials suggests. Nonetheless, the interactions between technology and evidence in international trials will no doubt continue to evolve. Telecommunications evidence, which has formed such a large part of the evidential cache for the Special Tribunal for Lebanon, will surely play a role in many future international trials including at other tribunals.

Second, as criminal behaviours evolve to exploit newly available technologies, we are likely to experience the potential for even more complex and technical international crimes and prosecutions. It is therefore essential that, to remain relevant, effective and capable, international jurisdictions are able to adapt to the use of new forms of evidence. To an extent, the nature of the evidence in the *Ayyash et al.* case has been shaped by the circumstances of the Tribunal's creation and the subject matter of its work. It is important for international tribunals with broader jurisdictions, however, to ensure that they are equipped, wherever possible, to adopt evolving approaches to evidence gathering, and that the rules and procedure surrounding its submission are capable of ensuring that the highest international standards are observed.

Finally, as an international community, we should continue to explore ways in which we can involve victims in judicial processes. It is important not to forget that complex international trials — especially those based on very technical evidence — exist to address every human suffering. In the case of the STL, this is not only the suffering of the broader Lebanese community, which was so rocked by the assassination of their former Prime Minster, but the very intimate and personal stories of pain and loss of those who lost their lives or suffered injury — the victims who continue to live with the physical, emotional and psychological scars of the attack. Their stories, preserved through evidence, form an important part of a historical record, which international tribunals must strive to provide an audience for, if victims are to ever consider that justice is truly being served.

# Дискуссионная панель 4: Доказательства в международном инвестиционном, коммерческом и спортивном арбитраже / Panel 4: Evidence in International Investment, Commercial and Sport Arbitration

*M. Swainston**

## Evidence in International Tribunals

I was honoured to take part recently in a session of the International and Comparative Law Research Centre (ICLRC) dealing with Evidence before International Courts and Tribunals, which asked, in particular, whether distinct *fora* apply similar approaches to evidence. I moderated a panel composed of experts from investment arbitration, commercial arbitration and sports arbitration.

Professor Dr. Nayla Comair-Obeid of the Obeid Law Firm considered that in investment and commercial arbitration, there was an evolution towards convergence of the common law and civil law traditions so, for example, civilian lawyers have become used to the idea of compelled disclosure, though on a stricter and more focused basis than Anglo-Saxon lawyers might like.

Dr. Mojtaba Kazazi went through burden and standard of proof in investment and commercial arbitration, and Roman Khodykin of Bryan Cave Leighton Paisner added an analysis of the switching of an onus of proof once one side has put forward a *prima facie* case. Interesting questions

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arose concerning the standard of proof, because that can vary according to the seriousness of the allegation made. This in turn has potential impact on the level of proof necessary to establish a *prima facie* case, and thus to shift an onus of proof to the other side.

Dr. Dirk-Reiner Martens explained how in sports law arbitration, technical issues concerning alleged drug use are routinely resolved by a robust contest of expert evidence, with questioning of experts, and sometimes by strict application of the rules for taking evidence where correct procedures have not been followed, given the seriousness of an adverse result for an athlete.

Overall, the picture emerged that in the fields represented by the speakers, principles concerning burden and onus of proof, and the standard of proof, are well developed and well understood, albeit that in every case there will be room for argument, the facts being different and lawyers being lawyers. There was also familiarity with the processes of taking evidence, and a robust readiness shared by all to challenge evidence, including by questioning of experts with the tribunal taking part.

As moderator, I could not help noticing a distinction in this regard between these fields and practice before the major curial international tribunals: the International Court of Justice (ICJ) and others increasingly involved in inter-State disputes such as the European Court of Human Rights (ECtHR).

For example, we heard earlier in the day that the ICJ typically seeks consensus between the parties on the approach to be taken to evidence. There is also academic research suggesting that in the past, the ICJ has been keen to avoid factual controversy, often finding that cases turn on questions of law dependent on uncontroversial facts[1]. A consequence may be that

[1] See, for example, C. E. Foster, 'Burden of Proof in International Courts and Tribunals', *The Australian Year Book of International Law*, Vol. 29, 2010, pp. 27–28. The author is referring *inter alia* to M.O. Hudson, The Permanent Court of International Justice: A Treatise, 1934, p. 500, and one of the panellists in the session on investment treaty, commercial and sports arbitration — M. Kazazi, 'Burden of Proof and Related Issues: A Study on Evidence before International Tribunals', 1996, p. 83.

there has been less attention to the development of principles of burden, onus and standard of proof[2].

We also heard that the ECtHR does not necessarily impose a burden of proof on the party making allegations in the same way as other tribunals. One can perhaps understand that, in terms of transfer of an onus to a State party holding all the facts, in certain circumstances, where a *prima facie* case has been made out. It would be impossible to justify in inter-State cases. My own experience of inter-State cases in the ECtHR is that the Court is seldom able to deploy sufficient resources or find sufficient time for proper fact-finding: as an example, 15 minutes per witness in a complex dispute where the witnesses deal with complex matters, is not enough.

Overall, the session dealing with investment treaty, commercial and sports law tribunals confirmed for me a more general impression that tribunals in these areas are more ready and able to deal with contested facts than the major public international law *fora*. There are a number of potential reasons.

First, the International Court of Justice may be conscious that its jurisdiction depends predominantly on consensus, and the instances where it is given jurisdiction are relatively few. At the same time, it knows that 'alternative dispute resolution' and 'self help' in the international context can have unfortunate consequences going beyond the case before them. Accordingly, it is understandable if a tradition has developed of trying to resolve disputes with as little damage to the fabric of international relations as possible.

Second, international legal culture in some international courts is substantially infused by the civil law tradition and is, perhaps, more resistant to common law influence than investment and commercial arbitration. The civil law tradition, by contrast with the common law, is ill at ease with aggressive adversarial dispute resolution and places less emphasis on cross-examination. Perhaps for the same reason, the ECtHR has shown a preference for nominating and calling its own experts, rather than leaving the choice of experts with the parties on an adversarial basis.

[2] *Ibid.*

Third, the avoidance of factual controversy in international courts is, perhaps, also driven by the experience of practitioners before them. These are usually lawyers, who entirely specialise in public international law (PIL), often at a rarefied academic level. They are unlikely to be specialists in fact-finding or trial tactics. As a result, they may not be comfortable, as practitioners, to advise that particular evidence should be challenged, and how, or to test it themselves by cross-examination. Tribunals drawn from such lawyers may be similarly ill at ease presiding over a contest of evidence.

Finally, there may have been a sense, in and around the major PIL tribunals, that given their elite status and quasi-diplomatic role, they somehow have greater insight into what has really happened in international controversies than most observers, even without probing evidence.

For all of these reasons, the architecture, organisation and ethos of the major PIL courts is often not conducive to the robust testing of evidence.

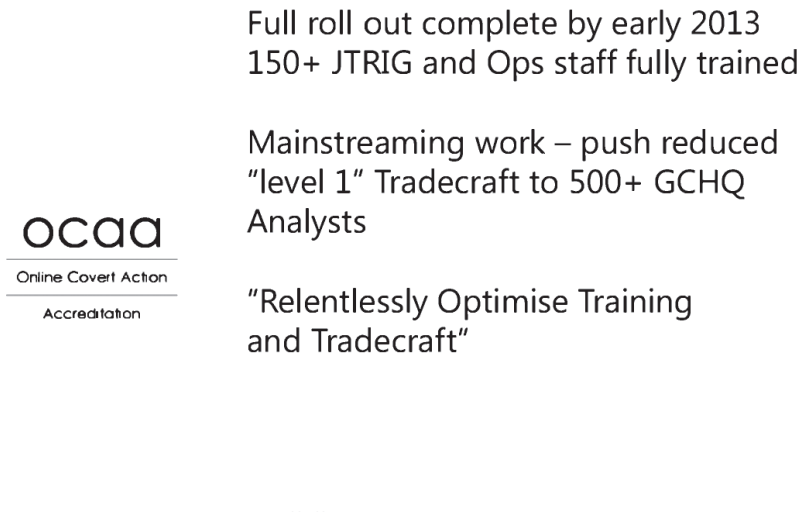
I believe that a major current question in international affairs is whether PIL cases can continue to be resolved credibly without properly addressing evidence, and whether the need to do so now trumps diplomatic nicety. There are many reasons why, but suffice it now to mention one.

Modern digital media allow digital creation, alteration and editing of pictures, video and sound recordings without a trace. They allow staging of events in one part of the world to be ascribed to another with minimal prospect of contradiction. They allow propaganda to have a greater potential impact on bigger populations than ever before in history.

Anyone who doubts this assessment would do well to study the documents released by Edward Snowden, the former NSA contractor who turned whistle-blower on certain activities of security services within the Five Eyes alliance[3].

The press reporting of Edward Snowden's revelations focused on the ability of States to intercept phone calls and emails, etc., but that in itself may well have been media manipulation aimed at damage control. Far more interesting were slides showing the numbers of people engaged in creating false material on the Internet.

[3] The US, the UK, Canada, Australia and New Zealand.




Other materials show how the false material is disseminated through social media, highlighted via blogs and websites (such as those of purported 'citizen journalists') and then spun into mainstream media as received fact.

UK TOP SECRET STRAP1

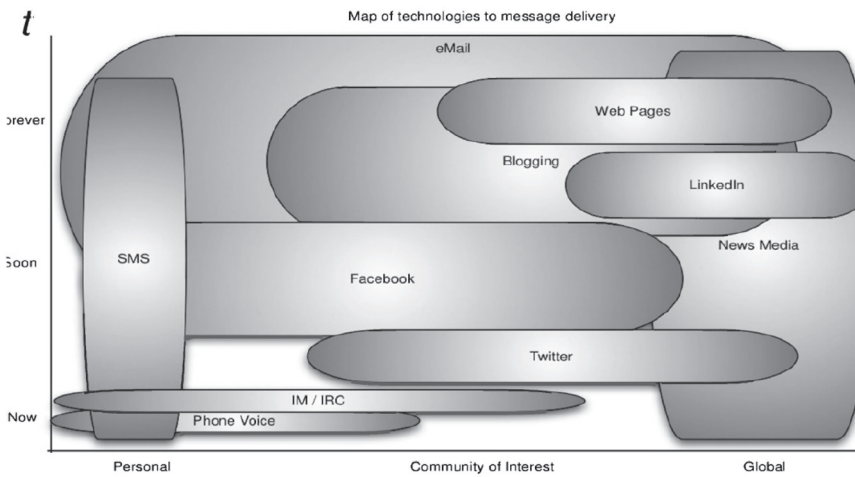
# CNIO

Computer Network Information Operations

- Propaganda
- Deception
- Mass messaging
- Pushing stories
- Alias development
- Psychology



SECRET//SI//REL TO USA, FVEY

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Having seen in real cases the scale and sophistication of such material, I doubt the ability of international courts to see through it without proper evidential enquiry — the sort of evidential focus that comes naturally in investment treaty, commercial and even sports law cases, where tribunals routinely give the parties a proper opportunity to present and challenge evidence, including using their own experts at the forefront of relevant technical skill.

It seems obvious too that there must be a disciplined analysis of how to deal with digital material that is so susceptible to manufacture and manipulation. Should it be admitted as evidence at all, without proof of the origin of the data, its custody, and the processes applied to it and by whom? Alternatively, should it carry any weight at all? Perhaps these might be good questions for another ICLRC session.

*M. Kazazi**

# General Features of the Rules of Evidence in International Procedure

I am very pleased to be here today, and like to thank the organizers for their excellent preparation as well as hospitality. In particular, I would like to thank Judge Roman Kolodkin. I enjoyed listening to Dr. Rajput's keynote remarks, as I did in listening to the previous speakers in the course of the day.

At the outset, as investor-State arbitration is part of the topic of our panel. I would like to recall that this workshop is happening at a time when a general debate is going on about the role of international tribunals in determining investment disputes and the possible implications for their future shape, in particular whether a permanent international court should be established to deal with investment disputes. At the same time, ICSID is undertaking an extensive review of its Arbitration Rules, based on the jurisprudence of about 600 ICSID cases. The first result of ICSID's review, released last August for public comments, includes a number of proposals on evidence issues, but not a major change.

Now, on the issues before us today, my response is in the affirmative to the important question raised in the general title of the workshop: *Evidence before International Courts and Tribunals: Distinct Fora, Similar Approaches?* On that basis, I would like to start my comments with a few words on the nature of the rules of evidence in international proceedings, and with quoting A.H. Feller, a renowned scholar, and later the Legal Counsel of the United Nations, who published a study in 1935 on the law and procedure of international tribunals and the practice of the Mexican claims commission, as a major post World War I claims commission. In a brief preface to his important work, he characterized the procedure before

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international tribunals at the time as the Antarctica of international law, in terms of its difficulty, complications, and the need for further exploration. In the eloquent words of Mr. Feller:

> 'The realm of the procedure of international tribunals is the Antarctica of international law. A few explorers have skirted about its shores; others have surveyed portions of it with more or less thoroughness. Not until its little known territory has been conquered, region by region, will it be possible for future scholars to draw a complete and revealing map of the entire continent.'[1]

Over 80 years later, Antarctica has very little secrets to preserve and so does, in my view, international procedure. In recent decades, international procedure and evidence have progressively evolved becoming codified, and harmonized. There exists now a number of recognized sets of international rules of procedure and evidence, and a wealth of largely consistent jurisprudence from the work of various international courts and tribunals on the rules of evidence. While each Tribunal may have its own characteristics due to its mandate, circumstances and purpose of its creation, its work load, etc., there is a harmonious international procedure and evidence, which seems common and consistent in its general principles and main rules.

Flexibility, lack of technical rules of evidence often seen in municipal laws, and freedom of the international courts or tribunals in the evaluation of evidence are main features of evidence in international procedure. As an important common feature, there is generally little restriction on the admissibility of evidence before various types of international tribunals[2]. There is no restriction based on the form of the evidence or the medium on which the evidence is presented. Important is also the principle of the equality of the parties, which as a fundamental principle, is generally respected and applied in international procedures to ensure a fair procedure.

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[1] A. H. Feller, 'The Mexican claims commissions, 1923-1934: A study in the law and procedure of international tribunals', New York, Macmillan Company, 1935**,** p. vii.

[2] For a discussion on instances of inadmissibility of evidence in international procedure, *see* M. Kazazi, 'Burden of Proof and Related Issues: A Study on Evidence before International Tribunals', Kluwer, 1996, pp.186–212.

In international procedure, three main general rules are recognized concerning the burden of proof, reflecting the roles and duties of three principal actors in each judicial or arbitral case, i.e. the claimant, the respondent, and the tribunal.

First, the rule of *actori incumbit probatio* is the broad basic rule of the burden of proof, according to which each party, apart from its procedural position as claimant or respondent in the case, has to prove its claims and contentions. Generally, in spite of the difference in the nature of various types of tribunals and claims resolution facilities, the duty of each party in proving its claims or contentions, in principle, remains the same. The broad basic rule of the burden of proof applies practically in all *fora* in spite of their different nature, compositions or purpose. That being said, as will be explained below, the nature of a tribunal or a fact-finding body may affect the level of the standard of proof and the role of the tribunal in investigating the facts.

The second general rule of the burden of proof in international procedure concerns the duty of the parties to co-operate in placing before the tribunal the facts relevant to the disputed issues. While the rule of *actori incumbit probatio* emphasizes the role and duty of the claimant, the rule of collaboration of parties emphasizes the respondent's obligation to produce documents in its possession in an international procedure.

The issue of the production of evidence is important, and normally the parties to an international litigation co-operate in providing the tribunal with the documents and other evidence in their possession. It should be recalled, however, that the mechanism of 'discovery' of documents, in the form and comprehensiveness that it does exist in the courts of the United States and some other common law countries, does not exist in international procedure.

The issue of production of documents by a party to the possible benefit of the adversary is generally complicated in international proceedings. International arbitral tribunals generally do not enjoy the power, as some national courts do, to force production of evidence by an unwilling party. Therefore, understandably, the question of compelling the production of evidence, and also that of consequences of non-production are not yet fully settled in international procedure, including in investor-State arbitration

and similarly in international arbitration. By necessity, a number of major international arbitral or law institutions have tried to facilitate the issue by providing optional rules that, through the agreement of the parties in each case, would apply to the issue of disclosure of evidence available to the other party. These rules generally provide details on conditions and limits of disclosure, and on consequences of refusal to disclose, including the tribunal's power to draw its own inference (including adverse or negative inference) from the non-justified refusal. Among the international rules addressing this issue, the IBA Rules on the Taking of Evidence in International Arbitration (2010) have gained wide recognition and are usually adopted by reference and applied as necessary in both investor-State and other international arbitrations. In adopting the IBA Rules, the arbitral tribunal and the parties normally leave room for flexibility and the possibility of applying the IBA Rules with changes that may be necessary given the circumstances of the case.

