

INTERNATIONAL COURT OF JUSTICE

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**CASE CONCERNING  
ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO**

**DEMOCRATIC REPUBLIC OF THE CONGO**

**v.**

**UGANDA**

**MEMORIAL OF UGANDA ON REPARATION**

**VOLUME II**

28 SEPTEMBER 2016





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- Annex 23 Durward Sandifer, *Evidence before International Tribunals* (1975)
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- Annex 32 P. Tomka & V.-J. Proulx, “The Evidentiary Practice of the World Court” in *LIBER AMICORUM GUDMUNDUR EIRIKSSON* (J. C. Sainz-Borgo ed., forthcoming 2016)

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Ngurdoto-Tanzania Agreement between the Democratic Republic of the Congo and the Republic of Uganda on Bilateral Cooperation (8 Sept. 2007)





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**NGURDOTO-TANZANIA AGREEMENT**

**BETWEEN**

**THE**

**DEMOCRATIC REPUBLIC OF THE CONGO**

**AND**

**THE**

**REPUBLIC OF UGANDA**

**ON**

**BILATERAL COOPERATION**

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**Ngurdoto, Tanzania 8<sup>th</sup> September, 2007**

*Handwritten signature*



THE REPUBLIC OF UGANDA

**NGURDOTO-TANZANIA AGREEMENT  
BETWEEN  
THE DEMOCRATIC REPUBLIC OF CONGO  
AND  
THE REPUBLIC OF UGANDA  
ON  
BILATERAL COOPERATION**

**Preamble**

This Agreement is made between the Democratic Republic of Congo (the DRC) and the Republic of Uganda (hereinafter referred to jointly as the Parties).

CONSIDERING that the common cultural heritage and shared natural resources in the two countries offer enormous opportunities and strengths for the pursuit of stability and prosperity;

RECALLING the Agreement establishing a Joint Permanent Commission of Cooperation, 1986 between the two countries; the Agreement of Cooperation for the Exploration of Hydrocarbons and Exploitation of Common Fields, June 1990 and the Luanda Agreement on Cooperation and Normalization of Relations, September 2002;

FURTHER RECALLING the Lusaka Ceasefire Agreement of July 1999, the Tripartite Agreement, October 2003; the Principles of Good Neighbourly Relations and Cooperation, September 2003, the Pact for Security, Stability and Development in the Great Lakes Region, December 2006, the United Nations Charter and the Constitutive Act of the African Union;

REAFFIRMING their commitment to the letter and spirit of the said Instruments;

REGRETTING the violent incidents, some involving loss of life, that have recently taken place along the common border;

DETERMINED to promote social, cultural, economic, and political cooperation in order to achieve peace, security and prosperity,

*me* The Parties hereby agree as follows:





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## CHAPTER I: DEFENCE AND SECURITY

## Article 1

## Negative Forces

The Parties undertake to strengthen bilateral efforts to eliminate all negative forces operating from the two countries, particularly for Uganda, the Lord's Resistance Army (LRA), the Allied Democratic Alliance (ADF), the People's Redemption Army (PRA), and the National Liberation Army of Uganda (NALU) and for DRC, Forces Armees du Peuple Congolais (FAPC) of Jerome Kakwavu, Mouvement Revolutionaire Congolais (MRC) of Bwambale Kakolele, CNDP of Laurent Nkunda. To this end, the Parties agree that:

- (a) the process of apprehension, disarmament, demobilization, repatriation, resettlement and reintegration (DDRRR) of persons in the negative forces referred to above, shall, within 90 days from the date of this Agreement, be demonstrably undertaken in either country, respectively. The foregoing may be achieved through joint military operations in concert with MONUC. The Parties shall deny sanctuary to any person opposed to DDRRR.
- (b) The Government of the DRC shall formulate an action plan to neutralize the negative forces, particularly the LRA and ADF, which shall become effective by January 2008;
- (c) the Joint Verification Mechanism already existing between Parties shall be strengthened by opening liaison offices in the towns Aba, Beni, Bunia, Kinshasa, Fort Portal, Arua, Kisoro, Kanungu and Kampala;
- (d) the decisions reached in previous bilateral meetings with regard to the negative forces but have not been implemented shall be implemented within three months from the date of this Agreement and future joint decisions shall be implemented without delay;
- (e) there shall be meetings of Ministers of Defence and Security and their Permanent Secretaries at least twice a year to review progress in this respect. These meetings shall be preceded by those of Chiefs of Defence Forces and Chiefs of Military Intelligence, which shall be held at least once a



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year. In addition, there shall be meetings of Regional Commanders as well as those of local political leaders every month;

- (f) At the Tripartite Plus One meeting scheduled to take place in Kampala, the Government of Uganda shall support a proposal by the DRC to ensure the successful integration of the DRC national army, disarmament of the Interahamwe and other negative forces and the joint pacification, by MONUC and the DRC national army, of areas in North Kivu currently affected by hostilities.

### Article 2

#### Settlement and Repatriation of Refugees

The Parties agree to set up a Tripartite Commission on Refugees involving the Government of the Democratic Republic of the Congo, the Government of the Republic of Uganda and the United Nations High Commission for Refugees in the last quarter of 2007 with a view to ensuring that:

- (a) refugees are settled away at least 150 km from the common border, as required by international instruments governing refugees;
- (b) refugees are sensitized about the situation pertaining in their countries;
- (c) refugees are repatriated once the conditions that compelled them to flee their countries improve in accordance with international rules governing refugees.

### Article 3

#### Border Demarcation and Security

- (1) The Parties reaffirm their commitment to respect the principle of inviolability of borders as inherited from the colonial powers.
- (2) The Parties agree to the joint re-marking, where necessary, of the international boundary between the two countries as defined in the Agreement between the United Kingdom and Belgium Respecting Boundaries in East Africa (Mt. Sabinio to the Congo-Nile Watershed) of

*me*



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3<sup>rd</sup> February 1915 and its annexes as recognised under the Charter of the Organisation of African Unity and its successor, the Constitutive Act of the African Union.

- (3) The Parties agree to set up a joint team of experts within one month from the date of this Agreement to work out the modalities of carrying out the task in (2) above. The joint team may co-opt any person or persons from any country or body as it may be deemed necessary.
- (4) The parties agree that upon being constituted, in remarking the international boundary, the joint committee shall give priority to Rukwanzi island and in the territory of Mahagi, particularly the areas of Uriwo, Anzida/Panzuru, Angiero, Pagira and Pamitu; and in the territory of An the border of Vura.
- (5) The Parties agree that Rukwanzi island and Mahagi, particularly the areas of Uriwo, Anzida/Panzuru, Angiero, Pagira and Pamitu shall be immediately demilitarized.
- (6) The Parties further agree that the DRC administration on Rukwanzi island shall remain in place for one month from the date of this Agreement and during that month. it shall sensitize the resident population about this aspect of the Agreement. Immediately after the said one month, Uganda shall appoint a co-administrator to jointly administer the island with the DRC administrator, and post police personnel equal in number to those stationed by the DRC on the island to maintain civil order.
- (7) The Parties agree to ensure that the existing mechanism under which regular joint border meetings are held alternately on both sides of the border involving local political leaders, military commanders and other technical officials as well as central government representatives shall have the responsibility of monitoring and ensuring the implementation of the provisions of (5) and (6) above.





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CHAPTER II: ECONOMIC COOPERATION

Article 4

Management of Trans-boundary Resources and Regularization of Cross-border Trade In Minerals

- (1) The Parties agree to ensure and facilitate cooperation in all economic fields of common interest, particularly the use and management of trans-boundary living resources. To this end, the Parties agree to convene a session of the Joint Permanent Commission of Cooperation in Uganda in December, 2007 for the purpose of exploring ways of harmonising and adopting best practices for preserving trans-boundary resources such as crops, animals, fisheries, forests and national parks, for mutual benefit.
- (2) The Parties reiterate their commitment to cooperate in the exploration of trans-boundary hydrocarbons and in the exploitation of trans-boundary fields. To this end, the Parties agree that:
  - (a) where an oil field is found to straddle their common border, the Parties shall jointly explore and exploit that field and proportionately share the costs and proceeds in accordance with the principle of *unitisation*. The respective Ministers responsible for the oil sector shall meet within one month from the date of this Agreement to deliberate and agree on the detailed modalities in this regard;
  - (b) they shall within three months from the date of this Agreement attach petroleum experts in their respective embassies who will, under a framework to be agreed upon between the Parties, observe petroleum exploration activities on each other's side of the border;
  - (c) they shall continue to exchange information, experience and expertise in petroleum matters;
  - (d) the Democratic Republic of Congo shall enhance Petroleum exploration in the Albertine basin as soon as possible to enable the Parties identify and evaluate trans-boundary fields;
  - (e) the DRC Government shall send a team of experts within one month from the date of this Agreement to visit areas where oil has been discovered near the common border.



\* (f) they shall update the said <sup>THE REPUBLIC OF UGANDA</sup> *Agreement of Cooperation for the Exploration of Hydrocarbons and Exploitation of Common Fields, 23 June 1990* with a view to improving and strengthening it.

- (3) The Parties undertake to ensure the following in order to enhance economic cooperation and trade regularisation:
- (a) the conclusion of an agreement for mutual assistance in Customs matters for preventive research and repression of illegal activities;
  - (b) setting up a common project to fight illegal trade and fraudulent networks in minerals, starting within 90 days;
  - (c) the establishment of a regional gold trade centre and refinery in the Democratic Republic of Congo, starting within 30 days;
  - (d) the enhancement of exchange of information by the respective mine surveillance authorities;
  - (e) active participation in the Traceability Group in the Great Lakes Region.
  - (f) the signing of an Agreement between the two countries' Ministries responsible for Minerals, on economic and technical cooperation in the sectors of geology, mines and steel, within 30 days.

#### Article 5

##### Development of Cross-border Infrastructure and Trading in Electricity

- (1) The Parties agree that their respective Ministers responsible for infrastructure shall convene, in the framework of the session of the Joint Permanent Commission scheduled for December 2007 in Uganda, meet to work out modalities for developing road, rail and water transport infrastructure linking the two countries;
- (2) The Parties agree to conclude an Agreement for cooperation in the interconnection of their respective power grids in the framework of the Nile Basin Initiative through, among others, extending the 132 kv transmission line from Kasese (Uganda) to provide electricity for the areas of Beni-Butembo-Rutchuru in the Democratic Republic of the Congo.



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- (3) The Parties agree to jointly undertake studies on the project in (2) above which will be reinforced by the electricity generation project on River Semliki. Their respective Ministries responsible for energy and their energy distribution companies should meet within one month in Kampala, Uganda, to study modalities for implementing this project.

### CHAPTER III: POLITICAL AND DIPLOMATIC COOPERATION

#### Article 6

##### Normalization and Strengthening of Bilateral Relations

The Parties agree to normalize and strengthen their bilateral relations by, among others

- (a) reviving the activities of Joint Permanent Commission of cooperation which should hold its next session in December, 2007 in Uganda to review what has been done or has not been done during the last 10 years of its inactivity and recommend ways of ensuring a solid foundation for future bilateral cooperation;
- (b) upgrading their diplomatic representation to ambassadorial level;
- (c) holding an annual summit of the Heads of State of the Parties to be held alternately on each Party's territory, or wherever they may decide.

#### Article 7

##### Claims

- (1) The Parties agree to form, with each Party nominating not more than three members, an ad hoc joint technical team to study and advise the respective Ministers of Foreign Affairs on matters relating to:

(a) claims by the Embassy of the DRC in Kampala in connection with:

- (i) plot 25 A Elizabeth Avenue, Kololo which is a subject of a dispute involving a Ugandan national; and





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- (ii) three villas on Acacia Rd No.7B, Mbuya No.14 and Bugolobi No.12 which were auctioned due to the Embassy's indebtedness.
  - (b) a claim of outstanding payment of US\$1 million for services rendered by M/s Uganda Air Cargo to the DRC Government.
- (2) The joint team in (1) above shall report its findings within one month from the date of this Agreement.

**Article 8**

**Implementation of the Judgment of the International Court of Justice (ICJ)**

The Parties agree to constitute, with each Party nominating not more than 7 members, an ad hoc committee to study the ICJ judgment in the Case Concerning Armed Activities on the DRC Territory (DRC v Uganda) and recommend to the JPC modalities of implementing its orders on the question of Reparations.

**CHAPTER IV: GENERAL PROVISIONS**

**Article 9**

**Amendment**

This Agreement may be amended or revised with the written consent of the Parties.

**Article 10**

**Dispute Resolution**

Any dispute between the Parties to this Agreement relating to the interpretation and application shall be resolved amicably.



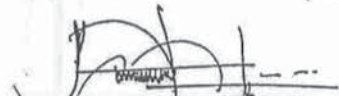
THE REPUBLIC OF UGANDA


Article 11

Date of Effectiveness

This Agreement takes effect upon signature by the Parties.

IN WITNESS WHEREOF, the Parties have signed this Agreement at NGURDOTO on this 8<sup>th</sup> day of the month of September in the year 2007 in English and French, both texts being equally authentic.

  
.....  
H.E Joseph Kabila Kabange  
PRESIDENT OF THE DEMOCRATIC  
REPUBLIC OF THE CONGO

  
.....  
H.E Yoweri Kaguta Museveni  
PRESIDENT OF THE  
REPUBLIC OF UGANDA

WITNESSED BY:

  
.....  
H.E Jakaya Mrisho Kikwete  
PRESIDENT OF THE UNITED REPUBLIC TANZANIA



## **Annex 2**

**Joint Communiqué Issued by the Democratic Republic of the Congo and the Republic of Uganda  
Held on 4th August 2016, at Mweya Safari Lodge, Kasese District, Uganda (4 Aug. 2016)**






REPUBLIC OF UGANDA

JOINT COMMUNIQUÉ ISSUED BY THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE REPUBLIC OF UGANDA HELD ON 4<sup>TH</sup> AUGUST 2016, AT MWEYA SAFARI LODGE, KASESE DISTRICT, UGANDA.

1. At the invitation of His Excellency Yoweri Kaguta Museveni, President of the Republic of Uganda, His Excellency Joseph Kabila Kabange, President of the Democratic Republic of Congo paid an Official Visit to Uganda on 4th August 2016.
2. H.E President Joseph Kabila Kabange was accompanied by H.E Solomon Banamuhere, Senior Minister/Minister in charge of Decentralization and Customary Affairs, H.E. Elvis Mutiri wa Bashara, Minister of Tourism, H.E. Julien Paluku Kahongya, Governor of North Kivu Province, H.E. Abdallah Pene Mbaka Jefferson, Governor of Ituri Province, Mr. Jean Pierre Massala, Charge d'Affaires a.i. and other senior officials.

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REPUBLIQUE DEMOCRATIQUE DU CONGO

COMMUNIQUE CONJOINT EMIS PAR LA REPUBLIQUE DEMOCRATIQUE DU CONGO ET LA REPUBLIQUE DE L'OUGANDA A MWEYA SAFARI LODGE, DISTRICT DE KASESE-OUGANDA, CE 4 AOUT 2016.

1. Son Excellence Monsieur Joseph Kabila, Président de la République Démocratique du Congo, a effectué une visite officielle en Ouganda en date du 4 août 2016 à l'invitation de Son Excellence Monsieur Yoweri Kaguta Museveni, Président de la République d'Ouganda, à Mweya Lodge, Kasese-Ouganda ce jeudi 4 août 2016
2. Son Excellence Monsieur le Président Joseph Kabila était accompagné de S.E.M. Salomon Banamuhere, Ministre d'Etat et Ministre en Charge de la Décentralisation et des Affaires Coutumières, S.E.M. Elvis Mutiri wa Bashara, Ministre du Tourisme, S.E.M. Julien Paluku Kahongya, Gouverneur de la Province du Nord Kivu, S.E. Abdallah Pene Mbaka Jefferson, Gouverneur de la Province de l'Ituri, Mr. Jean-Pierre Massala, Chargé d'Affaires a.i. en République de l'Ouganda et d'autres hautes personnalités.

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3. The Uganda Delegation included Hon. Sam Kutesa, Minister of Foreign Affairs, Hon. William Byaruhanga, Attorney General, Lt. Gen. Henry Tumukunde, Minister of Security, Hon. Betty Amongi, Minister of Lands, Housing and Urban Development, Hon. Charles Okello Engola, Minister of State for Defence, Hon. Simon D'Ujanga, Minister of State for Energy, Hon. Simon Peter Lokoris, Minister of State for Mineral Development, H.E James Kinobe, Ambassador of Uganda to Democratic Republic of the Congo and other senior officials.



3. Faisaient partie de la Délégation ougandaise l'Honorable Sam Kutesa, Ministre des Affaires Etrangères, l'Honorable William Byaruhanga, Procureur Général de la République, Lt. Gén. Henry Tumukunde, Ministre de la Sécurité, l'Honorable Betty Amongi, Ministre des Affaires Foncières, de l'Habitat et de l'Aménagement Urbain, l'Honorable Charles Okello Engola, Vice-Ministre Chargé de la Défense, l'Honorable Simon D'Ujanga, Vice-Ministre Chargé de l'Energie, l'Honorable Simon Peter Lokoris, Vice-Ministre Chargé du Développement Minéral, Son Excellence James Kinobe, l'Ambassadeur de la République de l'Ouganda en République Démocratique du Congo ainsi que d'autres hauts fonctionnaires.

4. The two Heads of State held fruitful discussions on a number of issues of common interest at bilateral, regional and international level. They expressed satisfaction at the cordial bilateral relations existing between the two countries and reaffirmed their commitment to further enhance these relations.

4. Les deux Chefs d'Etat ont eu des discussions fructueuses sur de nombreux sujets d'intérêt commun sur le plan bilatéral, régional et international. Ils se sont réjouis de l'état des relations bilatérales cordiales existant entre les deux pays et ont réaffirmé leur engagement à consolider davantage ces relations.

5. The two Heads of State welcomed the efforts in the implementation of the Ngurdoto Agreement of 8<sup>th</sup> September 2007 on Uganda/DRC bilateral cooperation and agreed to concretize areas of cooperation within the framework of the Joint Permanent Commission

5. Les deux Chefs d'Etat ont salué les efforts visant à mettre en œuvre l'Accord de Ngurdoto du 8 septembre 2007 portant sur la coopération bilatérale entre l'Ouganda et la RDC et ont convenu de concrétiser les domaines de coopération dans le cadre de la Grande Commission Mixte.