The third general rule of the burden of proof reflects the role of international tribunals in that respect, and concerns the authority of international tribunals in matters related to evidence. The authority of international tribunals is vast and encompasses the freedom in admission and evaluation of evidence, including drawing appropriate inferences from the refusal of a party to produce evidence readily available to that party. The authority of international tribunals also includes determining which party bears the burden of proof as well as the level of evidence required to meet that burden, i.e., the standard of proof.

On the standard of proof, while normally this is a rather subjective exercise by the arbitrators or judges of an international tribunal, to the extent that one might be able to trace it from the results of the cases and sometimes the language of the judgment or award, the preponderance of evidence is the measure generally applicable in international procedures. However, the nature of the international tribunal or the fact-finding body may affect the standard of proof. As a result, for instance, in international mass claims processing procedures involving valuation of losses suffered by victims of armed conflict and human rights violations (e.g., claims before the United Nations Compensation Commission) a more lenient standard of proof has been applied. To the contrary, the international criminal tribunals (e.g., ICTY) have applied the higher and stricter standard of 'proof beyond

reasonable doubt' in light of the presumption of innocence vis-à-vis the accused.

The general features of the law of evidence and its main rules in international procedure are confirmed by the practice of major international disputes settlement bodies, including international commercial arbitration and investor-state arbitration. The ICJ, in its turn, has played an important role by addressing and confirming the main features and rules of evidence in international procedure in its jurisprudence. It is quite helpful that the Court, perhaps, as a result of the sharp increase in its workload and due to the nature of some of its recent cases, seems to have gradually moved away in the last two decades from its earlier practice of focusing primarily in its judgments on the law and on undisputed facts. In a number of cases, the Court has provided detailed treatment of disputed facts and evidence. This approach probably more visible since the *Nicaragua case*, has had a positive impact on the law of evidence before international tribunals and has contributed to its development generally.

Now, let me conclude by a brief reference to evidence in investor-State arbitration. A general review of the investor-State arbitration cases (including, e.g., some cases before the Iran-US Claims tribunal, ICSID cases and the work of its various arbitral panels, and *ad hoc* investment dispute cases) shows that similar to other international tribunals, the general rules of the burden of proof are consistently applied, and that investor-State arbitrations do not differ in this regard from other international tribunals. Therefore, it does not seem that there are major issues concerning the main rules of evidence, which, for instance, are fully reflected in the ICSID Arbitration Rules. That being said, given the particular nature of the investment dispute cases and the presence of the States in all cases, it seems that many of the investor-State arbitral panels are facing issues related to production (or non-production) of evidence either by the State or by the investor-party to the case.

These issues include request of a State party for exemption from production of a particular evidence on the basis of State secrecy. Obviously, this is a contention that needs detailed explanations and possibly proof to enable the other party to verify the request and respond. Confidentiality of the material to be disclosed is another ground that may be raised by both the

State and the investor. Confidentiality ground is particularly challenging, as the tribunal often has to make a decision on the plea without having seen the evidence itself. A solution used by some tribunals is to appoint independent experts to review the documents and report to the tribunal with their advice on the confidentiality. Concerns arising out of international public policy are sometimes another ground for non-production of a document. These and similar pleas for exemption from production of evidence are addressed on a case-by-case basis by the respective arbitral panels. In resolving these matters, in addition to specific circumstances of each case, due regard is given to the principle of the equality of the parties and the impact of non-production on the rights of the other party in the case. As mentioned above, the IBA Rules are also used as guidelines, where applicable.

*N. Comair-Obeid**

# Evidence Before International Courts and Tribunals: Distinct Fora, Similar Approaches?

## Introduction

Dear Colleagues and Guests,

It is an honour for me to participate in the last session of this very well thought-out event on 'Evidence before International Courts and Tribunals'.

I am very pleased to be in Moscow, a city, which I am visiting for the first time and where I had a very warm welcome. Moscow is a fascinating place and its arbitration landscape has been constantly blooming over the last years, which makes me very pleased to be here and to participate in today's discussions.

The interplay of different legal cultures on the arbitration scene triggers an interaction of different rules of evidence, which often intermingle and merge to form new sets of rules on evidence. Because of the crucial importance of such rules in the conduct and outcome of any arbitration case, analysing the different approaches to evidence in international arbitration is both timely and topical.

I will focus my presentation on the differences between common law and civil law approaches to evidence and their coexistence in international commercial and investment arbitration. I will first highlight the key characteristics of common law and civil law systems with regard to evidence and will then describe the way the two systems have merged in the arbitration world, thus forming a hybrid, yet efficient system.

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## Party-driven evidential process in the common law tradition

*The common law tradition: an adversarial system under which the parties have large powers to conduct the procedure*

I will start with the characteristics of the common law approach to evidence.

In the common law adversarial tradition, the judge remains largely passive, leaving the active case management to the parties. As a result, the evidential process is party-driven — that is the disputing parties decide what fact and expert witness evidence they wish to serve in support of their respective case and are in charge of interrogating the witnesses and experts they call[1].

*Long-established tradition of document disclosure in common law countries*

Under the common law tradition, the evidentiary process is mainly in the hand of the parties and practitioners, and judges have historically viewed a broad, party-initiated disclosure process as an inevitable feature of dispute resolution and are often reluctant to meaningfully limit the use of that right by either party.

The golden rule in document disclosure in Common law is the proverbial 'cards face up on the table' in order to secure equality of arms and in search for an 'absolute truth'[2]. Thus, under the English Law, for instance, the parties have an obligation to make available evidence which either supports or undermines their respective case[3], save for some exceptions, including legal advice and litigation privileges[4].

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[1] G. Blanke, 'Document Production in International Arbitration: From Civil Law and Common Law Dichotomy to Operational Synergies', *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 83, Issue 4, November 2017, p. 424.

[2] *Ibid.*

[3] Under Article 31.6 of the England and Wales Civil Procedure Rules:
'Standard disclosure requires a party to disclose only: (a) the documents on which he relies; and (b) the documents which: (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction.'

[4] *Three Rivers District Council* v. *Bank of England*, (No. 5) [2003] QB 1556 and *Three Rivers District Council* v. *The Bank of England*, (No. 6) [2005], 1 AC 610.

*Cross-examination by counsel well rooted in the common law tradition*

Further, the common law heavily relies upon oral testimony. As such, common law practitioners will typically master the art of cross-examination of witnesses and experts whose oral testimonies will form an important part of the evidentiary record. Indeed, under the common law tradition, the physical presence of a witness affords the judge the opportunity of observing the witness demeanour[5]. This is perceived as being a useful indication of a witness's truthfulness and, therefore, a source of essential complementary information to understand the parties' cases.

## Tribunal-driven evidential process in the civil law tradition

*The civil law tradition: an inquisitorial system, which relies on the judge to conduct the proceedings*

Civil law practitioners have a very different conception of the way the procedure should be conducted. As Pierre Tercier explained in a lecture at the American University Washington College of Law, justice is not dispensed in the same way everywhere around the globe, meaning that the preferred way of applying the law in one legal system can be unconceivable in another legal system[6]. This idea is well reflected in civil and common law countries' approach to gathering evidence.

Thus, the inquisitorial approach underlying the civil law draws on the Roman adage of *iura novit curia* — 'the Court knows the law', whereby the judge takes an active role in the fact-finding process and is responsible for establishing the truth[7].

*Civil courts' reluctance to order the parties to produce material, which they had not voluntarily proffered as evidence*

As a result, party-driven discovery is a concept, which is foreign to civil courts. The general approach in most civil law arbitration legislation

[5] 'Evidence in Civil and Common Law Legal Systems', Abyssinia Law, 2012.
[6] 'Washington, D.C: Tercier on harmonization', Global Arbitration Review, 11 December 2015.
[7] G. Blanke, op. cit.

with regard to discovery in international arbitration parallels that of the model law, i.e. they do not specifically address the subject of disclosure. For example, the Swiss Law on Private International Law is silent on matters of disclosure, only providing that the arbitral tribunal have authority over the procedural conduct of the arbitration and the power to seek judicial assistance in evidence-taking from national courts[8].

This approach reflects the civil law courts' conception of justice, which is protective of the Parties' privacy and in the same time sceptical of the Parties' ability to say and seek the truth. Claude Reymond, former Professor at the University of Geneva, said: 'We feel that the principle *onus probandi incumbat alleganti* excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it in English, or worse, in American style, as an invasion of privacy by the court, which is only acceptable in criminal cases'[9].

*Civil courts' scepticism toward oral evidence*

Furthermore, because the parties are potentially distorting the truth to their advantage, statements made by the parties tend to be treated by the civil law judge with suspicion.

Consequently, counsel with civil law backgrounds are not accustomed to cross-examining witnesses and experts, as it is rather the judge who is in

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[8] *See* Federal Act on Private International Law of 18 December 1987:
*Article 182*: '1. The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice. 2. Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules. 3. Whatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in an adversary procedure.'
*Article 184:* '1. The arbitral tribunal shall itself take the evidence. 2. Where the assistance of state authorities is needed for taking evidence, the arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court at the seat of the arbitral tribunal; such court shall apply its own law.'

[9] Cl. Reymond, 'Civil Law and Common Law Procedures: Which is the More Inquisitional? A Civil Lawyer's Response', *Arbitration International*, vol. 5, issue 4, 1989, pp. 357, 360.

charge of questioning potential witnesses, legitimated by his/her objectivity, neutrality, and impartial approach to the procedure[10].

I have myself experienced a number of arbitration proceedings where civil law lawyers did not have a good command of cross-examination techniques, and found themselves at a disadvantage compared to the opposing parties' lawyers coming from a common law background. This shows the importance of training civil law lawyers in order to be able to defend properly the case of the parties they represent.

## Harmonisation of approaches to evidence in international commercial and investment arbitration

The following summary of the civil and common law approaches to evidence demonstrates the pros and cons of these two legal traditions.

*Disclosure in international arbitration: privacy v. transparency*

The extent a legal system wants to give to party disclosure requires striking the right balance between the competing needs of protecting the Parties' privacy and the will to promote transparency.

The need for transparency in arbitration has led a number of arbitration practitioners, including those from civil law backgrounds, to be in favour of disclosure. For example, Karl-Heinz Bockstiegel said: 'though coming from a jurisdiction where specific disclosure still is an exception, I have found a number of cases where one party would be at an extreme and unacceptable disadvantage if it were not granted access to some relevant documents which only the other party has in its possession'[11].

While the arbitral tribunal's power to order disclosure is ultimately defined by the procedural law of the arbitration (the law of the seat) which

[10] J. H. Rubinstein, 'International Commercial Arbitration: Reflections at the Crossroads of Common and Civil Law Traditions', *Chicago Journal of International Law*, vol. 5, № 1, p. 308.

[11] K.-H. Böckstiegel, 'Taking Evidence in International Commercial Arbitration — Legal Framework and Trends in Practice' in Karl-Heinz Böckstiegel, Klaus Peter Berger & Jens Bredow (eds.), *The Taking of Evidence in International Commercial Arbitration,* 2010, pp. 1, 5.

provides the legal basis and framework for the arbitrators' disclosure authority and the limits on such authority[12], the procedural rules chosen by the parties generally give more detailed information about the way evidence should be gathered[13].

The procedural rules produced by arbitral institutions are marked by the convergence of adversarial and inquisitorial techniques in the presentation of documentary evidence to facilitate a harmonized approach to document production in international disputes[14].

The International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) have been designed as a procedural compromise solution between the common and civil law worlds in the presentation of evidence in international arbitration proceedings.

In practice:

- The IBA Rules have introduced a practical framework for the advancement of requests for document production in an international arbitration process involving parties from varying cultural and legal backgrounds[15].
- The Redfern Schedule assists in the articulation and determination of document production requests under the IBA Rules, and as such facilitates an understanding of how document production under the IBA Rules works in practice[16].

The 2010 United Nations Convention on International Trade Law (UNCITRAL) Rules and the Hong Kong International Arbitration Centre

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[12] G. B. Born, 'International Commercial Arbitration', Chapter 16, 'Disclosure in International Arbitration', Kluwer Law International, 2014, pp. 2325–2334.

[13] *Ibid.*, pp. 2337– 2342.

[14] S. H. Elsing and J. M. Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration', *Arbitration International*, vol. 18, issue 1, 2002, p.59.

[15] *See* IBA Rules, Article 3, Documents.

[16] Originally devised by English arbitrator Alan Redfern, the Redfern Schedule is a table containing four columns, which set out (i) a description of the documents requested; (ii) the requesting party's justification for the request; (iii) the opposing party's reasons for refusing the request; and (iv) the tribunal's decision on each request.

(HKIAC) Rules, for instance, also confirm the arbitral tribunal's disclosure authority.

The International Chamber of Commerce (ICC) Rules, on the other hand, do not expressly provide for requests by the parties for disclosure, but it is clear that an ICC Tribunal's authority extends to permitting the parties to make requests for disclosure from their counter-parties upon which the tribunal may base its disclosure orders.

There is now an emerging consensus among experienced arbitrators and practitioners that a measure of document disclosure is desirable in most international disputes. Thus, justice is almost always best served by a degree of transparency which brings the relevant facts before the arbitrators; justice, as well as efficiency, is also best served by ensuring disclosure of the relevant facts sufficiently in advance of the witness hearing that the parties can prepare and present their cases in light of these facts[17].

As a result, almost all jurisdictions recognize the inherent or implied power of international arbitral tribunals to order disclosure by the parties to the arbitration, again generally as an aspect of the tribunal's broader procedural and evidence-taking authority.

In practice, arbitral tribunals usually consider that for document production to be efficient, it must serve the purpose of bringing to the arbitral tribunal's knowledge not just any documents relevant and material to the outcome of the dispute, but documentary evidence without which a party would not be able to discharge the burden of proof lying upon it. Accordingly, parties are most often not allowed to request the production of documents only to prove the inaccuracy of statements made by the other party. Instead, their request for document production had to be limited to documents helping them in discharging their burden of proof. Moreover, when a document production request is disputed, the arbitral tribunal will consider whether *prima facie*, the requesting party actually needs the documents to discharge its burden of proof.

[17] G. Born, opt. cit., p. 2346.

*Cross-examination of witnesses and experts in arbitral proceedings: time efficiency v. truthfulness*

While documents are preferred forms of evidence in international arbitration, because they are considered more trustworthy, easily manageable, and because it is more economical to bring them before the court of law, arbitration practitioners coming from both common law and civil law backgrounds generally agree that witness evidence brings additional information which is very helpful in arbitral tribunals' quest for truthfulness. Oral testimony is seen as important complementary evidence to fill in the gaps left by the documentary evidence and to bring new elements, which can guide tribunals in their decision-making process. Arbitral tribunals generally follow an approach very similar to the taking of witness evidence in ordinary English court proceedings.

With regard to oral testimony, the IBA Rules on the Taking of Evidence, in Articles 4 and 5, extensively cover party-appointed fact and expert witnesses. They further take into consideration the civil legal tradition of tribunal-led evidence gathering, by providing for the possibility of a tribunal-appointed expert in Article 6.

Similarly, the LCIA Rules, although produced by an institution based in a common law country, provide for the option of a tribunal-appointed expert. Under Article 21(1) of the LCIA Arbitration Rules, '[t]he Arbitral Tribunal, after consultation with the parties, may appoint one or more experts to report in writing to the Arbitral Tribunal and the parties on specific issues in the arbitration, as identified by the Arbitral Tribunal'.

With regard to the practice relating to oral evidence more specifically, international arbitration offers the opportunity to address the concerns presented by common law and civil law approaches to witness and expert evidence by finding a middle ground approach.

The common law adversarial system has sometimes been criticized for encouraging bias in witnesses and experts, and for contravening key principles of the duties of experts such as the duty to be objective, unbiased, and uninfluenced by the pressures of the dispute resolution process, or of any of the parties.

This observation applies particularly to experts. Indeed, one can legitimately doubt the independence and objectivity of two experts, representing two opposite parties, and presenting completely opposite and conflicting views. For instance, experts may differ in their opinion regarding the level of damages appropriate due to a breach of contract, or assess differently the relevance of certain factors in an expropriation claim. Another issue is that where party-appointed experts divide on theoretical lines. For example, accounting experts may have fundamentally different views as to the best way to value a company or business. In following their independent methodologies and modes of expression, tribunals may find it difficult to read two different expert reports alongside each other and to compare the opposing points. The question then arises of whether experts in these circumstances are fulfilling their duty of assisting tribunals in reaching an informed decision.

Party-appointed experts are sometimes referred to colloquially as 'shadow' experts, because they are essentially an extension of the party itself, as opposed to a 'clean' expert whose responsibility is to present impartial expert evidence to the tribunal.