6. The summit further directed as follows:

i) Concerning the issue of ADF, H.E President Yoweri Kaguta Museveni received a briefing from his Counterpart on the FARDC efforts to neutralize the armed group. President Joseph Kabila however expressed concerns about ADF recruits from Uganda. In this regard, the two Heads of State agreed that intelligence services from both countries coordinate closely to eliminate the recruiting networks and establish mechanisms to manage the porous common border.

ii) On the status of the ex-M23 elements in Uganda, President Museveni informed his Counterpart that over 736 ex-combatants M23 were still in Uganda, despite the conclusion of the Kampala Dialogue (Nairobi Declaration). President Kabila raised the concern that some of the ex-M23 elements who had been granted amnesty had declined repatriation and questioned their motives. In this regard, President Kabila emphasized that he had fulfilled all the required conditions for their repatriation and hence, promised to task his officials to travel to Uganda and encourage the ex-Combatants M23 elements to accept repatriation. Therefore, in pledging the support of the Uganda authorities, President Museveni committed to ask his services the motive of the ex-M23 refusal.

6. Le Sommet s'est en outre convenu sur ce qui

i) Concernant la question des ADF, Son Excellence le Président Yoweri Kaguta Museveni a reçu un briefing de la part de son Homologue sur les efforts des FARDC pour neutraliser le groupe armé. Le Président Joseph Kabila a cependant exprimé sa préoccupation face au recrutement des ADF en Ouganda. À cet égard, les deux Chefs d'Etat ont convenu que les services de renseignement de deux pays devront échanger régulièrement les informations afin d'éliminer les réseaux de recrutement et mettre en place des mécanismes pour gérer la frontière commune poreuse.

ii) Pour ce qui est du statut des éléments ex-M23 en Ouganda, le Président Museveni a informé son Homologue que plus de 736 ex-combatants M23 se trouvent toujours en Ouganda, et ce en dépit de la fin du Dialogue de Kampala (Déclaration de Nairobi). Le Président Kabila s'est dit préoccupé que certains éléments ex-M23 qui s'étaient vus accorder l'amnistie aient décliné le rapatriement et a mis en doute leurs intentions. À cet égard, le Président Kabila a souligné qu'il avait déjà rempli toutes les conditions requises pour leur rapatriement et a cependant promis d'envoyer ses Officiels en Ouganda, lesquels vont encourager les ex-Combattants M23 d'accepter le rapatriement. Ainsi, tout en promettant le soutien de l'Ouganda, le Président Museveni s'est engagé à interroger ses services sur le motif du refus des ex-M23.

- iii) Regarding the estimated 207,000 refugees from DRC currently hosted in Uganda, the two Heads of State agreed that the DRC government will dispatch a team of officials to discuss with the refugees with a view of encouraging their voluntary return.
- iv) On the border demarcation, the two Heads of State welcomed the success of the Joint Technical Commission at Vurra, and agreed that their respective technical officials commence the demarcation of Rukwanzi.
- v) On the judgment of the International Court of Justice (ICJ) of 19<sup>th</sup> December 2009 related to the Uganda military activities in the DRC, it was agreed that President Joseph Kabila comes up with a new proposal on the implementation of the court judgment. The two Heads of State decided that in the interim, the filing of Memorials on reparation by DRC scheduled on 28<sup>th</sup> September 2016 be postponed pending consideration of the proposals to settle the question of reparations directly.
- vi) On the oil potential in the Albertine Graben, H.E. President Yoweri Kaguta Museveni briefed his counterpart on the progress of the oil sector in Uganda, including the Hoima (Uganda) – Tanga (Tanzania) crude oil pipeline. They agreed to set up a joint team of officials from the Ministries responsible for Petroleum to work closely and meet in a week's time with a view of expeditiously reviewing the progress status of oil exploration on the DRC side.
- iii) Concernant les quelque 207.000 réfugiés congolais se trouvant en Ouganda, les deux Chefs d'Etat ont convenu que le Gouvernement de la RDC dépêcherait une équipe de fonctionnaires afin de discuter avec les réfugiés et les encourager au retour volontaire.
- iv) Au sujet de la démarcation frontalière, les deux Chefs d'Etat ont salué la réussite des travaux de la Commission Technique Mixte à Vurra, et ont convenu que les Experts de deux pays respectifs devraient démarrer la démarcation de Rukwanzi.
- v) Concernant l'Arrêt de la Cour Internationale de Justice (CIJ) du 19/12/2009 sur les activités militaires de l'Ouganda en RDC, il a été convenu que le Président Joseph Kabila transmette une nouvelle proposition sur l'indemnisation relativement à la mise en œuvre de cet Arrêt. Les deux Chefs d'Etat se sont convenus que dans l'entretemps, le dépôt des mémoires par la RDC prévu le 28 septembre 2016 devrait être reporté en attendant l'examen des propositions pour la résolution directe de la question des réparations.
- vi) Concernant le potentiel pétrolier du Graben Albertin, Son Excellence le Président Yoweri Kaguta Museveni a entretenu son Homologue sur le progrès du secteur pétrolier en Ouganda, y compris le pipeline (Oléoduc) du pétrole brut Hoima (Ouganda) – Tanga (Tanzanie). Ils ont convenu de mettre en place une équipe conjointe d'experts des Ministères en charge du pétrole pour travailler étroitement et se retrouver endéans une semaine afin d'examiner promptement l'état d'avancement de l'exploration du pétrole du côté congolais.



- vii) On cooperation in the energy sector, the two Heads of State discussed the planned project of 220KV transmission line to supply electricity from Kasese to the DRC areas of Beni, Bunia and Butembo. In this regard, the responsible Ministers of Energy of the two countries were directed to fast-track the implementation of that project.
- viii) To spur economic growth in the region, President Kabila agreed to a request from president Museveni on the construction of a bridge across River Semliki linking Bunia to the Uganda side of the border, and directed the Ministers responsible for roads to prioritize the implementation of that project.
9. In line with the decision of the Joint 6<sup>th</sup> Session Permanent Commission (JPC) held in Kinshasa on 23<sup>rd</sup>-27<sup>th</sup> August 2014, the Government of Uganda committed to host the next session of the Joint Permanent Commission in November 2016
10. His Excellency, President Joseph Kabila Kabange, expressed his appreciation to the Government and the People of the Republic of Uganda for the warm welcome and hospitality which was accorded to him and his delegation.
11. His Excellency, President Joseph Kabila Kabange extended an invitation to His Excellency, President Yoweri Kaguta Museveni to visit Democratic Republic of the Congo on a date to be mutually determined through diplomatic channels
- vii) Pour ce qui est de la coopération dans le secteur de l'énergie, les deux Chefs d'Etat ont discuté du projet de la ligne de transmission de 220KV afin de fournir de l'électricité à partir de Kasese aux agglomérations congolaises de Beni, Bunia et Butembo. À cet effet, les Ministres de l'Énergie de deux pays sont chargés d'accélérer la mise en œuvre de ce projet.
- viii) Afin de stimuler la croissance économique dans la région, le Président Kabila a donné son accord à une requête du Président Museveni sur la construction d'un pont sur la rivière Semliki pour relier Bunia à la partie ougandaise de la frontière, et ont instruit les Ministres en charge des routes de faire de la mise en œuvre de ce projet une priorité.
9. Après la tenue de la 6<sup>ème</sup> Session de la Grande Commission Mixte à Kinshasa de 23 au 27 août 2014, le Gouvernement ougandais s'engage à son tour d'abriter le prochaine session de la Grande Commission Mixte en novembre 2016.
10. Son Excellence Monsieur le Président Joseph Kabila Kabange a exprimé sa gratitude au Gouvernement et au Peuple de la République de l'Ouganda pour le chaleureux accueil et l'hospitalité qui lui ont été réservés ainsi qu'à sa délégation.
11. Son Excellence Monsieur le Président Joseph Kabila Kabange a lancé une invitation à Son Excellence Monsieur le Président Yoweri Kaguta Museveni à effectuer une visite en République démocratique du Congo à une date qui sera fixée ultérieurement par voie diplomatique

Done on 4th August 2016 At Mweya Safari Lodge, Kasese,  
Uganda



H.E. Sam KUTESA  
Minister of Foreign Affairs/  
*Ministre des Affaires Etrangères*  
Republic of Uganda.

Fait à Mweya Safari Lodge, Kasese (Ouganda), le 4 août  
2016, Ouganda



S.E.M. Salomon BANAMUHERE, Ministre d'Etat et Ministre  
en Charge de la Décentralisation et des Affaires Coutumières,  
*Senior Minister/Minister in charge of Decentralization and  
Customary Affairs*  
République Démocratique du Congo



### **Annex 3**

Loss of Uganda Government Property at Uganda's Embassy, Kinshasa



## UCM ANNEX 92

LOSS OF UGANDA GOVERNMENT PROPERTY AT UGANDA EMBASSY,  
KINSHASA

ITEM	PARTICULARS	QTY	UNIT PRICE (US \$)	TOTAL PRICE (US \$)
	<b>A. PREMISES</b>			
01	Official Residence for Ambassador A Double-storeyed Building with a perimeter wall (newly renovated), situated at 12, Avenue de l'Ouganda, zone de la Gombe, Kinshasa	1	2,000,000	2,000,000
02	Chancery with two detached buildings (three- storeyed and double storeyed) with a perimeter wall situated at 17, Avenue Tombalbaye/Avenue de Travailure, Kinshasa	1	3,000,000	3,000,000
	<b>B. VEHICLES</b>			
03	A Mercedes Benz 240E(one-week old at the time of evacuation)	1	45,000	45,000
04	A Mercedes Benz 280S ( in perfect condition)	1	25,000	25,000
	<b>C. Furniture at the Official Residence and Officers' Houses</b>			
05	Settees (Set)	3	5,000	15,000
06	Easy Chairs (Set)	7	2,000	14,000
07	Wing Chairs	2	600	1,200
08	Dinning Chairs	60	200	12,000
09	Elbow Chairs	2	600	1,200
10	Single Chairs	15	200	3,000
11	Upholstered Dressing Chair	1	350	350
12	Bedroom Chairs	10	300	3,000
13	Long Chairs	2	800	1,600
14	Writing Chairs	5	300	1,500
15	Divans (Sets)	6	5,000	30,000
16	Curtains (Pairs)	60	400	24,000
17	Curtains Boxes	30	100	3,000
18	Curtains Rails	60	50	3,000
19	Ordinary Tables	17	150	2,550
20	Coffee Sets	16	500	8,000
21	Dinning Tables	6	2,000	12,000
22	Carving Tables	6	350	2,100
23	Dressing Tables	5	1,500	7,500
24	Side Tables	6	200	1,200
25	Nests of Tables (Sets)	5	400	2,000
26	Occasional Tables	4	1,200	4,800
27	Trolleys	6	450	2,700
28	Sofa Chairs (Sets)	6	2,500	15,000
29	Double Beds	15	3,000	45,000
30	Table Flags	2	50	100
31	Flag Stand	2	300	600
32	Flag Mast	1	500	500
33	Rugs	27	4,000	108,000
34	Writing Desks	5	1,000	5,000
35	Carpets (m <sup>2</sup> )	1,700m <sup>2</sup>	40	68,000
36	Sideboards	6	7,000	42,000
37	Dressing Chests	2	900	1,800
38	Headboards	6	1,500	9,000
39	Bedside Lockers	42	300	126,000
40	Standard Lamps	12	200	2,400