In the civil law inquisitorial system, tribunal-appointed experts are more likely to deliver un-biased opinion based on the instructions that were given to them at the time they were retained.

In practice, however, working from detailed instructions alone may result in an expert having a less comprehensive view of the case compared with those who are working more actively alongside counsel. For these reasons, it may prove ineffective to rely solely on a tribunal-appointed expert. Further, arbitral tribunals may rely heavily on the opinion of a single person, and in this case, the arbitration procedure would look more like an elaborate and costly version of expert determination.

The flexibility of the arbitral procedure allows the tribunal to adapt to the particular circumstances of the case, using, to a certain extent, its discretion to follow the best way to ensure access to justice between the parties.

In practice, it is advisable that tribunals play an active role to request that the parties, at an early stage after the first round of submissions, when they have a better understanding of the case and the issues, submit a common

list of experts within a specific discipline, including the methodology the experts would like to rely on, and a list of common issues to address.

Hot-tubbing is another potential solution applied in international arbitration proceedings, in that it can help experts agree on the issues and present more focused evidence.[18]

The process of hot-tubbing involves experts convening at the initial stages of a matter in order to define the issues and points of fact in dispute. The technique can be used to good effect, particularly in highly technical cases, where it can enable a tribunal to compare and contrast the experts' opinions on the same issue. However, the technique may only be effective where a significant amount of preparatory work has been done to narrow the issues in dispute, and where the tribunal is sufficiently knowledgeable on the remaining issues that could be discussed effectively. The tribunal should have enough comfort with the underlying issues to probe the experts critically — something, which is far from guaranteed.

Further, arbitrators can intervene more pro-actively to manage the evidence of party-appointed experts and define at an early stage the issues on which evidence is needed[19]. Arbitral tribunals can notably:

- establish a separate protocol for experts in a first procedural order, as well as ask the parties to identify who will act as their expert, and on what matters by a particular date;
- direct experts to meet prior to finalising any reports on a 'without prejudice' basis;
- monitor the progress of the experts with regular conference calls;
- ask the parties to agree or submit the factual assumptions for damages in advance so that the differences can be identified, and once the tribunal has made a determination, ask the experts to calculate the difference;

[18] Fr. P. Kao *et al.*, 'Into the Hot Tub…A Practical Guide to Alternative Witness Procedures in International Arbitration', *The International Lawyer*, vol. 44. № 1, p. 1036.
[19] J. Waincymer, 'The Process of Arbitration', Part II, in *Procedure and Evidence in International Arbitration*, Kluwer Law International, 2012, p. 905.

- schedule a 'meet and greet' between experts after the initial round of expert reports for the purposes of narrowing issues in dispute. It should be made clear that they can speak on an open or without prejudice basis, following which the party-appointed experts could submit supplemental reports only on those issues where there is disagreement;
- direct that the parties agree on a common document set for the experts before the final expert reports are produced. If the experts are working from the same document set, it means they have to take the same evidence into account, which lessens the risk that the reports produced do not 'meet' on the evidential issues;
- suggest a list of issues to be submitted by the parties on which the expert(s) is/are being briefed, especially in technical cases where different experts may be dealing with different points;
- follow the Sachs Protocol[20], a method proposed by Dr. Klaus Sachs at the 2010 ICCA annual conference in Rio de Janeiro, where he suggested that the arbitral tribunal select an 'expert team' comprised of one expert from each list put forward by the opposing parties as tribunal-appointed experts rather than party appointed experts.

The members of any expert team, like any tribunal-appointed experts, have duties of being independent and impartial, and are responsible to the tribunal, not to the party who appointed them. Such protocol can be said to combine the advantages of party-appointed and tribunal-appointed experts.

Under the Sachs Protocol, once the parties have made their first submissions, the arbitrators should invite each party to create a list of three to five persons that parties consider appropriate to serve as experts. The tribunal can then invite each party to comment on the experts proposed by other party's list. Two experts would be appointed jointly by the tribunal as an 'expert team' and compensated out of the common fund of deposits

[20] Kl. Sachs, 'Protocol on Expert Teaming: a New Approach to Expert Evidence' in Albert Jan van den Berg, *ICCA Congress Series*, 2010, pp. 135–149.

for the arbitration paid by the parties. The expert team will prepare a preliminary joint report to be circulated to the tribunal and the parties for comment, and then prepare their final joint report taking into account those comments. The expert team, if required, would also testify at the hearings themselves.

*Particularities of investor-state arbitration*

The rules, procedures, and practice of document production and oral testimony in investment arbitration largely mirror those found in commercial arbitration. There are, however, certain issues that are specific to investor-state arbitrations, which are worth mentioning.

*1. Evidentiary privileges*

One aspect of evidence-gathering that may differ in investor-state arbitration is the extent of exceptions to discovery rules. As such, a number of privileges rarely seen in commercial arbitration cases are more regularly invoked in investment arbitrations. This includes cabinet privilege, or information related to secret diplomatic negotiations, state secrets, deliberative process privilege, confidential taxpayer records, and the secrecy of law enforcement investigations[21].

*2. Difficulties related to gathering evidence in a situation of conflict/ administrations not keeping relevant documents on record*

Some issues are specific to investor-state arbitrations against States, which have faced internal or external conflicts, including through civil unrest or revolution.

My experience of investor-State arbitrations with States affected by the consequences of a crisis is that they often experience difficulty in fully participating in the proceedings.

States typically experience difficulties in respect to gathering and producing evidence due to destruction of documents, poor or a complete lack of archiving, the inability to access or conduct expertise on certain sites, etc.

[21] G. Blanke. op, cit.

On the other hand, the Claimant in investor-State arbitrations will often be large — potentially a multinational company — and have a very organized system for recording and classifying key documents.

This creates a significant imbalance in the arbitral procedure, where the State is at a significant disadvantage and unable to prove allegations, even if potentially true.

*3. Difficulties related to States having limited budget means (non-submission of expert reports, etc.)*

Another experience that I faced in the arbitration against a post-conflict State, is the State's lack of resources leading to a parsimonious approach to evidence submission.

What should a tribunal do in a situation when one of the parties, typically the investor, submits extensive witness evidence together with expert reports, and the State submits no expert report at all?

One possibility in this situation is for the tribunal to appoint its own expert, but this has to be counterbalanced by the necessity to ensure cost- and time-efficient arbitral proceedings. It is also questionable whether you can require the Party, which has renounced its right to appoint an expert for financial reasons, to pay for a tribunal-appointed expert.

Under the ICSID Arbitration Rules, tribunals have a role to play in ensuring the equality of arms between the Parties whether in asking relevant questions to the experts and witnesses or in calling upon the parties to produce documents.

Under Rule 34(2), 'the Tribunal may, if it deems it necessary at any stage of the proceeding: (a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there.'

Under Rule 35(1), 'Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.'

The tribunal will have to be subtle in reaching a fair solution, while securing different crucial rights of the parties, which include the protection of their free will, privacy, and equal treatment in the arbitral proceedings.

## Conclusion

I will conclude briefly by highlighting the central importance of today's conference theme, to which I am glad I have been invited to contribute.

Indeed, evidence is a central aspect of any national litigation or arbitration. Carl Sagan said that: 'Absence of evidence is not evidence of absence'– yet, for a court or an arbitral tribunal, a fact, which is not proven, cannot be taken into consideration, whether it is a true fact or not. Hence the importance to keep everything on record, something that the Parties, often State Parties, too often neglect.

As to evidence rules, I do believe that those applicable in international arbitration represent a good middle ground capable of promoting fair and efficient proceedings, while protecting the parties' right to privacy. The mix of cultural and legal backgrounds in international arbitration has enriched the practice and been a driving force in finding a balanced and reasonable approach to evidence gathering.

*D.-R. Martens**

# Evidence in Sports Arbitration

## Introduction

Recognizing that today's audience may not be fully familiar with the peculiarities of sports arbitration, I will make some introductory remarks before entering into my topic.

Sports arbitration — and thus evidence taking in sports arbitration — is dominated by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. Indeed, any athlete wishing to compete in the events run by an organisation within the Olympic pyramid (i.e. within the so-called Olympic movement) must accept the jurisdiction of the CAS ('forced arbitration'). This quasi-monopoly has been challenged in recent years by a number of private/commercial organisers that have tried to stage mostly one-off competitions by enticing top-level athletes with significant prize money and arranging for dispute resolution outside of the CAS (or refraining from regulating dispute resolution). Some international federations are trying to respond to this trend by threatening to sanction any athletes (primarily with ineligibility) that participate in competitions, staged outside of their reach.

A further threat to the CAS — and thus to the entire dispute resolution system in sport — comes from athletes who challenge (so far unsuccessfully) the independence of the CAS as a whole, claiming that it is unduly influenced by the IOC and international federations.

The jury is still out on whether any of these challenges will one day succeed in reshaping the structure of international sport and the resolution of sport disputes; for now, CAS remains the dominant sports dispute

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resolution forum, and its rules of evidence have a significant impact on the taking of evidence in sports disputes.

### Main features of CAS arbitration

CAS disputes are usually decided by a panel of three arbitrators or by a sole arbitrator. Unlike many other arbitral institutions, the CAS operates off a closed list of arbitrators. Approximately 400 arbitration-/sports law specialists appear on this list, from which the parties (and on some occasions, as discussed below, the CAS itself) must select their arbitrators.

The way that the chairperson of a panel is appointed for a specific case depends on the type of procedure. There are three 'divisions' at CAS, which administer three different types of procedures.

First, the so-called 'ordinary' arbitration division deals with cases where the parties have chosen the CAS as the body to resolve potential future disputes. These types of cases are often normal contract disputes that may involve entities or persons involved in sports. Under the rules governing arbitrator appointment in ordinary procedures, the parties each appoint an arbitrator from the list, and those two arbitrators then select the chairperson also from the list.

Second, the CAS Appeals Arbitration Division administers appeals against decisions rendered by sports federations (primarily disciplinary and eligibility or transfer cases). In those cases, each party selects one arbitrator, and the chairperson of the panel is appointed by the President of the CAS Appeals Arbitration.

Finally, as of the beginning of 2019, CAS has created a special anti-doping division (CAS ADD) to act as a first instance decision maker and sanctioning body for alleged anti-doping rule violations pursuant to delegations from, e.g., international federations. Cases can either be decided by a sole arbitrator or by a three-member panel of arbitrators, who are chosen from separate list of arbitrators that may only sit in CAS ADD proceedings. If the parties submit their case to a sole arbitrator, the parties may mutually agree on the arbitrator, failing which the Division President will decide; it is possible to appeal decisions rendered by a CAS ADD sole

arbitrator to the CAS Appeal Arbitration Division. When a CAS ADD case is heard by a three-member panel of arbitrators, the parties waive their ability to appeal an eventual award to the CAS Appeals Arbitration Division. The composition of a three-member panel is determined as follows: the parties may each nominate an arbitrator, and the chairperson is appointed by the agreement of the parties, or, in the event the parties are unable to agree, by the Division President.

## Rules on evidence at CAS

The CAS has its seat in Lausanne, Switzerland and is thus a Swiss Court of Arbitration. As a result, the Swiss Private International Law Act (PILA) applies to CAS cases, if at least one of the parties to the arbitration agreement, is neither domiciled in nor a habitual resident of Switzerland (Article 176 PILA). Pursuant to consistent jurisprudence in Switzerland, the 'seat of the arbitral tribunal' is deemed to be in Switzerland even if a CAS panel hears the case in another country.

The PILA establishes the fundamental rules for international arbitration in Switzerland and regulates matters such as the validity of the arbitration agreement, questions of arbitrability, the applicable law, etc.

*Article 182 PILA*

According to Article 182 PILA, which is consistent with general practice in international arbitration, the parties are, first and foremost, in charge of determining the procedure for a given case, which they often do by making reference to specific rules of arbitration such as the Code of Sports-related Arbitration and Mediation Rules (CAS Code). To the extent that the parties have failed to determine the arbitral procedure, the latter is in the hands of the arbitrators, provided that they respect the rules of equal treatment and the right of the parties to be heard.

Article 182 (VI Procedure) of the PILA provides:

1. Principle

1) The parties may directly or by reference to rules of arbitration determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.

2) If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.

3) Regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial proceedings.

*Evidence taking: common law style or civil law style*

Lawyers/arbitrators who have been trained in and work pursuant to the common law style of litigation are accustomed to letting the parties take the leading role in determining the way in which evidence is taken ('adversarial style'). In particular, the parties decide whom to present as witnesses and — as a matter of principle — pre-determine the subject matter of the testimony, mostly by submitting witness statements summarizing the expected testimony. In cross-examination, the other party then tries to challenge such testimony, mostly by putting in question the witness' credibility.

Conversely, civil law lawyers/arbitrators generally set out in their submissions the issues that they consider instrumental for the outcome of their case and proffer the respective proof/witness. It is then for the judge/arbitrator to decide, on the basis of his or her preliminary analysis of the case, which evidence to take and who to hear as a witness ('inquisitorial style').

The issue of common law style versus civil law style of evidence taking is not just a theoretical question! It may make a decisive difference whether an arbitration panel leaves it to the parties to decide on the way in which evidence is presented as compared to the practice of civil arbitrators, who determine what they consider to be essential for the outcome of the case and who thus decide on what evidence needs to be taken, including and, in particular, who will be heard as a witness.

In CAS arbitrations, the extent to which a panel takes advantage of its right under Article R44.3 of the CAS Code, i.e. the extent to which it 'orders the production of additional documents or the examination of witnesses, appoints and hears experts, and proceeds with any other procedural step' (Article R44.3 CAS Code) and thus takes a proactive role in the proceedings, may be crucial. CAS practice shows that panels generally seem to be conservative when it comes to making use of Article R44.3 orders.

## Types of evidence

*Restrictions on written submissions and proffer of evidence*

The CAS Code expressly provides that in ordinary proceedings (Article R44.1 CAS Code):

> '…together with their written submissions, the parties shall produce all written evidence on which they intend to rely. After the exchange of the written submissions [which "as a general rule … [consist of] one statement of claim, one response, and, if the circumstances so require, one reply and one second response", Article R44.1, final paragraph] the parties shall not be authorized to produce further written evidence except by mutual agreement, or if the Panel so permits, on the basis of exceptional circumstances.'

In appeal proceedings, the Appellant 'shall file … a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence on which he intends to rely' (Article R51 CAS Code). And the Respondent 'shall submit … an answer containing: a statement of defence; any defence of lack of jurisdiction; any exhibits or specification of other evidence upon which the Respondent intends to rely; the name(s) of any witnesses, including a brief summary of their expected testimony … [and] the name(s) of any experts it intends to call, stating their area of expertise, and state any other evidentiary measure which it requests' (Article R55 CAS Code).

In CAS practice as a general rule, panels tend to be fairly generous in finding 'exceptional circumstances' and thus inviting a second round of submissions.

*Witnesses and witness statements*

In ordinary proceedings, according to Article R44.1 of the CAS Code, 'the parties shall list the name(s) of any witnesses, whom they intend to call, including a brief summary of their expected testimony…' (Article R44.1 CAS Code).

Similarly, in appeal proceedings pursuant to Article R51 CAS Code, 'the Appellant shall file with the CAS court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits

and specifications of other evidence upon which he intends to rely'. In the Answer Brief, the Respondent shall submit 'the name(s) of any witnesses, including a brief summary of their expected testimony'.

As is true in general, witness statements may be of limited value in that they are, almost without exception, formulated by attorneys, and thus may not always accurately reflect the truth as the witness recollects it.

*The IBA Rules on the taking of evidence in International Arbitration (the IBA Rules)*

As a general rule CAS panels often refer to the IBA Rules as a general guideline for the taking of evidence to the extent that the CAS Code is silent on a particular evidentiary issue.

*Expert evidence*

As is the general rule in international arbitration, the evidence provided by party-appointed experts is considered expert evidence, and not merely a party's submission. Obviously, in doping-related cases, expert evidence is the key to the outcome of the proceedings, in that, generally, the arbitrators may not be sufficiently familiar with the medical/pharmacological details of a particular doping scenario.

Despite the obvious partisan position that party-appointed experts usually take, CAS panels rarely make use of their right to 'appoint [court appointed] experts' (Article R44.3).

*A. Rajput*

## Concluding remarks

Literary critics may disagree on which is the best contribution of Shakespeare to the English Literature, but they more or less much agree on one thing; one dialogue he uttered is transcendental, which is: 'to be or not to be?' I guess that is probably a good way to respond to the question that we have been trying to deliberate for the entire day today: evidence before international courts and tribunals — distinct fora, similar approaches, to be or not to be. I think it is a step in the direction of progress, because from a position of saying 'no' we are moving to a position of reflection and contemplation: should we or should we not? At least some guidance on issues of evidence and practices of different courts and tribunals would be helpful in this regard. Overall, the discussion makes me optimistic, and that optimism arises from some common takeaways, which I think have emerged from the discussions that we have had today. It was all because of the excellent level of participation from the panellists and from the audience. So I think, the real credit of this Shakespearean moment, of to be or not to be on evidence goes to all the participants collectively, as a collective thinking exercise. Let me note some common and salient themes of today's discussions.

All agree on the point that there are problems, and the problems are at different levels, there are problems across institutions, there are problems within the institutions, but there are problems. Then the question is whether we are looking for similarity at approaches. If the answer is going to be 'yes', then the question is at which level we are asking that question. If we are going to ask that question at a higher level, in terms of two different institutions, the answer is obviously going to be 'no', because the institutions are different. If we go slightly lower and try to ask 'is this civil law/common law approach', the answer is probably not going to be changed. But if we try to go further down, dig deeper down into the principles of evidence, as they are applied, *dehors* the environments in which they are applied, it seems there is great deal of similarity. When I was listening to the discussion on burden of proof, evidence, shifting of burden of proof, especially from the European Court of Human Rights, what came to my mind that is precisely

what the ICJ was trying to do in the Genocide Cases. Maybe, when we are looking at it from a higher level, from the top of the mountain, we see a bit of clouds and a bit of divergence. But when we use granular approach in our analysis, get closer to the actual application of the principles, or just to the notion of the principle itself, we probably can find a lot of similarities. We find a great deal of similarity in the philosophical foundation of a certain principle of evidence. I am deliberately avoiding the use of the word 'rules', because rules, as jurisprudentially or normatively understood, have some binding characteristic. But principle have a great amount of flexibility. It is possible therefore, that one could conceive, of such broad pool of principles to which one can go into, draw upon, and use it based on the circumstances depending on the peculiarities of that particular Court or Tribunal. It would depend on the level at which it is functioning: whether it is an institution or an *ad hoc* tribunal. However, what appears to emerge is that the presence of such set of principles gives great deal of clarity.

We have seen that there has been a lot of debate between the civil and common lawyers, as to which form of system is predominant — we are, of course, going to keep fighting on that all the time; the question is: 'do we want to go on a crusade for that?'! If we do want to go on a crusade for that, the ultimate sufferer is the international adjudicative process. And I do, to some extent, really like the approach of the last panel, the commercial arbitrators. Somebody made to me a comment: 'Well, they have to make money, so they have to be practical', but whatever it is, they have found the solution. If they have found a solution, if they feel that civil law and common law can coexist, then there is no harm to be practical in adjudication of disputes between States, or private entities and States. Well, the United Nations is meant to achieve co-existence. We should therefore find common grounds and move forward, rather than indulge in an ideological battle. The discussions during the day have shown the scope for common ground on which we can proceed further.

I wish to make two brief concluding points.

Extensive references were made to the drafting history of the PCIJ Statute, and that then it was not felt necessary to draft or refer to rules on evidence. However, we have to ask ourselves a question: is the situation of international adjudication today the same as in 1922, when the PCIJ Statute

was drafted? Can we ignore the proliferation of international courts and tribunals and the number of disputes that they are currently deciding? There is a dramatic change in the nature and size of evidence that is presented at proceedings before international courts and tribunals. The drafters of the PCIJ Statute could not have contemplated questions of evidentiary value of satellite images, or voluminous examinations and cross-examinations, or handling expert witnesses, which is a regular feature of international adjudication at the present time. Today when the times have changed, is it not an opportune moment to revisit the need and utility of principles of evidence? We need to reflect whether non-existence of principles of evidence in the PCIJ Statute and the ICJ Statute was deliberate or purely accidental.

The second point is, when we are talking about differences in different adjudicative systems, are we talking about referring to actual differences in the principles or simply terminological differences? Because what seems to be underneath, the undercurrent of the principles, appears to be quite similar. I do think there is certain degree of similarity, that one can see if one tries to remove the theoretical trappings, or let us say the definitional trappings, remove the definitional struggle and just try to look at the substance of how those principles are being used and applied. If we do have such set of flexible tools, I think it will certainly add clarity to the process.

As I was speaking to some of the present or former judges of different courts and tribunals, some of them felt that this man was on a mission to tie our hands. Just for their comfort, if at all there is such a project, which goes ahead at the International Law Commission, the outcome of the project will be in the form of principles: a set of non-binding norms, which courts and tribunals can rely upon as per the requirements of the case. We see that there is a need of a greater dialogue between international courts and tribunals on evidentiary issues. At the moment, there are cross-references to evidentiary practices of different courts and tribunals. They are looking at each other, because they respect each other and know that each of them has a different experience. If the exchange of ideas is already happening on an informal level, would not it be better to have a more formalized approach and develop a clear set of principles which could be of use for all the relevant courts and tribunals?

While the comfort and satisfaction with the principles of evidence of the courts and tribunals is central, we cannot forget that the principal users of these principles are States. If we only achieve comfort and satisfaction of the judicial institution, there may be questions raised by States. There is a certain degree of sensitivity involved, since there is an element of sovereignty. It is necessary to see how the element of sovereignty functions, how it factors in. All this has to be taken into account. It has to be balanced with the interests of private individuals who would be a party, or have stakes in international adjudication. We certainly do not want to be in a situation where we have no principles of evidence and excess discretion to adjudicators, thus creating a situation of *ex aequo et bono*. This would create confusion. Clarity on principles of evidence as applied would be helpful.

I remember a conversation with a very sophisticated German Professor: a deep thinking, philosophical professor. I would deliberately not name him; and these are his words in an oral conversation, not written, and I do not wish to take underserved credit. I wish to share his words of wisdom with you: 'Rules of any kind are disabling for a bad judge and enabling for a good judge.' In that sense, principles of evidence can assist in the process of adjudication, they would not be disabling, they would be rather enabling.

I must say, I just join everybody, as to how phenomenally this whole event has been organised. I am grateful to Judge Kolodkin, it was his idea to have such kind of event, so that we all could speak to each other. We may have disagreed on anything and everything, but there is one common denominator on which we all agree — it was an exceptionally well-organized and extremely well-executed event. And I take this opportunity to thank Judge Kolodkin, the Center, and everybody who has been working behind it to make this a success. Thank you very much!

# Доказательственные привилегии в международных судах и трибуналах (материалы круглого стола, 15 мая 2019 г.) /

# Evidentiary Privileges in International Courts and Tribunals (Round-Table Proceedings, May 15, 2019)

*M.-B. Dembour**

## Do the Regional Courts of Human Rights Accept to Draw Negative Inferences When the Defendant State Fails to Produce a Piece of Evidence?

### Focus of this contribution

The brief I have received is to look at the production of documents and, more specifically, at the consequences, which arise in international human rights adjudication when a party fails to produce a document needed for evidentiary purposes.

The first thing to note is that evidence is said to be 'free' (more of a civil law tradition language) and/or 'non-technical' (more of a common law tradition language) across the three regional human rights courts that currently exist in the world — namely, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and People's Rights. Importantly, if they so wish, each of these courts can elect to get involved in the gathering of evidence. In particular, they can ask the parties to produce documents.

The question, therefore, arises as to what happens if the defendant state fails to cooperate with a court by not complying with a request to produce documents or by not having volunteered a document, which was

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obviously relevant. The same question, of course, arises when it is the applicant, who fails to disclose some documents. However, it is generally the defendant State who will hold compromising documents which it could be tempted not to submit to the court, making the question more pertinent in its regard.

As the oldest of the three human rights regional courts, the ECtHR is often regarded as the model for its two sister-institutions. This presentation will review how it has dealt with the issue, focusing on the landmark case of *Ireland* v. *United Kingdom*. A brief comparative excursus afterwards will highlight that we should not assume that the Strasbourg approach is necessarily shared by the other courts.

## Early pronouncement

When it comes to evidence, one of the most quoted passages of the ECtHR's case law, including by the Strasbourg Court in subsequent case law, originates in the judgment the Plenary Court adopted in the case of *Ireland* v. *United Kingdom* on 18 January 1978. It reads:

> '[Regarding whether Article 3 (art. 3) has been violated], the Court adopts the standard of proof «beyond reasonable doubt», but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account [para. 161].'

As we shall see, these words go to the heart of our topic. First, it may be useful to recall what the case was about. *Ireland* v. *UK* concerned five sensory deprivation techniques of interrogation, which the United Kingdom had applied in the early 1970s in the context of extra-judicial detention and internment deployed in Northern Ireland during 'the Troubles'. For the present discussion, what is interesting is how the Court treated Ireland's claim that the interrogation techniques violated Article 3 ECHR[1].

[1] We are thus leaving aside the part of the judgment, which accepted UK's argument that the extra-judicial nature of the detention and internment had been necessary to combat terrorism in Northern Ireland, thereby justifying the British derogation from Article 5 ECHR under Article 15 ECHR.

To anticipate, the Court concluded that the use of the techniques amounted to inhuman and degrading treatment contrary to Article 3 ECHR, but not torture, which, in stark contrast, the Report of the erstwhile European Commission of Human Rights opined had occurred.

The facts of the case were disputed by the parties. This persuaded the Court, presumably the more so, since this was an inter-state case, to depart from the principle, according to which it should normally refrain from acting as a court of fourth instance. If the facts as determined by the domestic courts of the defendant State were not to be accepted, where were they to be found?

For the present discussion, we can leave aside that the original system of the European Convention on Human Rights tasked the Commission with ascertaining the facts — without making its factual conclusions binding on the Court. More important here is that the Convention did not say anything (and still says nothing) about the burden of proof. In the 1970s, the Registrar of the Court wrote: '*Sur qui pèse … le fardeau de la preuve? Commission et gouvernement en ont débattu … mais … la Cour [statue] à la lumière de l'ensemble du dossier*'[2]. This perspective was confirmed in *Ireland* v. *UK*, whose para. 160 stated:

> 'In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3 (art. 3), the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*.'

In time, this also got reflected in the text of the Convention, whose current Article 38 provides: 'The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.' In sum, the ECtHR is at the helm of the

[2] For a concurring view, *see* Eissen, 'La présentation de la preuve dans la jurisprudence et la pratique de la Cour européenne des Droits de l'Homme', in *La présentation de la preuve et la sauvegarde des libertés individuelles,* 1977, 143-312, at p. 156, para 16.

collection of evidence. The ECHR evidentiary regime thus seems to go in a different direction from where the adage *actori incumbit probatio* (which can be loosely translated, as 'the proof has to be brought by the party who brings up an allegation') would lead[3].

The Convention is silent not only about the burden of proof but also about the standard of proof. Above we already saw that the Court opted for the 'beyond reasonable doubt' (BRD) standard in *Ireland* v. *UK*. It is worth now going through the reasoning, which led to this pronouncement. Paragraph 161 started by saying:

> 'The Commission based its own conclusions [finding the five sensory techniques amounted to torture] mainly on the evidence of the one hundred witnesses heard in, and on the medical reports relating to, the sixteen "illustrative" cases it had asked the applicant Government to select. The Commission also relied, but to a lesser extent, on the documents and written comments submitted in connection with the "41 cases" and it referred to the numerous "remaining cases" (see paragraph 93 above). As in the "Greek case" (Yearbook of the Convention, 1969, The Greek case, p. 196, para. 30), the standard of proof the Commission adopted, when evaluating the material it obtained, was proof "beyond reasonable doubt"'.

As a word of explanation, the *Greek Case* had been brought in 1967 by Denmark, Norway and Sweden, and then the Netherlands, in the wake of the coup d'état in Greece. The coup had been followed by gross violations of human rights. One might have been tempted to regard these as incontrovertible. However, instead of taking them as it were for granted, the erstwhile Commission painstakingly examined them, using the BRD

[3] Such a foundation has not prevented the ECtHR from developing over the years a jurisprudence about the question of how to allocate the burden of proof between the parties. The Court has come to distinguish a number of different scenarios in this respect. For example, if the state alleges that an applicant has not exhausted national remedies, the burden is on the state to explain which remedies were not exhausted. If an applicant brings *prima facie* evidence of a forced disappearance, or treatment in detention, which caused injury or death, or participation in extraordinary rendition, it is for the state to bring further evidence infirming the reality of this *prima facie* case for violation not to be found.

standard and attracting praise for the 'judicial precision' with which it had established the facts[4].

In *Ireland* v. *UK*, the United Kingdom would have been keen on the adoption of the BRD standard — a concept found in the common law and used in particular in adversarial criminal proceedings — as it seems to make it particularly difficult and, indeed, potentially impossible for the applicant to prove their case[5]. By contrast, Ireland would not have been happy with it. Indeed, para. 161 of the Judgment continues:

> 'The Irish Government see this [BRD] as an excessively rigid standard for the purposes of the present proceedings. They maintain that the system of enforcement would prove ineffectual if, where there was a *prima facie* case of violation of Article 3 (art. 3), the risk of a finding of such a violation was not borne by a State which fails in its obligation to assist the Commission in establishing the truth (Article 28, sub-paragraph (a) in fine of the Convention). In their submission, this is how the attitude taken by the United Kingdom should be described.'

In this passage, Ireland is hinting at the fact that the United Kingdom had refrained from submitting all relevant documents in its possession. Ireland also makes the general observation that the BRD standard makes it difficult, if not impossible for the applicant, to evidence the facts when the defendant state fails to cooperate in the collection of evidence.

The United Kingdom's unsurprising submissions were summarised by the Court:

> 'The respondent Government dispute this contention and ask the Court to follow the same course as the Commission.'

The Court's decision has already been quoted above. To repeat:

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[4] *See* e.g. Kiss et Végléris, 'L'affaire grecque devant le Conseil de l'Europe et la Commission européenne des droits de l'homme' in *Annuaire français de droit international,* 1971, para 56.

[5] A deeper analysis would, nonetheless, show that this need not logically be the case. It all depends on how one understands the concept of 'reasonable' and its opposite 'unreasonable' doubt.

> 'The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3 (art. 3). To assess this evidence, the Court adopts the standard of proof «beyond reasonable doubt» but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account [para 161].'

Arguably, this was not the most inspired move. It triggered fierce criticism in subsequent case law by dissenting judges who argue that the BRD standard is simply unsuitable for international human rights adjudication[6]. This view seems to be shared by the other regional human rights courts, both of which have stayed away from adopting the BRD standard.

The ECtHR may have sensed that there was some incongruity in adopting a standard which could appear excessive in requiring too exacting evidentiary demands from the applicant (at a time when it might not have been seen that the standard could also be applied to the defendant State)[7]. The Court immediately went on to mitigate the perception that the BRD standard requires exceptionally strong evidence, by adding that 'sufficiently strong, clear and concordant inferences' can produce a proof BRD.

Some commentators were quick to denounce this addition as illogical. Others remark, persuasively, in my view, that inferences can indeed happen to be so strong as to eliminate almost every uncertainty as to what has happened[8]. One can explain this through an example: let us assume you come back to your house to find your front door, which you knew perfectly

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[6] *See* e.g. *Anguelova* v. *Bulgaria* (13 June 2002) and *Ggini* v. *Serbia* (15 January 2019).

[7] Today the Court does not hesitate to shift the burden of proof in some Article 2 and Article 3 complaints, especially having to do with forced disappearances, bad treatment in detention and extra-ordinary rendition. The State may also have to prove that a measure adopted under paragraph 2 of Articles 8-11 was necessary in a democratic society. Although the Court does not refer to the BRD standard in the latter scenario, its application would not be theoretically impossible.

[8] This is particularly well argued by El Boudouhi in *L'élément factuel dans le contentieux international* (2013).

well to be blue, is now green. Provided, that in all other respects the door remains the same, you will probably infer it has been repainted, even though you have not witnessed the action of repainting. For such an inference to hold before a judge, you would need to provide evidence of a series of facts, including that the door used to be blue, that it is now green, and that it has not changed in any other respect.

In *Ireland* v. *UK*, Ireland wanted the Court to draw inferences from a number of facts it had established, plus the fact that the UK was failing to cooperate with the Strasbourg institutions in the establishment of the facts. However, the lack of cooperation, which would have provided the basis for some inferences, was a fact which itself needed to be substantiated, which Ireland was not in a position to do. (In time, evidence to this effect surfaced, leading Ireland to request a revision of the original judgment forty years later, as discussed in the next section).

In 1978, the most the Court felt it could make of this situation was to state the position of principle according to which the manner in which the Parties conduct themselves (here, understand the defendant State) can lead it to draw inferences. No doubt, Ireland would have wanted the Court to go further. As already quoted, it argued that the system of enforcement would be ineffectual if, where there is a *prima facie* case of violation, the risk of an adverse finding is not borne by the State who is proving to be uncooperative in assisting the Court in establishing the truth. However, the Court was not prepared to find that the UK had committed torture.