41	Bedside Lamps	26	100	2,600
42	Lamp Shades	12	50	600
43	Chests of Drawers	6	350	2,100
44	Bedside Rugs	32	150	4,800
45	Welsh Dressers	2	4,000	8,000
46	Wardrobes	16	1,500	24,000
47	Desk Lamps	5	150	750
48	Cupboards	2	800	1,600
49	Bedside Cabinets	2	300	600
50	Book Cases	5	1,500	7,500
51	Mattresses	15	800	12,000
52	Pillows	42	50	2,100
53	Ash Trays	20	10	200
54	Waste Baskets	30	10	300
55	Dust Bins	11	20	220
56	Portraits	7	500	3,500
57	Art Crafts	70	500	35,000
58	Flags (Standard)	3	50	150
59	Maps	13	50	650
60	Bathroom Curtains	14	200	2,800
61	Bathroom Mirrors	14	70	980
62	Bathrooms Mats (Sets)	14	150	21,000
63	Door Mats	10	30	300
64	Ironing Boards	5	70	350
65	Sundry Items	Various	-	2,000
<b>D. FURNITURE AT CHANCERY</b>				
66	Executive Desks	4	2,000	8,000
67	Executive Chairs	4	500	2,000
68	Side Drawers	5	200	1,000
69	Sofa Chairs (Sets)	7	2,500	17,500
70	Easy Chairs (Sets)	3	2,000	6,000
71	Coffee Sets	7	400	2,800
72	Ordinary Tables	4	150	600
73	Ordinary Chairs	14	50	700
74	Side Tables	4	80	320
75	Nests of Tables (Sets)	2	400	800
76	Carpets (m <sup>2</sup> )	500	40	20,000
77	Sideboards	2	7,000	14,000
78	Lamps and Lamp Sheds	4	250	1,000
79	Filing Cabinets	14	200	2,800
80	Trolleys	2	450	900
81	Secretarial Desks	2	1,500	3,000
82	Secretarial Chairs	2	300	600
83	Long table	1	500	500
84	Stools	5	30	150
85	Cupboards	4	800	3,200
86	Book Shelves	4	1,500	6,000
87	Ash Trays	10	10	100
88	Waste Baskets	10	10	100
89	Dust Bins	2	20	40
90	Portraits	6	500	3,000
91	Art Crafts	20	500	10,000
92	Flags	1	100	100
93	Flag Mast	1	500	500
94	Table Flags	1	50	50
95	Sales	2	4,000	8,000
96	Curtains (Pairs)	20	400	8,000

97	Curtains Boxes	10	100	1,000
98	Curtain Rails	20	50	1,000
99	Door Mats	2	30	60
100	Maps	8	50	400
101	Sundry items	various	-	2,000
<b>E. OFFICE AND OTHER EQUIPMENT AT CHANCERY</b>				
102	Computers	2	2,000	4,000
103	Printers	2	700	1,400
104	Photocopier	1	15,000	15,000
105	Fax Machine	1	1,500	1,500
106	Television	1	1,500	1,500
107	Video Recorder	1	700	700
108	Radio	1	1,200	1,200
109	Refrigerator	2	800	1,600
110	Cooker	1	800	800
111	Vacuum Cleaners	1	500	500
112	Telephone Switch Board	1	12,000	12,000
113	Shredders	4	350	1,400
114	Fans	10	150	1,500
115	Air Conditioners	6	250	1,500
116	Punches	5	10	50
117	Staplers	5	10	50
118	Heaters (Water)	2	300	600
119	Gardening Tools	Assortment	-	300
120	Car Tools	Assortment	-	1,000
121	Lawn Mower	1	450	450
122	Typewriters	3	300	900
123	Tea Set	1	100	100
124	Coffee Set	1	100	100
125	Trays	3	20	60
126	Cutlery	Various	-	300
127	Sundry Equipment	various	-	1,500
<b>F. HOUSEHOLD AND OTHER EQUIPMENT AT THE OFFICIAL RESIDENCE AND OFFICERS' HOUSES</b>				
128	Refrigerators	7	1,000	7,000
129	Freezers	2	800	1,600
130	Cookers	7	800	5,600
131	Televisions	2	1,500	3,000
132	Video Recorders	2	700	1,400
133	Microwave	1	400	400
134	TV Racks	2	175	350
135	Kitchen Chef	1	1,500	1,500
136	Lawn Mower	1	450	450
137	Fans	20	150	3,000
138	Air Conditioners	22	250	5,500
139	Vacuum Cleaners	5	500	2,500
140	Gardening Tools	Assortment	-	600
141	Heaters (Water)	6	300	1,800
142	Radio	2	1,200	2,400
143	Flat Irons	5	100	500
144	Kettles	5	50	250
145	Flasks	10	25	250
146	Brandy Glasses	24	3	72
147	Sherry Glasses	24	3	72
148	Liqueur Glasses	24	3	72



149	Claret Glasses	24	4	96
150	Tumblers	68	4	272
151	Glass Butter Dishes	6	5	30
152	Table Forks (DOZ)	10	24	240
153	Table Knives (DOZ)	10	24	240
154	Table Spoons (DOZ)	10	24	240
155	Soup Spoons (DOZ)	10	24	240
156	Dessert Spoons (DOZ)	10	24	240
157	Dessert Forks (DOZ)	10	24	240
158	Tea Spoons (DOZ)	10	24	240
159	Coffee Spoons (DOZ)	10	24	240
160	Fish Eaters (DOZ)	10	24	240
161	Sauce Ladles	18	5	90
162	Sugar Tones	6	3	18
163	Beef Carvers	2	5	10
164	Cheese Knives (DOZ)	5	24	120
165	Grape Fruit Spoons (DOZ)	5	24	120
166	Meat Plate (China)	10	15	150
167	Pudding Plates (DOZ)	10	24	240
168	Cheese Plates (DOZ)	5	24	120
169	Fish Plates (DOZ)	10	24	240
170	Soup Plates (DOZ)	10	30	300
171	Dishes	40	30	1,200
172	Sauce Boats and Stands (Sets)	6	20	120
173	Vegetable Tureens and Covers	6	20	120
174	Electric Washing Machines	1	800	800
175	Saucepans for Electric Stove	40	15	600
176	Milk Saucepans for Electric Stove (Sets)	6	40	240
177	Cream Bowls	6	20	120
178	Tea Cups and Saucers (China) (DOZ)	10	100	1,000
179	Tea Plates (DOZ)	10	30	300
180	Coffee Cups and Saucers (DOZ)	10	100	1,000
181	Sugar Bowls	6	5	30
182	Dish Washers	1	550	550
183	Salad Bowls	7	20	140
184	Trays	12	20	240
185	Soup Bowls	10	24	240
186	Spatulas	8	10	80
187	Potato Mashers	6	5	30
188	Strainer Spoons	6	3	18
189	Sandwich Machine	1	40	40
190	Sausage Tins	6	5	30
191	Bun Tins	6	5	30
192	Cake Trays	6	8	48
193	Baking Tins	6	8	48
194	Biscuit Tins	6	8	48
195	Cake Tins	6	8	48
196	Toilet Brush Holders	11	2	22
197	Linen Boxes	2	30	60
198	Fruit Sets	2	50	100
199	Table Clothes	4	60	240
200	Napkins (DOZ)	4	15	60
201	Milk Jugs	10	10	100
202	Dusters	20	2	40
203	Egg Beaters	2	50	100
204	Omelette Pans	3	20	60
205	Dustpans	2	10	20
206	Tea Pots	8	20	160

207	Coffee Pots	8	20	160
208	Water Jugs	10	15	150
209	Ice Buckets and Tongs	6	30	180
210	Vase Cuts	10	20	200
211	Soup Cups and Saucers (DOZ)	10	24	240
212	Basins	5	2	10
213	Canister Racks	2	5	10
214	Kitchen Knives	20	2	40
215	Pedal Bins	6	3	18
216	Glass Jars	8	5	40
217	Buckets	5	2	10
218	Brushes	15	1	15
219	Rolling Pins	5	2	10
220	Mops	20	2	40
221	Chopping Boards	6	15	90
222	Brooms	20	3	60
223	Can Openers	6	2	12
224	Strainers	7	2	14
225	Tea Strainers	7	1	7
226	Oval Plates (DOZ)	2	30	60
227	Casseroles (DOZ)	2	20	40
228	Roasters	2	50	100
229	Beverage Openers (Assortment)	-	2	20
230	Jugs	10	5	50
231	Servicing Mats (DOZ)	4	15	60
232	Cocktail Mats (DOZ)	8	5	40
233	Bath Towels	1	180	180
234	Blankets	2	200	1500
235	Sundry Household items	Assorted	-	-
<b>G. DOCUMENTS AT THE CHANCERY</b>				
236	Confidential Files	-	-	Priceless
237	Open files	-	-	Priceless
238	Books	-	-	Priceless
239	Agreements	-	-	Priceless
240	Titles	-	-	Priceless
241	Certificates	-	-	Priceless
242	Printed Materials	-	-	Priceless
243	Inventories	-	-	Priceless
244	Registers	-	-	Priceless
245	Passports for renewal	-	-	Priceless
246	Archives	-	-	Priceless
247	Sundry documents	-	-	Priceless
<b>H. SUPPLIES AT THE CHANCERY AND OFFICIAL RESIDENCE</b>				
248	An assortment of detergents and other Cleaning Materials	-	-	3,000
249	Stationery	-	-	10,000
250	Beverages and related Office Sundry Supplies	-	-	3,000
251	Flags (DOZ) - standard	-	-	600

I. PRIVATE PROPERTY AT THE OFFICIAL RESIDENCE				
252	Computers for Uganda Airlines	2	2,000	4,000
253	Printers	2	600	1,200
254	Fax Machine	1	1,600	1,600
255	File and Document	-	-	Priceless
256	Nissan Saloon Car belonging to a Ugandan (Mrs. Jachlean Mbabazi)	1	12,000	12,000
257	Mercedes Benz Car belonging to a Ugandan	1	20,000	20,000
258	Mazda Saloon Car belonging to a Ugandan	1	11,000	11,000
PROPERTY LOOTED FROM DIPLOMATS IN KINSHASA MISSION-DRC				
J. COS KAMANDA BATARINGAYA (DR)				
259	One Brand New Nissan vehicle	1	38,000	38,000
260	Two New leather sofa sets	2	5,000	10,000
261	One Deep Freezer	1	1,800	1,800
262	One Music System	1	6,000	6,000
263	One Cooker	1	1,000	1,000
264	Clothing (10 suits, 13 shirts, 8 trousers 3 night dresses, shorts, socks, ties	-	13,000	13,000
265	Beddings (2 mattresses, 8 pairs of bedsheets, 4 bed covers, towels	-	-	2,000
266	4 suitcases, 2 travelling bags and one brief case	-	1,700	1,700
267	Sets of tables (glass)	3	-	2,000
K. HENRY PICHO-OKELLO				
268	Brand new Lap-top computer complete with its components, stabiliser and electric wire connections etc	1	3,500	3,500
269	Brand new portable office organiser	1	300	300
270	Brand new Camera with zooming lens	1	50	50
271	Clothing: (8 suits, 16 shirts, 6 trousers, 2 sleeping clothes, 2 bath robes, 12 silk-ties, socks hankies etc)	-	-	5,620
272	4 pairs of shoes and 2 pairs of sandals	-	-	450
273	Bedding: ( 8 pairs of bed-sheets, 3 bed covers, 4 complete set of towels, 3 mosquito nets)	-	-	1,190
274	2 suit cases, 1 travelling bag	-	-	350
L. M. KEDISI				
275	Household property/furniture	-	-	4,500
276	Beddings	-	-	4,000
277	Clothes	-	-	3,000
278	Fax Machine	1	1,200	1,200
279	Decoder	1	2,000	2,000
280	Video Recorder	1	1,500	1,500
281	T.V	1	900	900
282	Music System	1	1,200	1,200
M. BAMUTURAKI K. RICHARD				



284	One Deep Freezer/Fridge Worth	1	1,200	1,200
285	One Computer (Pancard: Model April, 1997 together with all its Components namely UPS, Printer/Fax (Canon: 5 In one), stabiliser, wire connections etc...	1	4,500	4,500
286	One TV Worth	1	800	800
287	One Video Deck Worth	1	500	500
288	Radio Worth	1	50	50
289	One Cooker Worth	1	700	700
290	Household property such as clothes, cutlery, voltage stabilisers for different electronic gadgets e.t.c.	1	8,000	8,000
<b>N. F. ONEGA-WACHHGIU</b>				
291	1. Music Systems: (i) One Unit Multi System TV and Video Recorder Full Set with Table  (ii) One Unit HiH Stereo System mid size stereo equipment with amplifiers, surround prologic, tuner double deck, equalizer, SCD  (iii) Audio Accessories, Adaptors, Alarm Clock, Flask lights, torch etc	1  1  1	2,500  3,000  1,200	2,500  3,000  1,200
292	Beddings  Bed Linens, Blanket, Bed sheets, 5 Pillows, 3 Mattresses, 4 Mosquito nets, Tables Cloths, Bath Towels, Robes, etc	-	-	3,000
293	Clothing  Dresses, Ladies Shoes & Slippers, Ladies Shoulder 2 Hand Bags, 2 Travelling Bags, Ladies Fragrances, Lingerie, etc	-	-	6,000
294	Furniture and Equipment  9 Black Ebony Stools, 1 Coffee Set, etc	-	800	800
295	Cookeries and Cutleries  Proclaim, Glassware, Tableware, Stainless Steel Wares etc	-	1,200	1,200
296	Household Accessories & Appliances  1 Water distiller, 1 Electric Flat Iron, 1 Electric Kettle, 1 Electric Fan, 1 Hair Drier, 1 Juice Extractor etc	-	800	800
<b>Total</b>				



#### **Annex 4**

Photographs of Damages to Uganda's Chancery Located at No. 17 Tombalbaye Avenue de  
Travailure, Gombe, Kinshasa

















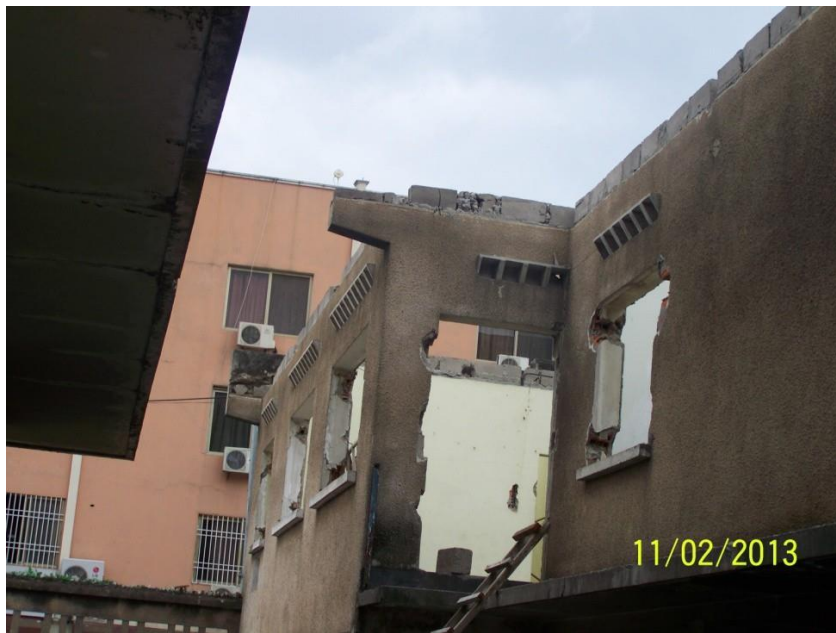




























## **Annex 5**

Government of Uganda, *Response by Uganda on the Evaluation of the Evidence Submitted by the Democratic Republic of Congo in Support of Her Claim Arising out of the ICJ Judgment of December 2005* (24-29 Nov. 2014)





**RESPONSE BY UGANDA ON THE EVALUATION OF THE  
EVIDENCE SUBMITTED BY THE DEMOCRATIC REPUBLIC OF  
CONGO IN SUPPORT OF HER CLAIM ARISING OUT OF THE ICJ  
JUDGMENT OF DECEMBER 2005**

PRESENTED BY THE HONORABLE ATTORNEY GENERAL OF THE  
REPUBLIC OF UGANDA AT THE 2ND JOINT MINISTERS' MEETING  
ON THE IMPLEMENTATION OF THE RULING OF THE ICJ 2005,  
HELD IN PRETORIA, SOUTH AFRICA 24-29 NOVEMBER 2014

- Honourable Raymond Tshibanda, Minister of Foreign Affairs, International Cooperation and Francophone of the Democratic Republic of Congo,
- Honourable Wivine Mumba Matipa, Minister of Justice and Human Rights of the Democratic Republic of Congo,
- Honourable Ministers from the Democratic Republic of Congo,
- Honourable Ministers from the Republic of Uganda,
- Your Excellencies the Ambassadors,
- Distinguished delegates, Senior Officials and Members of the Joint Ad Hoc Committee on the Implementation of the Judgement of the International Court of Justice,

I join my colleague, the Hon Minister of Foreign Affairs of Uganda in welcoming you to this very important meeting on the implementation of the Judgment of the International Court of Justice.

In accordance with the Agreed Minutes of the 1<sup>st</sup> Ministers' meeting held in South Africa in 2012, I present to you the response of the Republic of Uganda in respect of the evaluation of the evidence submitted by the Democratic Republic of Congo in support of her claim arising out of the ICJ Judgment of 19<sup>th</sup> December 2005.