The Court's position has found its way into the Rules of the Court of the European Court of Human Rights, which, in their current phrasing, contain the following provision:

> 'Where a party fails to adduce evidence or provide information requested by the Court, or to divulge relevant information of its own motion, or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate.'[9]

[9] Rule 44C1, dating from August 2018. Rule 44A deals with the duty to cooperate with the Court, Rule 44B with the failure to comply with an order of the Court. *See* also See also Rule 54, Rule 59, Rule A1 of the Rules of the Court.

As can readily be seen, the vagueness of this provision does not guarantee a win for the applicant, once it is suspected or even established that the defendant State is failing to divulge relevant information. The liberty of appreciation enjoyed by the Court means that it is not promised that negative inferences will be drawn in such cases, although this is not ruled out either.

### ECtHR's recent case law

In December 2014, the Irish Government requested a revision of the 1978 *Ireland* v. *UK* judgment. Incontrovertible proof regarding the lack of cooperation, which had characterised the attitude of the UK Government in the original proceedings, had emerged. Four decades on, the revision request sought to have the interrogation methods used in 1971 recognised to have amounted to torture. Ireland argued that evidence about the long-term effects of the sensory deprivation techniques had been in the hands of the UK Government in the 1970s, but purposely not submitted by it in the original proceedings. Ireland's second line of argumentation was that official documents, recently declassified, showed that the use of the controversial five techniques had been authorised at ministerial level, which the UK Government had always known, but had not divulged in the original proceedings (para. 20 of the 2018 Judgment). A Chamber of the ECtHR dealt with the revision request. On 20 March 2018, it rejected it by six votes to one.

There was a long and strongly worded dissenting opinion by Judge O'Leary, which ended:

> '75. […] both limbs of the revision request reveal new facts which were unknown both to the Court and to the applicant State when the original judgment was handed down. Those new facts reveal (i) that medical expertise was available to the respondent Government pointing to the long-term serious mental effects of the five techniques, such that in reality there was no conflict of evidence on this crucial point which related to the intensity of the suffering endured, and (ii) the existence, nature, extent and purpose of a policy of non-disclosure and obstruction by the respondent State. […]
>
> '76. In 1978, the Court decided not to draw certain inferences from what was alleged but could not then be proved as being the conduct of

> the respondent State. In 2018, a majority of the chamber has decided to ignore the bigger picture now available to it on the grounds that the principle of legal certainty must prevail. […]
>
> '77. […] in the present case, it is difficult to avoid the impression that […] the Court […] has sought to shelter itself behind that principle. By doing so, it risked damaging the authority of the case law, which that principle seeks to safeguard […].'

Judge O'Leary points out that the facts should not have been in dispute in the original case. All the necessary evidence existed to ascertain them. The problem was that the respondent State did not cooperate and decided not to disclose the evidence that it possessed at the time. Strikingly, this attitude of non-cooperation benefited the UK, for it escaped being found in violation of torture in 1978 — and then again in 2018, despite the fact that its non-cooperation was now incontrovertibly established. Incomprehensibly from a human rights law perspective, the Court did not draw the conclusion that could have been expected.

Judge O'Leary's opinion referred to a number of ECHR decisions, which supported his view that the Court should have accepted to revise the 1978 Judgment. One of these was *Timurtas* v. *Turkey*, a disappearance case in which the defendant State failed to provide information (such as detention records) decided on 13 June 2000. As quoted by Judge O'Leary in his opinion at para. 44:

> '66. [...] States should furnish all necessary facilities to make possible a proper and effective examination of applications [...]. It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38, § 1 (a) of the Convention (former Article 28, § 1a), but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect, the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained

(see the *Ireland* v. *the United Kingdom* judgment of 18 January 1978, Series A No. 25, pp. 64-65, § 161).'[10]

Another was *Ahmet Ozkan and Others* v. *Turkey* (6 April 2004), quoted by O'Leary at para. 45 of his dissenting opinion:

'[481.] It is true that it cannot be said that the Government failed to react with the required diligence in submitting documents once they were explicitly identified and requested by the Commission. However, the Court also considers that *the Government's passive attitude in producing documents which were in their possession and which were unquestionably of fundamental importance for elucidating disputed facts, and the Government's failure to submit these documents of their own motion* at a much earlier stage in the proceedings, was at best very unhelpful.' [Emphasis added by Judge O'Leary]

Judge O'Leary also relied amongst other case law on *Georgia* v. *Russia*, No. 1 decided on 3 July 2014, a case where the respondent State had specifically been asked by the Court to produce a number of documents[11]. This led him to submit at para. 48 his opinion:

'Where a failure to disclose is established, a strong presumption works in favour of the applicant Government, particularly when findings or

[10] On the last word of 'obtained', a better vocabulary to use might have been 'assessed'. Earlier on, this paragraph also stated 'the Court would emphasise that Convention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation)'. Such a phrasing could suggest that the Latin adage is now taken by the Court to be the principle which governs or should govern its evidentiary regime, even though, as explained above, it might have originally been regarded as alien to the principle that the Court examines all the material before it as it sees fit, as per current Article 38 ECHR. In addition, it is not clear why the Court should seek to distance its reasoning from the adage given that, correctly understood, it makes it possible — and even arguably imperative — to impose a burden of proof on the defendant State.

[11] This included: statistics re the expulsion of Georgian nationals in 2006; the text of two circulars which Russia retorted were secret, to which the Court observed the basis for such secrecy had not been explained, not to mention that it — the Court — could have limited the access granted to any document submitted, as well as files regarding disciplinary proceedings and statistics about appeals.

> inferences of fact are the result of investigations which are serious, consistent and corroborated by other sources.'

To be pedantic, one might say that inferences do not belong to the sphere of investigations as, perhaps, suggested in the last quoted passage, but to that of logic. Still, what is important is that Judge O'Leary means to stress that the facts on which inferences will be based must be clearly, one might say almost irrevocably, BRD-established.

There are cases where the Court shows itself ready to draw inferences. An example of this is *Khamidkariyev* v. *Russia*, Judgment of 26 January 2017, where the Court stated:

> '124. The Court considers, accordingly, that a strong presumption of the Russian authorities' involvement in the applicant's relocation to Uzbekistan has arisen. The Government, however, have failed to rebut this presumption. In particular, they did not disclose the passenger logs for the Tashkent-bound flights, which had departed from the Moscow airports after 9 June 2014 (see paragraph 60 above). Nor did the Government submit any explanation as to how the applicant could cross the Russian border without a passport.
>
> […]
>
> '150. The Court has already established that in cases concerning disappearance from the Russian territory of individuals wanted for "extremism" crimes in Uzbekistan and Tajikistan that the Russian authorities bear the burden of proof to show that the applicant's disappearance was not due to the passive or active involvement of the State agents (see, with further references, *Mukhitdinov*, cited above, § 76). It notes that the Government have not discharged the burden in the present case. Their claim that the State agents were not involved in the applicant's kidnapping as such does not suffice to absolve the State from responsibility. The Court accordingly finds that the respondent State must, therefore, be held accountable for the applicant's disappearance.'

As can readily be seen, here the Court uses the vocabulary of 'presumption' rather than that of 'inference'. Pending a more comprehensive research of the case law, I do not feel in a position to assert whether I believe the two terms can be considered to be functionally equivalent or not. What I have

already observed, however, is that other cases proceed in a slightly different way from the passage just quoted. For example, in *El-Masri* v. *the Former Yugoslav Republic of Macedonia*, a case concerning the phenomenon of extra-ordinary rendition, the Court stated in its Judgment of 13 December 2012:

> '167. In such circumstances, the Court considers that it can draw inferences from the available material and the authorities' conduct (see *Kadirova and Others* v. *Russia*, No. 5432/07, §§ 87 and 88, 27 March 2012) and finds the applicant's allegations sufficiently convincing and established beyond reasonable doubt.'

The conclusion that can be drawn from the material presented above is that the ECHR system has always acknowledged the principle that parties are obliged to bring to the attention of the Court all relevant facts, including those which have been produced in the domestic legal order. It is also clear that the ECtHR is at liberty to draw negative inferences from a refusal of disclosure and/or suspected non-cooperation by the defendant State when (other) facts are proven which make these inferences quasi-certain. There are many cases where the Court has done so. However, there are also cases where it has refrained from doing so, including *Ireland* v. *UK* where the Court, in the words of Judge O'Leeary, turned 'a blind eye on a policy of extensive non-disclosure and obstruction' (para. 73 of his dissenting opinion). Given this bewildering array of decisions, more research will need to be conducted before being in a position to map out and make further sense of the ECtHR's approach.

## Beginning of comparative pointers

*Inter-American Court of Human Rights*

*Velasquez Rodriguez* v. *Honduras* was the first case decided on its merits by the IACtHR, in 1988. The way the judgment proceeds leaves me uncertain as to whether the Inter-American Court should be said to have operated a shift in the burden of proof in this case. To present it in an abridged form:

> § 29 — Recalls order by the Court of 7 October 1987 requesting the Government of Honduras to provide information, including an

organisational charter showing structure of Battalion 316 and its position within the Armed Forces of Honduras.

§ 45 — Recalls that the Court decided by 6 votes against 1 to hear the parties in a public session regarding measures requested by the Inter-American Commission of Human Rights.

§ 46 — Recalls the Government submitted documents (including autopsy reports) pursuant to Court's decision of 9 January 1988.

§ 82 — Recalls the Commission presented testimony and documentary evidence to show many kidnappings and disappearances, which were at the very least tolerated by the Government.

§ 119 — The Court remarks that evidence submitted by Commission tends to show a practice of disappearances.

§ 122 — States that criteria for burden of proof must be laid down, and other evidentiary questions addressed before the Court weights the evidence,

§ 123 — Declares that in principle, the Commission bears the burden of proof.

§ 126 — 'If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or, at least, tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.'

§ 128 — Standards of proof in international proceedings are less formal than in domestic proceedings.

§ 129 — Standard to be applied by the Court must recognise both seriousness of the present charge and the need to establish the truth convincingly.

§ 131 — Circumstantial or presumptive evidence is important in allegations of disappearances given the attempt to suppress information.

§ 134 — Human rights adjudication should not be confused with criminal justice.

§ 135 — The defendant State cannot rely on the defence that the complainant has failed to present evidence when the said could not have been obtained without the cooperation of the State.

§ 137 — Regrets that the Court will have to reach its decision 'without the valuable assistance of a more active participation' by Honduras.

§138 – 'The manner in which the Government conducted its defense would have sufficed to prove many of the Commission's allegations by virtue of the principle that the silence of the accused, or elusive or ambiguous answers on its part, may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record, or is not compelled as a matter of law. This result would not hold under criminal law, which does not apply in the instant case (supra 134 and 135). The Court tried to compensate for this procedural principle by admitting all the evidence offered, even if it was untimely, and by ordering the presentation of additional evidence. This was done, of course, without prejudice to its discretion to consider the silence or inaction of Honduras, or to its duty to evaluate the evidence as a whole.'

§ 147 — The Court lists the relevant facts that it finds proven.

§ 148 — The above leads it to find proven: (1) a practice of disappearances between 1981 and 1984 carried out or tolerated by Honduran officials; (2) Manfredo Velásquez's disappearance at the hands of or with the acquiescence of officials within the framework of that practice; and (3) the Government's failure to guarantee the human rights affected by that practice.

§ 183 — Honduras itself defines the acts as crimes.

§ 184 — Theory of the continuity of the State.

§ 185 — Thus, the State is responsible.

In terms of standard of proof, a reference to BRD is nowhere to be seen. This absence, which the Inter-American Court will maintain in subsequent case law, is in line with the *pro-homine* (and thus, ultimately

pro-victim) approach it has declared itself in favour of. As to the burden of proof, it could be argued that the Court requires each party to prove its own allegations. Accordingly, the reason why the IACtHR would have found violations of the American Convention on Human Rights would be, because of the inferences that could be drawn from facts, which had been proven by the Inter-American Commission (formally the party bringing the case before the Court) and the victim. However, a different perspective could be discerned, with para. 135 possibly suggesting a shift in the burden of proof. Whatever the proper analysis on this point, what is beyond doubt is that the Inter-American Court is prone to request that parties, including the defendant State, provide documents and explanations. One suspects it is quicker, than its European counterpart is, at making inferences when the respondent State fails to provide the requested information.

On this note, it can be observed that *Velasquez Rodriguez* is credited with having contributed to persuading the ECtHR to change its jurisprudence regarding how cases of disappearances needed to be established by the applicant. This evolution has in turn had an impact on the way the ECtHR approaches cases alleging bad treatment in detention as well as, more recently, involvement in extra-ordinary rendition.

*African Court on Human and People's Rights*

The African Court uses an interesting vocabulary of 'equitable distribution' of the burden of proof between the parties when facts are in dispute (see e.g. *Konaté* v. *Burkina Faso*). On the basis of an interview with a former President of the Court, I would tentatively suggest that the African Court does not seem attracted by the idea that the burden of proof shifts from the applicant to the state at some stage, arguably preferring to insist that each party brings the proof of its allegations[12]. If so, this could go hand in hand with a determination not to give the defendant State an easy way out from proving what can, or indeed in a certain perspective must, be regarded as constituting its very own allegations (rather than those of the applicant).

[12] Thus respecting the adage *actori incumbit probatio* (where the actor is not necessarily the applicant, but any party who makes an allegation).

## Conclusion

Comprehensive and systematic research is needed in order to understand the way each of the regional human rights courts applies evidentiary rules and principles, including, but not only, when documents fail to be produced by the defendant State. One may suspect that the evidentiary regime, which is being developed in each system, tends to favour one or the other party, and that apparently slight differences in phrasings adopted by the courts are significant, even if their exact implications still need to be worked out[13].

[13] This is something I plan to do with a research team in the context of an ERC advanced grant called 'DISSECT: Evidence in international human rights adjudication'.

*T. Treves*, R.T. Treves***

# Document Production before the ICJ and ITLOS: Some Observations

## Introduction

Documents are amongst the most important pieces of evidence that can be introduced during both national and international proceedings.

The importance of documents in national litigation is highlighted by rules of civil procedure giving preference to documentary evidence over testimony. In the US, for example, if there is a document, it should be submitted instead of examining a witness exclusively on the content of the existing document[1]. In Italy, the civil code considers documents as the main source of evidence and limits witness testimony to very few cases[2].

Documents are also fundamental evidence in international proceedings. The *Peru* v. *Chile* maritime delimitation case offers an interesting example. Peru claimed that there was no agreed upon maritime boundary between Peru and Chile. Chile, on the other hand, argued that there was an agreed upon maritime boundary between them. Throughout the case, Chile had the burden of proving the existence of the allegedly agreed upon maritime boundary. Had there been a maritime delimitation treaty, a document, Chile's case would have been easily resolved. However, such a document was never produced and seems not to exist. Chile argued its claim that a maritime boundary existed by producing other documents, declarations and treaties, and by documenting decades-long practice in the contested sea. These documents were in particular: the 1947 Proclamation of Chile and Peru, the 1952 Santiago Declaration and the 1954 Special Maritime Frontier Zone Agreement. This last Agreement proved quite fundamental

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[1] U.S. Federal Rules of Evidence, Rule 1002 (best evidence rule).

[2] *See*, articles 2699 ff of the Italian Civil Code.

in the definition of the case. The Court relied on it as evidence of the existence of a tacit agreement on the maritime delimitation between the parties:

> 'The 1954 Special Maritime Frontier Zone Agreement does not indicate when and by what means that boundary was agreed upon. The Parties' express acknowledgment of its existence can only reflect a tacit agreement, which they had reached earlier. In this connection, the Court has already mentioned that certain elements of the 1947 Proclamations and the 1952 Santiago Declaration suggested an evolving understanding between the Parties concerning their maritime boundary. […] In an earlier case, the Court recognizing that "[t]he establishment of a permanent maritime boundary is a matter of grave importance", underlined that "[e]vidence of a tacit legal agreement must be compelling". […] In this case, the Court has before it an Agreement, which makes clear that the maritime boundary along a parallel already existed between the Parties. The 1954 Agreement is decisive in this respect. That Agreement cements the tacit agreement.
>
> 'The 1954 Special Maritime Frontier Zone Agreement gives no indication of the nature of the maritime boundary. Nor does it indicate its extent, except that its provisions make it clear that the maritime boundary extends beyond 12 nautical miles from the coast.'[3]

Document production can be considered as the first of three steps of the fact-finding endeavour by a court or tribunal, the others being 'admission or rejection of evidence'; and 'evaluation or interpretation of evidence'[4]. Document production is the action by which a party introduces certain documents as evidence in the proceedings. Generally, before the ICJ and the ITLOS, document production is voluntary, meaning that the Parties are free to submit the documents that they see fit[5]. It may be said, therefore, that Parties are generally guided by the rules on the burden of proof and persuasion in deciding what documents to produce: States will tend to

[3] *Maritime Dispute (Peru* v. *Chile)*, Judgment, ICJ Reports 2014, p. 3, paras. 91-92.