## **1.0 BACKGROUND**

**1.1** In its 2005 Judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (the "2005 Judgment"), the International Court of Justice (ICJ) clearly set out specific parameters within which the Democratic Republic of Congo's (DRC) compensation claim must be evaluated.

The Court stated that it:

*"considers appropriate the request of the DRC for the nature, form and amount of the reparation due to be determined by the Court, failing agreement between the Parties, in a subsequent phase of the proceedings. The DRC would thus be given the opportunity to demonstrate and prove the exact injury that was suffered as a result of specific actions of Uganda constituting internationally wrongful acts for which it is responsible."*<sup>1</sup>

**1.2** The 2005 Judgment also defines, and therefore limits, the responsibility of Uganda in terms of persons (*ratione personae*), subject matter (*ratione materiae*), territory (*ratione loci*) and time (*ratione temporis*).

**1.3** Also, the applicable rules of international law governing reparation impose other general requirements as follows:

- Compensation must be limited only to the damage actually caused by a specific internationally wrongful act. The DRC

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<sup>1</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, para. 260



must demonstrate that “there is a sufficient direct and certain causal nexus between the wrongful act ... and the injury suffered.”<sup>2</sup> Injuries that are “too indirect, remote, and uncertain to be appraised” are subject to exclusion.<sup>3</sup>

- Compensation can only cover damages that are “shown with a reasonable degree of certainty” and that are not speculative.<sup>4</sup>
- a) Compensation must be proportionate to actual injury, taking into account the character of a wrongful act and the actual social and economic conditions in the place of its occurrence.
- b) Compensation does not cover damages the injured State failed to mitigate.
- c) Compensation must exclude damages to which the injured State contributed.

**1.4** As regards the limitations *ratione personae*, the DRC may only claim damages for injuries resulting from:

- a) Wrongful acts committed by the State of Uganda itself;
- b) Wrongful acts committed by the armed forces of Uganda and attributable to Uganda;
- c) Wrongful acts committed by irregular forces that are not attributable to Uganda as such but nevertheless give rise to Uganda’s international responsibility on the basis of its failure to prevent those acts, as the occupying power of Ituri.<sup>5</sup> Claims for damages for acts of third parties are sustainable if it is clear that those acts would not have occurred if Uganda had performed its obligation to prevent them.

**1.5** Regarding the limitations *ratione materiae*, the DRC may claim damages only for injuries resulting from categories of wrongful

<sup>2</sup> The Genocide Convention Case (2007), para. 462

<sup>3</sup> Trail Smelter Case (United States, Canada), Award, 16<sup>th</sup> April 1938 and 11<sup>th</sup> March 1941, UNRIIAA, Vol. III, pp. 1905-1982, at p. 1931

<sup>4</sup> Eritrea Damages Claims, Final Award, Eritrea-Ethiopia Claims Commission, p. 507

<sup>5</sup> See eg Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Judgment of 26<sup>th</sup> February 2007 ICJ Reports 2007, paras. 430, 462

acts established in the 2005 judgment. The wrongful acts identified by the Court are: (a) engaging in acts of killing, torture and other forms of inhumane treatment of the Congolese population; (b) destroying villages and civilian buildings; (c) failing to distinguish between civilian and military targets; (d) failing to protect the civilian population in fighting with other combatants; (e) child soldiers; (f) inciting ethnic conflict; (g) failing to take measures to put an end to such ethnic conflict; and (h) engaging in acts of looting, plundering and exploitation of the DRC's natural resources.<sup>6</sup> Therefore, the DRC's claim for alleged acts of rape cannot be sustained.<sup>7</sup>

**1.6** As regards the limitations *ratione loci*, the DRC may only claim damages for injuries occurring within the territories established in the 2005 judgment. For example, the Court found that Uganda did not participate in the attack on Kitona. It also specifically ruled that "it has not received convincing evidence that Uganda forces were present at Mobenzene, Bururu, Bomongo and Moboza."<sup>8</sup> The DRC may therefore not claim any compensation for acts occurring in any of these places or in other localities where the presence of the Ugandan armed forces was not proved.

**1.7** Concerning the limitations *ratione temporis*, the DRC may only claim for damages for injuries occurring within the time period stated in the 2005 judgment. This covers the following periods:

- a) 8<sup>th</sup> August 1998 – 2<sup>nd</sup> June 2003: the period during which Uganda's armed forces were found to be present in the DRC without the latter's consent.
- b) June 1999 – June 2003: the period during which Uganda was found to be the occupying power in Ituri.

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<sup>6</sup> Paragraphs (3) and (4) of the Operative Part of the 2005 judgment

<sup>7</sup> 2005 Judgment, para. 260

<sup>8</sup> 2005 Judgment, para. 91



## 2.0 EVALUATION OF THE EVIDENCE

Honourable Ministers and distinguished delegates,

During the meeting of Experts held in Kinshasa December 2012, which was a follow up to the Joint Ad Hoc Committee meeting of September, 2012, each Country handed over documentation supporting its claim.

Upon request, Uganda received approximately 10,950 documents which we have evaluated. I am glad to report that all the documents that were in French and had to be translated were evaluated.

In evaluating the over 10,950 documents, we have established that the claims fall in the following broad categories:

- (a) Acts of killing and death
- (b) Acts of torture and personal injury
- (c) Loss of buildings, clothing and other personal property
- (d) Loss of profits and business

In evaluating the evidence in respect of each of the categories, we have been guided by the parameters specified by the International Court of Justice in the Judgement of 19<sup>th</sup> December, 2005 and by the applicable international law governing reparation for international wrongful acts in respect of each category.

Let me say from the onset, that this is not the first case regarding reparation in the world.

In the Gulf War Reparations Case, the UN Compensation Commission considered the compensation of Kuwait by Iraq resulting from Iraq's Unlawful Invasion and Occupation of Kuwait. The Commission decided to divide the claims into six categories for processing and disposition:

1. Category "A" consisted of claims for those individuals who had to leave Kuwait or Iraq between the invasion on August 2, 1990, and the end of hostilities on March 2, 1991.
2. Category "B" was for claims for individuals who suffered serious personal injury or lost a family member as a result of the invasion.
3. Category "C" claims were for individuals making claims for a variety of damages up to \$100,000.
4. Category "D" claims were for individuals seeking more than \$100,000 in compensation.
5. Category "E" claims were designed for corporations and other business entities.
6. Category "F" contained claims for governments and international organizations.

Category "B" claims were limited to \$2,500 to \$10,000 per claimant and were designed for the smaller personal injury claims that could be processed expeditiously with limited proof requirements.

The Commissioners could request additional information from the Category "B" claimants and were required to determine that there was a causal relationship between the conflict and the harm.

For other individual claims for departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses up to \$100,000, there was Category "C".

As with "A" and "B", the processing of "C" claims was expedited.

The issues of causation and valuation were left to the Commissioners. The level of supporting documentation for "C" claims varied considerably. The Commissioners were asked to



decide in any given case whether or not the damage claimed should be awarded, recognizing the practical difficulties of retrieving documents in the context of an armed conflict.

Reflecting the Governing Council's desire to expedite the "A", "B", and "C" claims, the evidentiary provisions in Article 35 of the Provisional Rules for Claims Procedures provided that the claimants had the responsibility for providing "simple documentation" for "A" and "B" claims and "appropriate evidence" for "C" claims. Other claims were required to "*be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.*" The Commissioners were the arbiters of the quantity and quality of evidence required, and they could request additional evidence for the "D", "E", and "F" claims.

### **3. 0 EVALUATION OF THE BROAD CATEGORIES OF THE CLAIMS BY THE DRC**

#### **1. ACTS OF KILLING AND DEATH**

After studying the international rules relating to acts of killing and death, we have established that the purpose of awarding damages for death can only be to provide compensation for probable future net economic benefits that were lost by death.

The damages must therefore account for the probable future income and cost of living in order to derive the net economic benefits lost.

In **MARGARET EMERSON BAKER AND OTHERS, AND REGINALD C. VANDERBILT AND OTHERS AS EXECUTORS OF THE ESTATE OF ALFRED G. VANDERBILT, DECEASED (UNITED STATES) V. GERMANY**, The United Nations Tribunal held that, in

assessing damages in death cases, the measure of awards is not value of life lost, but losses to claimants and that since no evidence offered of producing power of decedent, and pecuniary returns to widow and children from his bequests to them are greater than contributions received from him during his life, no damages can be allowed.

In **CAROLINE M. BRIDGE AND EDGAR G. BARRATT, ADMINISTRATORS OF THE ESTATE OF JUSTUS MILES FORMAN, ET AL. (UNITED STATES) v. GERMANY** The United Nations Tribunal Held that awards which Commission is empowered to make in death cases are not value of life lost (benefits of which decedent's estate was deprived), but losses to claimants themselves resulting from death, so far as susceptible being measured by pecuniary standards (see Administrative Decision No. VI, p. 155).

In the Legal **Opinion in the Lusitania Cases Vol VII P. 32-44 1<sup>st</sup> November 1923** the UN Arbitral Tribunal opined as follows; *“the General rule in both common and civil law countries is to give complete pecuniary compensation for loss resulting to claimant from death of human being. Applying the rule to Germany's obligations under the Treaty of Berlin (see Administrative Decision No. II, p. 23 supra), Commission will generally take into account: (a) amounts, and (b) personal services which decedent would have contributed to claimant, and (c) the latter's mental suffering, all reduced to present cash value.”*

According to the Tribunal, in death cases the law of probabilities and averages is to be applied in estimating damages: the factors to take into account include life expectancy and the deceased's probable physical and mental capacity and earning powers.



In death cases the right of action is for the loss sustained by the *claimants*, not by the estate. The basis of damages is, not the physical or mental suffering of deceased or his loss or the loss to his estate, but the losses resulting to claimants from his death. The enquiry then is: What amount will compensate claimants for such losses?

In reparation for death, the issue is not to punish the wrongdoer but to fix the amount which will compensate for the wrong done, in this case the Tribunal determined that it is important to estimate the amounts:

- (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto*
- (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add*
- (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.*

*In making such estimates there will be considered, among other factors, the following:*

- (a) The age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him;*
- (b) The probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy*



- tables and all other pertinent evidence offered will be considered;*
- (c) The reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;*
  - (d) The age, sex, health, condition and station in life, and probable life expectancy of each of the claimants;*
  - (e) The extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;*
  - (f) In reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5% interest rate and standard present-value tables will be used;*
  - (g) Neither the physical pain nor the mental anguish which the deceased may have suffered will be considered as elements of damage ;*
  - (h) The amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;*
  - (i) No exemplary, punitive, or vindictive damages can be assessed."*

Therefore, in order to arrive at the probable future net economic benefits that were lost by death we have established from the previous cases on reparation that the calculation must take into account the following inputs:

- (a) Assumed future years of work
- (b) Probable lost wages
- (c) Cost of living
- (d) Inflation and discount rates.

Other relevant factors to consider are:

- a) Age of the deceased person
- b) Proof of relationship between the claimant and victim.
- c) Proof of dependency
- d) List of dependants of deceased.
- e) Evidence of loss of prospective financial benefits/assistance
- f) Social economic circumstances of the victims

Since we are talking about claims in respect of death, we need to agree jointly on the nature of proof required to prove a claim for death. We propose that in order for a claim of death to succeed, evidence of death must be provided.

The nature of evidence required to prove death, cause of death or dependency may include the following:

- Death certificate where available
- Police report indicating death
- Autopsy reports and medical reports showing cause of death
- Affidavits or statutory declarations stating fact of death and causes
- Proof of funeral and other expenses
- Proof of earnings and income of deceased.

In the case of ***Eritrea -Ethiopia Claims the*** evidence included death certificates, extensive hospital records, and other contemporaneous documents. These proved numerous deaths and the hospitalization and subsequent treatment of many persons wounded in the bombings.

## **2. Acts of torture and personal injury**

Again, the international jurisprudence in respect of torture or personal injury provides that the purpose of awarding damages for

injury can only be to provide compensation for probable future net economic benefits that were lost by injury.

Like in the case of death, the damages must account for the probable future income and cost of living in order to derive the net economic benefits lost.

Any calculation for reparation must take into account:

- a) Assumed future years of work
- b) Probable lost wages
- c) Cost of living
- d) Inflation and discount rates.

Other relevant factors to consider include:

- (a) Circumstances under which the said injuries were inflicted
- (b) Level of disability caused by the injury
- (c) Social economic circumstances of the injured individuals

The nature of evidence required to prove injury may include any of the following:

- Medical reports proving extent of injury and level of disability
- Photographs depicting injuries
- Statements of eye witnesses
- Police report from area where incident occurred
- Medical reports pertaining to treatment of injuries

### **3. LOSS OF BUILDINGS, CLOTHING AND OTHER PERSONAL PROPERTY**

**Article VII(11)(b) of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* provides that**



victims of gross violations of international human rights law are entitled to adequate, effective and prompt reparation for harm suffered.

Generally, the nature and amount of reparation depend on the damage caused. Reparation is not meant to enrich or impoverish the victim or his or her heirs. ***Cesti Hurtado case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of 31<sup>st</sup> May 2001, Series C No. 78, paragraph 36***

Previously, compensation has been awarded based on equitable considerations.

- (a) In the case of ***Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo) (Compensation Owed by the Democratic Republic of Congo to the Republic of Guinea), ICJ, 2012*** the Court awarded the sum of US\$ 10,000 regarding the personal property of Mr. Diallo on the basis of equitable considerations. Guinea had claimed US\$550,000 as the value for all assets lost (both tangible and intangible). Court was satisfied that the DRC's unlawful conduct had caused some material injury to Mr. Diallo with respect to personal property that had been in the apartment in which he lived, although it would not be reasonable to accept the very large sum claimed by Guinea.
- (b) In the case of ***Lupsa v. Romania, Application No. 10337/04, Judgment of 8<sup>th</sup> June 2006, ECHR Reports 2006 - VII, paras. 70-72***. Court having regard to all the evidence before it and ruling on an equitable basis awarded the applicant EUR 15,000 to cover all heads of damage, and not Euros 271,000 as claimed by the applicant.

(c) The Court in **Chaparro Alvarez and Lapo Iniguez v. Ecuador**, Judgment of 21 November 2007 (Preliminary Objections, Merits, Reparations and Costs) IACHR, Series C, No. 170, paras. 240 and 242 decided in equity to establish US\$20,000 as the value of Mr. Lapo's house since no supporting documentation was presented. It established US\$ 40,000 as loss of Mr. Chaparro's apartment as opposed to US\$135,729.07 requested for, because it was "*unable to establish clearly the basis used by the expert to establish that the apartment was worth this amount, since no additional evidence or arguments have been submitted by the representatives in this regard.*"

Compensation must be assessed in consideration of the social and economic circumstances of the claimants.

(a) The claims Commission in the **Eritrea – Ethiopia Damages Claim, para 26** found that "*compensation must be assessed in light of the actual social and economic circumstances of the injured individuals in respect of whom the State is claiming*". In seeking compensation for looted and destroyed property, Ethiopia presented evidence that the per capita value of the properties concerned was between US\$339 and US\$506 depending on the social and economic circumstances of affected areas.

(b) According to the **World Bank** statistical data on the DRC, the Poverty head count ratio at national poverty line (% of population) was 71.3% as at 2005 ([www.data.worldbank.org](http://www.data.worldbank.org)). Therefore, since most of the population at the time, was living below the poverty line, then the per capita claim of US\$ 50,000 per individual cannot stand.

#### 4. LOSS OF PROFITS AND BUSINESS



According to the *United Nations Compensation Commission* there is need for claimants to provide “clear and convincing evidence of ongoing and expected profitability” (**report and recommendations made by the panel of Commissioners concerning the first installment of “E3” claims, 17 December 1998 (S/AC.26/1998/13), para. 147**). “It is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded” (**S/AC.26/1999/14), para. 140**)

Claims for loss of profits are only allowed if they are not too remote or speculative and were possible earnings in the ordinary course of events. *Cape Horn Pigeon Case* 9 UN Rep 63 (1902); *Spanish Zone of Morocco Case* 2 UN Rep 615 at 658 (1925)

- (a) “in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible” (***Damages in International Law* (Washington, D. C., United States Government Printing Office, 1943), vol. III, p. 1837**).
- “Financially assessable damage”, refers to damage which is capable of being evaluated in financial terms.
- (b) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost ***American International Group, Inc. v. The Islamic Republic of Iran*, which stated that, Iran-U.S. C.T.R., vol. 4, p. 96, at p. 106 (1983)**.<sup>1</sup>

(c) The preferred approach is to examine the assets of the business, making allowance for goodwill and profitability, as appropriate. This method has the advantage of grounding compensation as much as possible in some objective assessment of value linked to the tangible asset backing of the business. The value of goodwill and other indicators of profitability may be uncertain, unless derived from information provided by a recent sale or acceptable arms-length offer. *Wells Fargo and Company (Decision No. 22-B) (1926)*, American-Mexican Claims Commission (Washington, D. C., United States Government Printing Office, 1948), p. 153 (1926). See also decision No. 9 of the United Nations Compensation Commission Governing Council in “*Propositions and conclusions on compensation for business losses: types of damages and their valuation*” (S/AC.26/1992/9), para. 16

International Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. According to the arbitrator in the *Shufeldt case*, “the *lucrum cessans* must be the direct fruit of the contract and not too remote or speculative” (p. 1099). See also *Amco Asia Corporation and Others v The Republic of Indonesia* (footnote [785] 565 above), where it was stated that “non-speculative profits” were recoverable (p. 612, para. 178).

Three categories of loss of profits may be distinguished:

- (i) lost profits from income producing property during a period when there has been no interference with title as distinct from temporary loss of use;
- (ii) **lost profits from income-producing property between the date of taking of title and adjudication;**



- (iii) lost future profits in which profits anticipated after the date of adjudication are awarded.

The second category of claims relates to the unlawful taking of income-producing property. In such cases lost profits have been awarded for the period up to the time of adjudication, the **Factory at Chorzow case**, and in the **Norwegian Shipowners' Claims case**, lost profits were similarly not awarded for any period beyond the date of adjudication.

In other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest. In the **Oscar Chinn case** a monopoly was not accorded the status of an acquired right. In the **Asian Agricultural Products Limited v. Republic of Sri Lanka**, ICSID Reports (Cambridge University Press, 1997), vol. 4, p. 245 (1990), a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings.

Claims for lost profits are also subject to the usual range of limitations on the recovery of damages, such as causation, remoteness, evidentiary requirements and accounting principles, which seek to discount speculative elements from projected figures.

The function of compensation is “to address the *actual losses incurred as a result* of the internationally wrongful act” in **LG&E International Inc. v. Argentine Republic, Case No. ARB/02/1, award, 25 July 2007, paras. 41–43.**, the Tribunal observed that the issue that the Tribunal has to address is that of the identification of the ‘*actual loss*’ suffered by the investor ‘*as a result*’ of Argentina’s conduct. The question is one of ‘*causation*’: what did the investor lose by reason of the unlawful acts?