[4] P. S. Reichler, 'Problems of Evidence before International Tribunals' in J. N. Moore (ed.), *International Arbitration*, Brill, The Netherlands, 2013, 47-52, 47.

[5] K. Highet, 'Evidence, The Court, and The Nicaragua Case' (1987), 81 American Journal of International Law 1-56, 7-9.

produce all documents that support their case. As stated by Highet: 'Indeed, the Court has long operated with a careful respect for the *onus probandi* of the Roman and civil law systems. The basic rule is one of practicality.'[6] Article 43(2) of the ICJ Statute seems to incarnate such rule by requiring that each Party submit with its written pleading the documents in support: 'The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers *and documents in support*.'

## Document production: at the crossroads of principles of procedural law

The ICJ and ITLOS Statute, however, also include provisions granting the Court or Tribunal powers regarding fact-finding and, in particular, powers to order the production of documents. These powers are explicitly mentioned to guarantee one of the primary functions of the Court and Tribunal, which is to solve the dispute before them. The settlement of a dispute brought before the Court or Tribunal requires often a clear and thorough reconstruction of the facts alongside the solution of the questions of law[7]. Having mentioned the general freedom of the Parties to introduce the documents that they wish in support of their pleadings, the granting of powers to the Court and Tribunal to request documents raises a series of questions. When should the Court or Tribunal make use of these powers? Do document production orders create obligations? What are the consequences of not complying with a documents production request by the Court or Tribunal?

To answer the first question, it should be kept in mind that one of the functions of the Court or Tribunal 'is "to do justice" between the litigant states, and to render a judgment or award which takes account of all relevant facts, which is limited to the *petitum* of the dispute, and which is made with final and binding force'[8]. It is in the interest of justice, therefore,

[6] K. Highet, 'Evidence, The Court, and The Nicaragua Case' (1987), 81 American Journal of International Law 1-56, 9.

[7] K. Highet, 'Evidence, The Court, and The Nicaragua Case' (1987), 81 American Journal of International Law 1-56, 1.

[8] C. Brown, 'A Common Law of International Adjudication', OUP, Oxford, 2007, 72.

that the Court or Tribunal must be able to reconstruct all the facts relevant for the solution of a dispute. The Court or Tribunal, therefore, may be called to use its powers to order the production of documents when one of the Parties knows that the other Party is in possession of a relevant document and has not disclosed it; when one Party discusses in its pleadings the content of a document, revealing its existence, but does not disclose it; when a Party is not participating in the proceedings. All these scenarios reveal that the power of the Court or Tribunal may and should be used to reveal 'known unknowns', but they also show that such powers cannot reveal the so called 'unknown unknowns': i.e. these powers do not allow the Court or Tribunal to uncover the existence of documents that not even the interested party knows about, and that neither party had mentioned or referred to[9].

In order to understand, however, how the Court and Tribunal exercise their powers even in the scenarios mentioned above, and in order to answer the questions whether a document production order is compulsory, and which are the consequences of non-compliance with such orders, it seems useful to indicate that document production is at the crossroads of at least two principles of procedural law. By 'principles of procedural law', we mean principles that are normally applied in domestic and international proceedings, even though not necessarily in all such proceedings. The two principles are:

1) The principle of cooperation of the parties with the adjudicating body and as between each other[10];

[9] *See* P. S. Reichler, 'Problems of Evidence before International Tribunals' in J. N. Moore (ed.), *International Arbitration*, Brill, The Netherlands, 2013, 47-52, 48.

[10] *See* R. Kolb, 'General Principles of Procedural Law' in A. Zimmermnn, C. Tomuschat, K. Oellers-Frahm, C. J. Tams, *The Statute of the International Court of Justice: A Commentary*, OUP, Oxford, 2012, 871-908, 903-904. Kolb refers to a 'duty of loyalty' between the parties and individuates its source in the good faith obligation imposed on all States by Article 2(2) UN Charter; See *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, ICJ, Request for the Indication of Provisional Measures, Order 3 March 2014, ICJ Reports 2014, p.147, para. 27, in which the Court seems to derive a principle of procedural cooperation, procedural good faith between the Parties from the principle of sovereign equality of States and equality of the parties during the proceedings.

2) The principle that a party is not bound to submit documents helpful to the other party[11].

It is clear from the mere enunciation of these principles that their coexistence may not always be easy, and that different courts and tribunals may give them a different weight.

The principle of cooperation is reflected in the following provisions of the ICJ Statute and Rules and of the ITLOS Rules:

*Article 49 ICJ Statute*: 'The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.'

*Article 62(1) ICJ Rules*: 'The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.'

*Article 77(1) ITLOS Rules*: 'The Tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the Tribunal may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.'

The principle that a party is not bound to submit documents against its position in the case is reflected in Article 43(2) of ICJ Statute: 'The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers *and documents in support*.' There is no corresponding provision in the ITLOS Statute and Rules.

[11] *See* R. Kolb, 'General Principles of Procedural Law' in A. Zimmermnn, C. Tomuschat, K. Oellers-Frahm, C. J. Tams, *The Statute of the International Court of Justice: A Commentary*, OUP, Oxford, 2012, 871-908, 904: 'it is perfectly open to a party to further its own interests even at the expense of the other party'. *Cfr*. G. Morelli, *La Théorie Générale du Procès International* (1937), 253 Recueil des Cours 360, in which the author argues that States have no reciprocal obligation during international proceedings, because of their sovereign equality, and that the only conceivable obligations are procedural obligations owed by the Parties to the Court or Tribunal.

### Is there an obligation to abide by the ICJ or ITLOS request for the production of documents?

The question whether document production orders create obligations is relevant, because a Party may decide not to produce a document that it has been ordered to produce by the Court or Tribunal. The text of Article 49 of the ICJ Statute and Article 77 of the ITLOS Rules and the principle of cooperation amongst Parties seem to be strong indications that orders are binding on the parties. However, the fact that the orders are sometimes not complied with and that no important consequence is drawn from such non-compliance may be due to the effect of Article 43 of the ICJ Statute, which seems to limit production of papers and documents to those in support of a party's position. The existence only of an obligation to produce documents in support of a party's pleadings, and the absence of an obligation to produce documents in support of the other party's case may lead to the conclusion that an order on document production does not create obligations. It would, instead, only be in the best interest of justice to supply the document.

It is interesting to note that two recent studies come to apparently diverging conclusions on whether there is a duty to disclose documents helpful to the other party.

On one side, Benzing, in the 3rd ed. of the *Commentary to the Statute of the ICJ*, argues that there is no general duty to disclose documents and evidence that are helpful to the other party:

> '…while a rule requiring full disclosure of all evidence may in theory foster the efficiency of international dispute resolution, the constitutive documents of the Court do not support such a far-reaching duty. To the contrary, Article 43, para. 2 of the Statute only requires parties to submit documents in support of their arguments. The Court has consequently never held that a general duty to present evidence adverse to a party's interest exists.'[12]

[12] M. Benzing, 'Evidentiary Issues' in A. Zimmermann, C. Tams, K. Oellers-Frahm, C. Tomuschat, *The Statute of the International Court of Justice: A Commentary* (3rd Edition), OUP, Oxford, 2019, 1371-1414, 1385.

However, the Court may define 'concrete duties of cooperation by issuing procedural orders'[13]. Benzing offers the example of discovery or disclosure orders pursuant to Article 49 of the ICJ Statute. These orders may be directed to a party at the request of a party or *proprio motu*.

On the other side, according to Chester Brown: 'it is widely accepted that parties to international litigation have a general obligation of disclosure which requires them to produce evidence which is in their possession and which is not available to the opposing party.'[14] Interestingly, the cases relied upon by Brown to sustain this point do not include ICJ or ITLOS cases.

The difference of views as to the existence of such general obligation may derive from a classic common law/civil law divide as regards document production and discovery — or simply, from the fact that Brown sees a trend more consonant with the good administration of justice in the jurisprudence of other courts and tribunals, including investment arbitration tribunals, than in the ICJ. This corresponds with Benzig's remark that 'a rule requiring full disclosure of all evidence may in theory foster the efficiency of international dispute resolution'. Moreover, there is a difference between a *Commentary* to the black letter articles of the ICJ Statute and a discussion on a *Common Law of International Adjudication*.

Instead of addressing the debate purely from a theoretical standpoint, both Gaetano Morelli and Keith Highet suggest conclusions, which are anchored to the reality of the proceedings: it is after all in the interest of the parties to prove their case. According to Gaetano Morelli, the procedural activity of the Parties during the proceedings is not governed by obligations[15]. Parties are instead free to choose whether to undertake certain procedural activities or not. Parties have an *onus*, a 'charge,' to produce the documents requested, not an obligation: it is entirely in their interest to follow the Court's request, but they are not exposing themselves

[13] *Ibid.*

[14] C. Brown, 'A Common Law of International Adjudication', OUP, Oxford, 2007, 105.

[15] G. Morelli, *La Théorie Générale du Procès International* (1937), 253 Recueil des Cours 362.

to international responsibility for not following the Court's order on document production[16].

Similarly, Keith Highet adopted quite a practical approach to the issue of whether a Court or Tribunal order on document production creates obligations. Highet identifies the trouble with identifying the creation of an obligation in the fact that it would imply the power to compel a sovereign State to act in a certain manner: 'Who is to compel a sovereign state to comply with any particular method of presenting its case?'[17] However, Highet's solution is, as said, a very practical one:

> 'In response, perhaps, one might consider the actual position of a legal adviser of a state engaged in litigation, who has just received an indication from the Court (or chamber) that evidence obtained in a certain way, and subject to certain procedural safeguards, would be appreciated by the Court (or chamber). Does one for a moment consider that such a legal adviser would seriously try to rebuff the Court (or chamber) and that he would not try to comply with that is apparently an expressed desire of the tribunal?'[18]

### What are the consequences of non-compliance?

Coming to the question of the consequences of non-compliance with document production orders, Article 49 of the ICJ Statute states that

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[16] *Ibid*. : « Les activités que les Parties exercent dans le procès ne forment pas, au contraire, le contenu d'une obligation de leur part. Les Parties sont juridiquement libres de les remplir ou non. Elles ne sont poussées à les remplir que par leur intérêt, parce qu'elle savent l'influence que peut avoir sur l'issue du procès l'accomplissement ou l'omission de ces activités. Il s'agit donc, non pas d'obligations, mais de *charge*. Par exemple, les normes qui établissent la langue dont on fera usage et qui règlent la représentation des Parties, les formes et les délais pour la communication des défenses écrites, les **modes de preuve**, etc., créent des charges et non pas des obligations ; l'inobservation de ces normes n'est pas un fait illicite, elle a seulement la conséquence de faire perdre les effets utile de l'acte. » (emphasis added)

[17] K. Highet, 'Evidence, The Chamber and the ELSI case' in R. B. Lillich (ed.), *Fact Finding Before International Tribunals — Eleventh Sokol Colloquium*, Transnational Publishers, Inc, Ardsley-on-Hudson, New York, 1992, 33-79, 62.

[18] *Ibid*.

'Formal note shall be taken of any refusal', while the ITLOS Statute and Rules are silent on this point.

This provision does not grant to the Court the right to draw negative inferences from a party's refusal to comply with an order to produce a document. It does not, however, exclude such possibility outright[19].

The only ICJ case we can refer to is the *Corfu Channel* case. Here the Court refrained from drawing negative inferences from the UK's refusal to comply with the Court's request to produce a document. The ICJ stated 'The Court cannot…draw from this refusal to produce the orders any conclusion differing from those to which the actual evidence gave rise.'[20] Individual members of the Court — such as Judge Jessup, in *Barcelona Traction second phase 1970* — are on record stating that negative inferences are possible[21]. It seems, however, that the Court, more than asserting that it is not allowed to draw negative inferences from a refusal to submit requested documents, avoided the question, by arguing that the documents were not in fact necessary. The Court gave prevalence to the evidence that had been produced, even if circumstantial, rather than to an inference that it could draw from evidence withheld.

### Case law

At this point, it is interesting to briefly go through certain particularly interesting cases of the ICJ and ITLOS in which document production was ordered.

The first case is the already mentioned *Corfu Channel* case. In this case, the Court ordered the UK to produce a document containing naval orders and the UK refused to produce it adducing naval secrecy. The Court had requested the document spontaneously, because it had been mentioned in

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[19] C. Brown, 'A Common Law of International Adjudication', OUP, Oxford, 2007, 108-109.

[20] *Corfu Channel* Case (*United Kingdom of Great Britain and Northern Ireland* v. *People's Republic of Albania*), ICJ Judgment, 9 April 1949, ICJ Reports 1949, p.4, 32.

[21] *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962, *Belgium* v. *Spain*), Second Phase, ICJ Judgment, 5 February 1970, ICJ Reports 1970, p. 3, Separate Opinion of Judge Jessup, pp. 161-221, 215, para. 97.

other documents and by witnesses. The Court did not attach any particular consequence to the non-production by the UK, because it considered that the events proved offered sufficient evidence of what had in effect happened[22].

In the *ELSI* case, during the hearing, Italy requested the production of 'a financial statement prepared for the fiscal year ended September 30, 1967 by Raytheon/ELSI's auditors, Coopers & Lybrand, that was referred to in oral argument by counsel for the United States, but which was not in evidence'[23]. Considering the time period that the statement covered, it was clear that it could potentially have an important impact on the issue of whether ELSI was insolvent according to Italian law. The Court ordered the production of the document, and the USA complied with the order. Interestingly, the document revealed itself extremely useful for Italy's case considering that it contained a FN in which ELSI was declared insolvent pursuant to Italian law. Counsel for Italy used the fact that this document had been withheld by the USA to emphasise its impact[24]. The Court took into consideration the document and gave it critical weight in reconstructing the facts[25].

In the *Genocide* Case (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Bosnia and Herzegovina requested the Court, pursuant to Article 49 of the ICJ Statute, to order Serbia to produce sections of documents that had been produced, but with substantial redactions and, thus, illegible[26]. Bosnia argued that the redacted sections contained valuable evidence that would allow it to prove the 'attributability of alleged acts of genocide to the Respondent'. As an alternative to the production of documents, the

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[22] *Corfu Channel* Case (*United Kingdom of Great Britain and Northern Ireland* v. *People's Republic of Albania*), ICJ Judgment, 9 April 1949, ICJ Reports 1949, p.4, 32.

[23] K. Highet, 'Evidence, The Chamber and the ELSI case' in R. B. Lillich (ed.), *Fact Finding Before International Tribunals — Eleventh Sokol Colloquium*, Transnational Publishers, Inc, Ardsley-on-Hudson, New York, 1992, 33-79, 59.

[24] *Ibid*., p. 59-60.

[25] *Elettronica Sicula S.p.A.* (ELSI) (*United States of America* v. *Italy*), ICJ Judgment, 20 July 1989, ICJ Reports 1989, p. 15, para. 19.

[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), ICJ Judgment, 26 February 2007, ICJ Reports 2007, p. 43, paras. 44, 205.

Applicant requested the Court to reverse the burden of proof on such issue of attributability[27]. The Court refused to order the production of documents requested arguing that Bosnia had already plenty of evidence at its disposal, on the basis of which to build its case:

> 'On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it. In the month before the hearings it submitted what must be taken to have been a careful selection of documents from the very many available from the ICTY. […]'[28]

However, the Court then decided that Bosnia had not proved its case.

In the *M/V Louisa* case, the ITLOS, without invoking Article 77 of the ITLOS Rules, ordered the production of the *Tupet contract*, the contract, on the basis of which the *Louisa* was conducting surveys of the sea floor during the hearing between *Tupet* and *Sage Maritime Scientific Research*. St Vincent and the Grenadines, in fact, had quoted the agreement and pleaded on the basis of its text, without however disclosing the agreement in its entirety[29]. St Vincent and the Grenadines did not disclose the document during the hearing, but only after a request by the Court, once the hearing was closed and during the Tribunal's deliberations[30]. The judgment, because Spain — the other party to the dispute — did not develop substantive arguments based on the document[31], did not rely on it and just expressed regret that the

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[27] *Ibid.*, para. 204.

[28] *Ibid.*, para. 206.

[29] *M/V 'Louisa'* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), Judgment, ITLOS Reports 2013, p. 4, para. 36, 46-47.

[30] *Ibid.*, para. 37. On Saint Vincent's misconduct, *see* the Separate Opinion by Judge Cot to the Judgment.

[31] See *M/V 'Louisa'* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), Judgment, ITLOS Reports 2013, p. 4, Separate Opinion of Judge Cot, p. 105, paras. 77-78: '77. The belated production of the *Tupet contract*, after the end of the oral proceedings, completely destabilized the proceedings as regards the crucial issue of the nature of the activities conducted by Sage in the Bay of Cadiz and, consequently, the merit of the prosecutions brought by the Spanish judicial authorities. Had the *Tupet contract* been produced in good time, i.e. during the written proceedings, it would have given rise to an adversarial exchange permitting an assessment of its importance and its impact.

document had to be produced upon the specific request of the Tribunal: 'the Tribunal notes with regret that a copy of this agreement was not provided by the Applicant until after the request was made by the Tribunal'[32].

In the *Certain Activities Carried Out by Nicaragua on the Border Area* case**,** Nicaragua invoked Article 62(1) of the ICJ Rules to obtain, before the opening of the oral proceeding, a study prepared by government experts in Costa Rica that showed that Nicaragua's dredging of the San Juan river had no adverse environmental impact, contrary to Costa Rica's claim before the Court[33]. The Court granted the request and relied on the document.

In the *Certain Iranian Assets* case, the US requested the production of confidential documents submitted by Iran in US national court proceedings[34]. The Court refused to issue the production of documents' order, because 'at that stage of the proceedings, the Court had decided not to use its powers under Article 49 of the Statute to call upon Iran to produce the documents […]'[35]. The US then petitioned the US court for access to the documents and obtained it. The US then published the documents on the website of the Department of State and announced its intention to file these public versions with the Court arguing that they were now publications 'readily available' pursuant to Article 56(4) of the Rules of Court[36].

78. So, was it fraud or not? The Tribunal, in its wisdom, chose merely to regret that the *Tupet contract* had been produced belatedly (paragraph 47 of the Judgment) and to dismiss the Application submitted by Saint Vincent. It would have been difficult for it to go any further in the absence of adversarial proceedings held to allow the Co-Agent of Saint Vincent to explain the strategy adopted. Reopening the proceedings was not really conceivable, especially since the opposing party, Spain, had not reacted to the content of the contract and had not requested the Tribunal to take any particular measure.'

[32] *M/V 'Louisa'* (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), Judgment, ITLOS Reports 2013, p. 4, para. 47.

[33] *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica* v. *Nicaragua*), ICJ Provisional Measures, Order, 8 March 2011, ICJ Reports 2011, p. 6, para. 27.

[34] *Certain Iranian Assets* (*Islamic Republic of Iran* v. *United States of America*), ICJ, Preliminary Objections, 13 February 2019, paras. 7-9.

[35] *Ibid*, para. 7.

[36] *Ibid*, paras. 8-9.

All of the cases reported above have one characteristic in common: the Court or Tribunal ordered the production of well-identified documents that had already been mentioned or referred to in the pleadings, or in other evidence already produced. In none of these cases was the Court or Tribunal asked to order the production of unidentified documents or a generic group of documents in order to evaluate what could potentially be useful for the case. This practice seems to confirm the absence of a duty of discovery before the ICJ and the ITLOS, and it also strengthens the principle according to which a party is not bound to submit documents in favour of the other party. It, however, also shows that the driving principles regarding document production before the ICJ and the ITLOS are those of equality of the parties, of an adversarial process and of the interest of justice.

## ITLOS and a broad ranging documents request: the *Norstar* judgment

The very recent judgment of the ITLOS in the *Norstar* case, *Panama* v. *Italy*, of 10 April 2018, provides an interesting nuance to the discussion on documents production. The Tribunal refused to accede to Panama's broad ranging request to order Italy to provide certified copies of files allegedly held by different authorities in Italy[37]. The Tribunal however 'encouraged the Parties to continue their cooperation with respect of evidence' and took note of the offer of Italy that the parties exchange lists of the documents respectively held so that each party would be able to consider specific and qualified requests from the other side[38]. The parties exchanged lists of documents, but then the matter was not pursued[39]. Thus, the Tribunal left the matter in the hands of the parties, and the outcome was the same already obtained through its refusal to accept the blanket request of Panama.

Interesting is the final statement on the issue by the Tribunal underlying that a request regarding specific and identified documents would have most likely been accepted:

> 'In the view of the Tribunal, Italy's suggestion that it would consider a specific and qualified request for evidence from Panama is reasonable

[37] *The M/V 'Norstar'* Case (*Panama* v. *Italy*), ITLOS Case No. 25, Judgment, 10 April 2019, para. 95.
[38] *Ibid.*
[39] *Ibid.*

and would not have created an obstacle for Panama in making a request for evidence. The tribunal notes that Panama, nonetheless, made no attempt to make any such request.'[40]

## Document production in the preliminary objections phase

Before closing our remarks, there is a particular question arising from recent cases submitted to the ICJ, which seems worth signalling. The question is the following: is the standard to deal with a request for the production of documents in the preliminary objections phase of a dispute before the Court different from that applicable in the merits phase?

The *Croatia Genocide* (*Croatia* v. *Serbia*) and the *Certain Iranian Assets* (*Islamic Republic of Iran* v. *United States of America*) Preliminary Objections Judgments respectively of 2008 and of 2019 seem to indicate that, in the view of the ICJ, such difference exists.

In the 2008 Judgment, the Court decided 'not to accede, at this stage of the proceedings [namely the Preliminary Objections phase], to Croatia's request that the Court call upon the Respondent, under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to produce a certain number of documents'. The Court also 'indicated to the Parties that the Court was not satisfied that the production of the requested documents was necessary for the purpose of ruling on preliminary objections'[41].

In the 2019 Judgment, the Court refused to order the production of documents requested by the United States arguing, with the same words used in the 2008 Judgment, from the fact that the case was in the preliminary objections phase[42]. It stated that 'at that stage of the proceedings the Court had decided not to use its powers under Article 49 of the Statute to call upon Iran to produce the documents'[43].

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[40] *Ibid*, para. 96.

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), ICJ Judgment, 26 February 2007, ICJ Reports 2007, p. 43, para. 15.

[42] *Certain Iranian Assets* (*Islamic Republic of Iran* v. *United States of America*), ICJ, Preliminary Objections, 13 February 2019, para. 7.

[43] *Ibid*.

Thus, the ICJ seems to consider that requests for the production of documents in the preliminary objections phase of a case must be assessed more severely than they would in the merits phase. Refusal of acceding to documents production requests, because the case is in the preliminary objection phase, may be criticized for two reasons.

First, because the preliminary objections phase is concluded with a judgment, that is binding on the parties. Full documentation is needed for the judges to reach such a conclusion that is decisive for the continuation or conclusion of the case[44].

Second, because to rely on the fact that the case is in the preliminary objection phase is inconsistent with the recent trend of the Court's jurisprudence as regards Provisional Measures proceedings, in which, contrary to what applies to Preliminary Objections, it is required to give *prima facie* assessments. As it is well known, the ICJ has developed a jurisprudence requiring, in provisional measures cases, an assessment of the 'plausibility' of the requesting party's case on the merits — a kind of *prima facie* assessment of the merits[45]. It would be strange that in the future the Court refrain from extending this requirement to the preliminary objection phase, which, as remarked, ends with a binding decision and not with an Order that the Court may amend or revoke[46]. If this were to be the case, there would be no reason to deny requests for the production of documents just because the case in the preliminary objections phase.

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[44] *See* Declaration of Judge *Ad Hoc* Treves in *The M/V 'Norstar'* Case (*Panama* v. *Italy*), ITLOS Case No. 25, Judgment, 10 April 2019.

[45] *See*, for example, recently *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran* v. *United States of America*), Request for the Indication of Provisional Measures, Order, 3 October 2018, paras. 53-54.

[46] Parties have already begun to plead 'plausibility' of the claims during preliminary objection phases of ICJ cases. For example, in the recent *Ukraine* v. *Russia* case: *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine* v. *Russian Federation*), Preliminary Objections, Verbatim Record, CR 2019/9, Monday 3 June 2019, 10 am, p. 20. Pleading by Mr. Wordsworth: 'Mr. President, Members of the Court, it is a privilege to appear before you, and to have been asked by the Russian Federation to present its case on the absence of jurisdiction under Article 24(1) ICSFT **due to the absence of a plausible case** on financing of terrorism that would fall within that provision.' (emphasis added)

*L. W. Madsen**

# Evidentiary privileges in WTO dispute settlement

## Introduction

The purpose of this paper is to examine the role, if any, of evidentiary privileges in WTO dispute settlement. The first section provides general considerations regarding evidentiary privileges in the context of the overarching framework for the WTO's dispute settlement mechanism. The second section examines certain specific disputes where WTO panels or the Appellate Body addressed issues concerning evidentiary privileges. These are meant to be illustrative examples of the use of evidentiary privileges in WTO dispute settlement proceedings, rather than an exhaustive study. Finally, the fourth section provides some concluding thoughts on the role of evidentiary privileges in WTO dispute settlement.

## General considerations

Unlike most national legal systems, the WTO's dispute settlement mechanism does not provide for comprehensive or detailed rules concerning procedural and evidentiary matters. The Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) is a treaty, negotiated by the governments of all Members, and as such, it provides a more general framework for the settlement of disputes. More specific procedural and evidentiary issues are addressed by WTO panels or the Appellate Body only insofar, as they arise in the context of a specific dispute. This section examines the overarching framework for the settlement of disputes in order to determine: first, if there is a basis in the DSU for invoking evidentiary privileges; second, whether parties may have interest in being able to invoke evidentiary privileges in WTO dispute settlement proceedings; and third, what outcome parties may achieve by invoking evidentiary privileges in WTO dispute settlement proceedings.

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Evidentiary privileges allow a party to refuse to disclose certain evidence or to prevent such evidence from being disclosed by others, or used in a judicial proceeding[1]. Such privileges are frequently used in national legal systems[2], and also in certain international legal systems such as international arbitration[3] and the International Criminal Court[4]. Well-known examples of evidentiary privileges include marital privilege, which allows a spouse not to testify or allows a party to prevent its spouse from testifying about confidential communications between the spouses during the marriage[5]; lawyer-client privilege, which allows a party to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his lawyer[6]; and doctor-patient privilege, which allows a party to refuse to disclose and to prevent any other person from disclosing confidential communication made to his doctor for the purpose of diagnosis or treatment[7].

At first glance, there would not appear to be a basis for invoking evidentiary privileges in WTO dispute settlement. The DSU does not explicitly refer to or address evidentiary privileges, which is perhaps unsurprising given its more overarching nature. Such privileges may, nonetheless, be inferred from more general notions, such as good faith and due process. More particularly, Article 3.10 of the DSU requires that the parties engage in dispute settlement proceedings 'in good faith in an effort to resolve the dispute'. If a party seeks to submit information that the other party has a legitimate interest in keeping out of the proceedings, it would arguably breach its obligation to engage in the proceedings in good

[1] *See*, e.g. *Black's Law Dictionary*, 9th edition, B. A. Garner (ed.), Thompson Reuters, 2009, p. 1318.

[2] *See*, e.g. E. Imwinkelried, 'Evidentiary Privileges' in *The New Wigmore: A Treatise on Evidence*, Wolters Kluwer Law & Business, 2002.

[3] *See*, e.g. *International Bar Association Rules on the Taking of Evidence in International Arbitration*, Article 9; and R. Mosk and T Ginsburg, 'Evidentiary Privileges in International Arbitration', (2001), Vol. 50, No. 1, *International and Comparative Law Quarterly*, pp. 345-385.

[4] Rules of Procedure and Evidence of the International Criminal Court, Rule 73.

[5] *See*, e.g. *Black's Law Dictionary*, 9th edn, B. A. Garner (ed.), Thompson Reuters, 2009, p. 1318.

[6] *See*, e.g. *Ibid*., p. 1317.

[7] *See*, e.g. *Ibid*., p. 1318.

faith. Although due process is not explicitly referenced in the DSU, it is considered to be implicit[8]. If a party is forced to provide information that it has a legitimate interest in keeping out of the proceedings, or the other party or the panel seeks to include such information, it would arguably violate the party's due process rights and its ability to effectively defend its interests. As elaborated further in the section below, WTO panels and the Appellate Body, on a number of occasions, have applied the notion of evidentiary privileges, although not often referring explicitly to this term.

Generally speaking, there are two types of situations that could prompt a party to seek to rely on evidentiary privileges. First, where a party has an obligation to provide evidence, but believes that the circumstances of certain evidence should exempt it from such an obligation. Second, where another party seeks to provide, or the adjudicator seeks to rely on, evidence that the party believes should be excluded by virtue of the surrounding circumstances.

In WTO dispute settlement, panels have the right to seek information from the parties to a dispute, and the parties have an obligation to respond 'promptly and fully' to any such request[9]. As a part of its obligation to conduct an objective assessment of the matter before it[10], a panel has discretion to draw adverse inferences from a party's failure to comply with requests for information[11]. To avoid this, a party therefore has an interest in invoking evidentiary privilege where it is asked to provide information that, it believes, is covered by such a privilege. Furthermore, all parties are, as a starting point, permitted to submit any information they deem relevant, and a panel may seek information from any individual or body, which it deems appropriate and from any other relevant source[12]. A party has an interest in invoking evidentiary privilege where the other party or the panel seeks to include information that the party believes is covered by such a privilege.

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[8] Appellate Body Reports, *India — Patents* (US), para. 94; and *Mexico — Corn Syrup* (Article 21.5 — US), para. 107.

[9] Article 13.1 of the DSU. *See also* Appellate Body Report, *Canada — Aircraft*, paras. 185 and 187.

[10] Article 11 of the DSU.

[11] *See*, e.g. Appellate Body Report, *Canada — Aircraft*, paras. 202-205.

[12] Article 13 of the DSU.

A party may be pursuing one of two outcomes when invoking evidentiary privilege: to have the panel or Appellate Body refrain from taking the privileged evidence into account, or to have the evidence removed or excluded from the record of the dispute altogether. While a party will clearly have an interest in pursuing the former, the confidential nature of WTO dispute settlement proceedings arguably renders the latter outcome a less critical one. Meetings are, as a general rule, closed to the public[13], and written submission by the parties are confidential, although a party may disclose its own statements to the public and request a non-confidential summary from the other party[14]. WTO panels and the Appellate Body may of course refer to arguments or information submitted by the parties in the final reports, which are made publicly available. In order to protect the confidentiality of certain information such as business confidential information, special working procedures can, however, be adopted. Such working procedures typically limit access to, and permissible use of, information labelled business confidential by the parties. They also require the panel or Appellate Body to redact such information from the final report[15].

The confidential nature of WTO proceedings, of course, only mitigates a party's concerns about disclosing privileged evidence to the public, not concerns about disclosing that evidence to the other party, the panel, or the Appellate Body. Such concerns are, however, only relevant in regard to evidence requested by the party. Evidence submitted by the other party is placed on the record and, thus, automatically disclosed to the parties, the panel and the Appellate Body. It is perhaps because of its limited relevance

[13] Paragraph 2 of Appendix 3 to the DSU; and Rule 27 of *the Working Procedures for Appellate Review*. WTO panels and the Appellate Body, however, frequently open their meetings to the public where both parties agree to do so. (See, e.g. Panel Reports, *US — Tax Incentives*, paras. 1.9-1.11 and 1.20; *Canada — Renewable Energy / Canada — Feed-in Tariff Program*, para. 1.9; and Appellate Body Reports, *US — Tax Incentives*, para. 1.14 and Annex D-3; and *US — COOL* (*Article 21.5 — Canada and Mexico*), para. 1.23 and Annex 6.

[14] Article 18.2 of the DSU.

[15] *See*, e.g. Panel Reports, *US — Tax Incentives*, para. 1.19 and Annex A-2; *US — Coated Paper* (Indonesia), para. 1.9 and Annex A-2; *US — Tuna II* (Mexico), (*Article 21.5 — US*) / *US — Tuna II* (Mexico) (*Article 21.5 — Mexico II*), paras. 1.22-1.23 and Annex A-3; and Appellate Body Report, *US — Tax Incentives*, para. 1.8 and Annex D-1.

that, the DSU does not even provide a framework for removing or excluding evidence from the record of a dispute. A review of past practice also suggests that the primary objective for invoking evidentiary privileges is to prompt WTO panels or the Appellate Body to refuse to take privileged information or evidence into account, rather than seeking to have that information or evidence excluded from the record of the proceedings altogether. While it is not uncommon for WTO panels or the Appellate Body to refuse to take certain information or evidence into account, only one panel appears to have clearly decided to exclude evidence and set out a procedure to do so[16].

Having provided some general considerations regarding the role of evidentiary privileges in the overarching framework for the WTO's dispute settlement mechanism, I turn to examine some illustrative examples of disputes in which WTO panels or the Appellate Body addressed issues concerning evidentiary privileges.

## Examples of the use of evidentiary privileges in WTO disputes

Since the parties in WTO disputes are Member governments, one might expect that parties would often seek to refuse to provide or to exclude confidential information related to government business, often referred to as executive privilege or state secret privilege[17]. In practice, however, such instances are not seen frequently and are typically resolved by panels in a pragmatic matter without unnecessary focus on sensitive issues. For

[16] Preliminary Ruling by the Panel, *EC — Seal Products*, paras. 3.5-3.6. As explained in the following section, the parties in this dispute all agreed to withdraw the relevant exhibits from the record, but the Panel, nonetheless, considered it useful to set out procedural directions. The Panel in *Russia — Traffic in Transit* ruled that an exhibit was submitted by Ukraine following the deadline set out in the Panel's working procedures and, on this basis, excluded the exhibit from the record. The Panel, however, did not set out a procedure for doing so, and it is unclear if the Panel actually excluded the exhibit from the physical and electronical records of the dispute or simply refused to take it into account in the assessment. (Panel Report, *Russia — Traffic in Transit*, Annex B-3, para. 3.1). The Panel in *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*) was requested by a party to exclude certain evidence from the record, but denied this request. (Panel Report, *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*), paras. 1.24-1.28 and 7.56.

[17] *See*, e.g. *Black's Law Dictionary*, 9th edn, B. A. Garner (ed.), Thompson Reuters, 2009, p. 1318-1319.

instance, in *EC — Seal Products*, the two complainants, Canada and Norway, both submitted exhibits containing certain legal opinions prepared by the Legal Service of the Council of the European Union. These opinions were classified under the applicable EU regulations and had, according to the European Union, been released without authorization[18]. Following a request by the European Union to have the relevant exhibits removed from the record, both Canada and Norway expressed their willingness to remove the exhibits[19]. The Panel therefore granted the European Union's request to have the exhibits removed, while providing both complainants an opportunity to submit replacement exhibits[20]. One complainant, Norway, hereafter requested that the Panel exercise its authority to request the European Union to provide copies of the legal opinions[21]. Without addressing the status or nature of the legal opinions, the Panel denied Norway's request, reasoning that the opinions were not necessary for the Panel's assessment and pointing out that Norway had been granted and, indeed, had taken advantage of, the opportunity to submit replacement exhibits with publicly available information[22].

Rather than looking further into the executive or state secret privilege, which specifically concerns government business, this section examines two types of evidentiary privileges that are more general in nature, lawyer-client privilege and settlement privilege, and examines how these privileges have been addressed in WTO dispute settlement proceedings.

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[18] Preliminary Ruling by the Panel, *EC — Seal Products*, paras. 2.1-2.2.

[19] *Ibid*., para. 2.4.

[20] *Ibid*., paras. 3.1-3.4.

[21] Panel Report, *EC — Seal Products*, paras. 7.71-7.72.

[22] *Ibid*., paras. 7.77-7.81. In *Canada — Aircraft*, Canada refused to provide certain information on the basis of 'cabinet privilege'. The Panel acknowledged that cabinet privilege might justify a party withholding evidence under certain circumstances, but considered that Canada had failed to explain clearly the basis for the need to protect the confidentiality of the information. Nonetheless, the Panel did not consider it necessary to address Brazil's request for it, to draw adverse inferences from Canada's failure to provide the information since it had rejected Canada's arguments for other reasons. (Panel Report, *Canada — Aircraft*, para. 9.345 and fn 633). The Appellate Body noted the Panel's approach but did not address it further. (Appellate Body Report, *Canada — Aircraft*, fn 132).

*Lawyer-client privilege*

As mentioned above, lawyer-client privilege allows a party to refuse to disclose and to prevent any other person from disclosing confidential communications between himself and his lawyer[23]. The purpose of this is to facilitate effective representation, by allowing the client to divulge and discuss favourable as well as unfavourable information with his lawyer without fear of it being disclosed in the subsequent proceedings.

There is no reference to lawyer-client privilege, and in fact no reference to lawyers at all, in the DSU. In one of the earliest disputes, *EC — Bananas III*, the complainants in the dispute, Ecuador, Guatemala, Honduras, Mexico, and the United States, contested the use of private lawyers by a third party, Saint Lucia, arguing that non-governmental employees should not be permitted to participate in hearings concerning WTO disputes. Although the Panel initially agreed with that proposition[24], the Appellate Body found that it was for each party to determine the composition of its delegation, and that Saint Lucia was not prevented from using private lawyers[25]. Today, the use of private lawyers in WTO dispute settlement proceedings is common practice, but there is only one instance where a WTO panel has explicitly addressed lawyer-client privilege.

In *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*), Thailand had brought criminal charges against *Philip Morris*, and these criminal charges, among other, formed part of the Philippines' claims against Thailand in the WTO dispute settlement proceedings. In the context of the criminal proceedings, the public prosecutor disclosed privileged communication between Thailand's Ministry of Commerce and its legal advisors without invoking its right under Thailand's Criminal Procedure Code to object to disclosure of confidential information[26]. The Philippines

[23] *See*, e.g. *Black's Law Dictionary*, 9th edn, B. A. Garner (ed.), Thompson Reuters, 2009, p. 1317.

[24] Panel Report, *EC — Bananas III*, paras. 7.10-7.12.

[25] Appellate Body Report, *EC — Bananas III*, paras. 10-12.

[26] Panel Report, *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*), para. 7.43. This Panel Report is under appeal at the time of this publication, but the Panel's procedural ruling on the lawyer-client communication was not appealed. (Notification of appeal by Thailand, *Thailand — Cigarettes* [Philippines] [*Article 21.5 — Philippines*]).

obtained the communication from *Philip Morris* and submitted it in the context of the WTO dispute settlement proceedings, arguing that it directly contradicted the position taken by Thailand before the WTO Panel[27]. Thailand, in turn, requested a ruling that the privileged communication should be excluded, and that the Panel should decline to rule on claims concerning the criminal charges, because its ability to undertake an objective assessment had been compromised by the Philippines' actions[28].

The Panel noted the absence of directly applicable legal provisions or guidelines expressly addressing lawyer-client privilege in the DSU and instead turned to review 'wider international practice', establishing three common principles: 1) Lawyer-client privilege is recognized in international dispute settlement proceedings; 2) Lawyer-client privilege may be waived if the party voluntarily discloses the information; 3) The question of whether privilege has been waived due to disclosure depends on the specific circumstances[29]. The Panel considered these principles fully consonant with the general principles of due process and good faith applicable in WTO dispute settlement proceedings, and, therefore, considered it appropriate to apply them in addressing the issue of lawyer-client privilege arising in the dispute before it[30]. The Panel reasoned that Thailand had waived its privilege by voluntarily disclosing the communication in the criminal proceedings against *Philip Morris* despite having the possibility, under Thailand's Criminal Procedure Code, to object to disclosure[31]. Further, the Panel rejected Thailand's argument that it had waived its lawyer-client privilege only in the context of the criminal proceedings against *Philip Morris*, not in the context of the WTO dispute settlement proceedings. In this regard, the Panel emphasized that *Philip Morris* was, under Thai law, free to share the communication obtained in the criminal proceedings with the Philippines, and that it would violate the Philippines' due process rights if they were,

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[27] *Ibid*., para. 7.21.

[28] *Ibid*., paras. 1.24, 7.22 and 7.26.

[29] *Ibid*., paras. 7.35-7.41. The Panel examined the International Bar Association Rules on the Taking of Evidence in International Arbitration and the Rules of Procedure and Evidence of the International Criminal Court, as well as the practice of the Permanent Court of Arbitration and investor-state dispute settlement tribunals.

[30] *Ibid*., para. 7.41.

[31] *Ibid*., paras. 7.43-7.50 and 7.56.

hereafter, prevented from submitting it in the WTO dispute settlement proceedings[32]. In light of this, the Panel concluded that the communication was admissible, and that the Panel was not prevented from ruling on claims concerning the criminal charges[33].

The approach taken by the Panel in *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*) shows that, although evidentiary privileges such as lawyer-client privilege are not explicitly addressed in the DSU, they may, nonetheless, be applied by WTO panels and the Appellate Body on a case-by-case basis. This allows WTO panels and the Appellate Body to take into account and mitigate the concerns underlying such privileges where relevant and appropriate.

It is noteworthy that, while the Panel concluded that the communication was admissible and that it was not prevented from ruling on claims concerning the criminal charges, the Panel ultimately found that the communication was not relevant to its assessment, emphasizing that it was given no weight and had no effect on the Panel's assessment[34]. In doing so, the Panel rejected Thailand's argument that the communication would 'plant a seed of doubt' as to Thailand's credibility and prevent the Panel from being able to assess Thailand's arguments with a 'clear and open mind'[35]. The Panel emphasized that it would assess the arguments of both parties according to the standard in Article 3.2 of the DSU, i.e. whether they are based on a correct understanding of the provisions of the covered agreements in accordance with the customary rules of interpretation of public international law[36]. In other words, while the Philippines was permitted to submit the communication between Thailand and its legal advisors and argue that it contradicted the position taken by Thailand in the WTO dispute settlement proceedings, the Panel did not consider that this would undermine Thailand's arguments nor lend any additional support to the Philippines' arguments. This suggests that the Panel's procedural ruling on the issue of lawyer-client privilege ultimately had little impact on the Panel's substantive assessment of the matter before it.

[32] *Ibid*., paras. 7.44-7.45 and 7.48-7.50.
[33] *Ibid*., paras. 7.43-7.50 and 7.56
[34] *Ibid*., paras. 7.53 and 7.56.
[35] *Ibid*., para. 7.51.
[36] *Ibid*., paras. 7.52-7.54 and 7.56.

*Settlement privilege*

Settlement privilege, also known as settlement without prejudice, means that a party has the right to refuse or prevent disclosure of offers and other concessions made in the context of settlement negotiations[37]. The purpose of this is to facilitate settlement negotiations among opposing parties, by allowing the parties to freely negotiate without fear that offers or concessions are used against them in subsequent legal proceedings.

Negotiations are an inherent part of the WTO dispute settlement system, with Article 4 of the DSU requiring the parties to 'enter into consultations in good faith … with a view to reaching a mutually satisfactory solution'[38] before resorting to further actions under the DSU[39]. However, consultations not only serve as an opportunity for the parties to negotiate in order to reach a mutually agreed solution, but also as an opportunity for the parties to 'exchange information, assess the strengths and weaknesses of their respective cases, [and] narrow the scope of the differences between them'[40]. And the Appellate Body has stressed the importance of parties disclosing facts in the course of conducting consultations[41].

According to the DSU, consultations 'shall be confidential, and without prejudice to the rights of any Member in any further proceedings'[42]. Although this has not been referred to explicitly as an issue of evidentiary privilege, WTO panels and the Appellate Body have, on a number of occasions, been asked to consider whether the content of consultations or information obtained in the context of consultations may be relied on in subsequent dispute settlement proceedings.

Due to the confidential nature of consultations, WTO panels and the Appellate Body have generally refrained from examining and taking into account what actually took place between the parties during

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[37] See, e.g. *Black's Law Dictionary*, 9th edn, B. A. Garner (ed.), Thompson Reuters, 2009, p. 1190.
[38] Article 4.3 of the DSU.
[39] Article 4.5 of the DSU.
[40] Appellate Body Report, *Mexico — Corn Syrup* (*Article 21.5 — US*), para. 54.
[41] Appellate Body Report, *India — Patents* (US), para. 94.
[42] Article 4.6 of the DSU.

consultations[43]. The Panel in *Korea — Alcoholic Beverages*, however, found that the parties could submit information gathered during consultations without breaching confidentiality, pointing out that panel proceedings are also confidential, and that consultations serve as an opportunity for the parties to gather correct and relevant information[44]. In *US — Lamb*, the Panel distinguished between 'documentary evidence' disclosed by parties during consultations, on the one hand, and 'concessions they have made or compromises they have achieved in the context of consultations', on the other hand[45]. The Panel emphasized that it would not serve the purpose of consultations if the parties were permitted to 'hold against one another' such concessions or compromises[46]. Similarly, the Panel in *US — Underwear* refused to take into account settlement offers made by the United States in the context of bilateral negotiations that took place between Costa Rica and the United States before and after the imposition of the measure at issue in the dispute[47].

The approach taken in these disputes shows that WTO panels and the Appellate Body address issues concerning evidentiary privileges on a case-by-case basis also where the privilege is more directly addressed in the DSU, by applying it only insofar as the underlying concerns manifest themselves. As mentioned above, the settlement privilege serves to facilitate negotiations between opposing parties by allowing them to discuss freely without fear that offers or concessions are used against them in subsequent legal proceedings. WTO panels and the Appellate Body address this concern by refusing to take into account information relating to consultations as a means to reach a mutually agreed solution, such as concessions, compromises, or settlement offers discussed among the parties. At the same time, they acknowledge that consultations not only serve as a settlement negotiation, but also as a fact-

[43] Panel Reports, *Korea — Alcoholic Beverages*, para. 10.19; and *US — Poultry* (China), paras. 7.35-7.36; and Appellate Body Report, *US — Upland Cotton*, para. 287.

[44] Panel Report, *Korea — Alcoholic Beverages*, para. 10.23.

[45] Panel Report, *US — Lamb*, para. 5.40.

[46] *Ibid*. The Panel, however, noted that the concern was 'probably less pertinent' to consultations held under Article 12.3 of the Agreement on Safeguards, given the requirement that the results of such consultations be notified to the Council for Trade in Goods, thus implying circulation to all Members.

[47] Panel Report, *US — Underwear*, para. 7.27.

finding exercise. For information relating to consultations as a fact-finding exercise, the same concerns do not apply, and WTO panels and the Appellate Body are thus more likely to take into account the information. This suggests a preference for a more flexible approach that allows WTO panels and the Appellate Body to take into account information where relevant and appropriate, rather than a rigid rule of disregarding any and all information obtained or discussed during consultations.

## Concluding thoughts

As explained above, the overarching framework for the WTO's dispute settlement mechanism does not explicitly regulate evidentiary privileges, but provides a more general basis for WTO panels and the Appellate Body to address the concerns underlying such privileges. The examples reviewed in this paper demonstrate that WTO panels and the Appellate Body do apply the notion of evidentiary privileges, explicitly or implicitly, where relevant and appropriate. Nonetheless, one could still question the relevance of evidentiary privileges in WTO dispute settlement. As explained above, the primary objective for invoking evidentiary privileges is to prompt WTO panels or the Appellate Body to refuse to take the privileged evidence into account, rather than seeking to have that evidence excluded from the record of the proceedings all together. This has also been the focus of parties, WTO panels, and the Appellate Body in practice.

However, even where a WTO panel or the Appellate Body rules that certain information should, as a matter of evidentiary privilege, not be taken into account, it is by no means certain that the panel or the Appellate Body would have taken this information into account in the absence of such a procedural ruling. Nor is it certain that this information would have had any effect on the final outcome of the dispute. WTO disputes concern measures, meaning any act or omission, attributable to a Member government[48]. Even where such measures are not themselves publicly available, there is typically a considerable deal of publicly available information concerning the measures, their operation, and effects. Furthermore, WTO panels and the Appellate Body generally conduct their assessment of the matter before

[48] *See*, e.g. Article 3.3 of the DSU and Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review*, para. 81 and fn 79.

them based on an objective standard concerning the facts constituting and surrounding the measure at issue, cautioning against 'undue reliance on the intent of a government behind a measure'[49]. In light of this, one might question if the types of information covered by evidentiary privileges would be of the kind that is likely to impact the substantive assessment by WTO panels and the Appellate Body.

This is, at times, made explicit by WTO panels or the Appellate Body. As described above, the Panel in *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*) ruled that Thailand had waived its lawyer-client privilege, but found that the communication between Thailand and its legal advisers was not relevant, emphasizing that it was given no weight and had no effect on the Panel's assessment[50]. At other times, WTO panels or the Appellate Body have declined to make a procedural ruling on the admissibility of evidence, where it considers that the evidence would in any event have no bearing on its substantive assessment. For instance, the Panel in *EC — Bed Linen* refused to rule on the admissibility of evidence concerning the content of the consultations which took place between India and the European Communities, reasoning that while the evidence was 'at best unnecessary, and may be irrelevant', this did not require the Panel to exclude it[51]. The Panel went on to explain that it 'may choose to allow parties to present evidence, but subsequently not consider that evidence, because it is not relevant or necessary to our determinations or is not probative on the issues before it. In our view, there is little to be gained by expending our time and effort in ruling on points of "admissibility" of evidence *vel non*'[52].

These considerations should not be construed as discarding the possibility that the decision to include or exclude evidence on the basis of evidentiary privileges may impact the substantive assessment by WTO panels or the Appellate Body, and ultimately the outcome of a dispute. They simply highlight that the importance of such evidentiary privileges should not be overstated either.

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[49] Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para. 1050.

[50] Panel Report, *Thailand — Cigarettes* (Philippines) (*Article 21.5 — Philippines*), paras. 7.53 and 7.56.

[51] Panel Report, *EC — Bed Linen*, para. 6.32.

[52] *Ibid.*, para. 6.33. (emphasis original).

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