Therefore in determining a claim for loss of business profits, the following are critical:

**1. Causation:**

There must be a link between the wrongful act and the business or claim

what did the person lose by reason of the unlawful acts

**2. Remoteness**

In order to be allowable, prospective profits must not be too speculative, contingent or uncertain

**3. Evidentiary requirements**

4. There must be proof that they were *reasonably* anticipated by the business and that the profits anticipated were probable and not merely possible

5. **Assessment** must be based on accounting principles

**6. Time in relation to awards for lost profits**

Lost profits are not awarded for any period beyond the date of adjudication

**4.0 FINDINGS**

After examining the 10,950 documents submitted in support of the claim of DRC, we have found the following shortcomings:

- (a) Many of the documents fail to demonstrate the existence of the requisite causal link between the injury claimed and wrongful acts that are attributable to Uganda. In fact, some documents indicate that the perpetrators were the Rwandan army/RPA or *Forces de Resistance Patriotiques en Ituri (FRPI)*, and *Union de Patriotes Congolais (UPC)* thereby making it impossible to apportion damage to the specific perpetrators (particularly, Uganda) in such instances. These claims should therefore fail.



However, Uganda is potentially liable for damages of all forces, or combinations thereof, occurring in Ituri in the period June 1999 to June 2003 because she was adjudged by the ICJ as the occupying power in Ituri.

- (b) Some of the claims exceed the limitations of the 2005 Judgment *ratione materiae* because they seek damages for wrongful acts for which Uganda was not specifically found responsible; e.g. rape. Therefore, any claims for rape including those that are consolidated with claims for other injuries must be excluded.
- (c) Many of the submitted documents do not even indicate the location where claimed injuries occurred, and those that do must be subject to additional investigation to determine whether they do not exceed the limitations *ratione loci*. As explained above, damages that occurred in Kitona, Mobenzene, Bururu, Bomongo and Moboza are not recoverable.
- (d) Some claims exceed the limitations *ratione temporis* because they seek damages not falling within the period between August 1998 and 2<sup>nd</sup> June 2003.
  - i. In the matrix of evidence attached, claims for damages which occurred in 1997, the year before Uganda was even in the DRC should be excluded.
  - ii. Some claims even provide for a span of more than one year making it difficult to determine the specific perpetrator and location and it also raises questions as to the credibility of the claims e.g. the claim in the report on smuggled minerals to Uganda provides for 1998/2003 to the tune of US\$ 1,984,430,000.00 (US Dollars 1.9 Billion). In addition, some claims go beyond 2003 up to 2010. Damages cannot therefore



be recovered for the periods when Uganda was not in a particular location or even in the DRC.

- (e) In many cases, damages are not shown with a reasonable degree of certainty with some claims being completely speculative. Notably, the process for determining property loss claims should have required each claimant to provide supporting evidence or documentation. It should be noted that information was compiled five (5) or more years after the occurrence of the damages claimed.

Similarly unsubstantiated/speculative are claims for property damages asserted by private and state legal entities. Consider the claim for Kilo-Moto Gold Mines damages to the tune of US\$ 5,303,551,027 (US Dollars 5.3 Billion) for industrial equipment/infrastructure which was not backed by any credible evidence with particulars such as who did what and when and how the mine was damaged. There was even no pre-war information relating to the status of the mine as a basis for the amount. See also Exhibits 7 and 8 which are both enterprises claiming for US\$25,140,854 (US Dollars 25 Million) and US\$16,275,466.49 (US Dollars 16.2 Million) respectively for merchandise, materials and households. Likewise, without any other evidence to support these claims, the costs could even have been inflated or false. The same applies to the claim by Ituri General Trade and Breeding Cogevi which claims US\$ 1,384,960 (US Dollars 1.38 Million) and many others.

It is noteworthy that for most claims the DRC fails to provide any supporting documentation that might lend credibility to such claims, including for example: (a) documentation in the form of invoices or bids, for the actual or estimated costs of reconstruction, repair of damaged buildings or restocking

looted farms; (b) surveys undertaken during or just after the war to assess the damage to property and the cost of restoration of civilian services (for example, health, education, water and electricity supply), rather than 'investigations' conducted for purposes of litigation; (c) detailed statements from witnesses with first-hand knowledge (for example, a school official or a court administrator) describing the relevant building and the destruction or looting, and attaching a detailed list of property lost with values. **To the contrary, the DRC only submits property lists or inventories that are unsigned, undated or otherwise lacking authentication, or containing patently exaggerated evaluations.** Such "evidence" would be given little or no evidentiary weight in determining the amount of compensation by the Court of we proceed to the Reparations Phase, failing inter-party negotiations.

This is of particular concern because the DRC seeks US\$ 50,000 per capita for approximately 7,800 property damage claims, although it nowhere attempts to justify this extraordinarily high sum or tie it to the actual evidence of harm.<sup>9</sup> This amount implies that value per property is more than 100 times the net amount that an average person would earn in their working life, which is not only incredible but speculative.

- (f) Multiple evidentiary shortcomings also affect claims for physical or moral injuries, or killings. Most have no description of the temporal or spatial circumstances giving rise to the injuries claimed; no indication of the perpetrators; and no explanation of the methodology used for calculating the claimed amounts.

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<sup>9</sup> DRC claim for damages, page 10 of the Annex



The probative value of such evidence is questionable especially in light of the dramatic discrepancy between the damages claimed by individuals and the per capita damages claimed by the DRC. As the evidence demonstrates, individual death claims vary from US\$200 to US\$40,000; whereas the DRC claims US\$ 500,000 (US Dollars Five Hundred Thousand) for every alleged death. Calculation of the average death damages claim by the DRC should have taken into account the probable future income including life expectancy, the cost of living, and the prevailing inflation and discount rates because the purpose of awarding damages for death and injury is to provide compensation for future lost income and no to enrich claimants. Notably, the Eritrea-Ethiopia Claims Commission found a per capita death claim of even US \$5,000 (US Dollars Five Thousand) to be significantly inflated and speculative.

Moreover under most legal systems, death claims must vary from person to person and they take into account the money that the individual would have spent on the dependants and not the value of the income earned.

(g) Most claims are not proportionate to the actual injury and do not take into account the actual social and economic conditions of the eastern DRC and the Great Lakes region as a whole, which has been characterised by instability and suffering for a period of time. For example, the DRC claims US\$50,000 per capita for the individual property losses. How, it must be asked, is this amount proportionate to an injury consisting of the theft of “6 pieces of tie-died material, 5 pants, 6 shirts, a pair of shoes, 1 coffee scale, one radio, one cuff, 2,900 shillings” (See Exhibit 2). The same applies to claims for physical and moral damages. (See Exhibit 3).

- (h) The colossal damages claimed by companies and individuals who do not even specify their profession or source of income suffer the same deficiencies; for example the claim by the company La Forestiere which seeks US\$2,295,060; the claim by Sotexki company which seeks US\$1,816,000, the claim by Vumuliya Justine which seeks US\$1,600,600, and the claim by Lemalema-Botende which seeks US\$850,000.
- (i) A further issue is that the claims by individuals should have been made on behalf of households considering that families in a household would have the same claim in order to avoid duplicity of claims.
- (j) Further, under international law, no compensation is payable for macro-economic damage, war expenses and for injury or death of soldiers in an armed conflict. Compensation is payable only if a State fails to protect the life of wounded or sick soldiers or Prisoners of War (POWs) under the Geneva Conventions.
- (k) The model that the DRC used in her claim, namely the Iraq-Kuwait case is not comparable to the DRC-Uganda claim in the following areas:
- i. The establishment of the United Nations Claims Commission in the Iraq-Kuwait case was done through a political process under Chapter VII of the United Nations Charter. Its function was distinct from the ICJ as it was mandated to examine the claims, verify their validity, evaluate the losses, assess payments and resolve disputed claims.<sup>10</sup>
  - ii. The Security Council expressly determined that Iraq was “liable for any direct loss, damage or injury arising in

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<sup>10</sup> Report of the Secretary General pursuant to Paragraph 19 of Security Council Resolution 687 (1991) 8/22559, 2<sup>nd</sup> May 1991



regard to Kuwait and third States, and their nationals and corporations as a result of the invasion and illegal occupation of Kuwait by Iraq<sup>11</sup> while none of the UN Resolutions attributed sole responsibility for the DRC conflict to Uganda.

- (l) The vast majority of the documents were prepared in 2008 by the DRC Government institutions based on data collected by the Evaluation Commission which had been established by the Government to verify and validate the estimates of the damages.<sup>12</sup> Specifically, the Ministry of Justice and Human Rights compiled most of the individual claims using forms that had been designed to collect specific data. Therefore, since most of the information was provided by proxy, it cannot be totally relied upon. The information needed to have been backed by proof of country data collected for example during a national census or any other related means. Instead, what the DRC relied on as databases are several websites covering several African countries whose sources include the World Bank.<sup>13</sup> This by itself also limits the reliability of the claims which were based on a questionable and unverifiable methodology. International courts and tribunals have always treated such evidence with great caution.

## **WAY FORWARD**

I wish to conclude by saying that the above evaluation of the evidence provided by the DRC to support her claim should not in itself be the final conclusion of the matter but rather the evaluation

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<sup>11</sup> UNSC Resolution 687

<sup>12</sup> Paras. 7 and 8, p.4, DRC Claim for damages.

<sup>13</sup> DRC Claim for damages, pages 42 and 43

should facilitate the arbitration and negotiation process towards reaching a final and amicable solution through the spirit of cooperation and brotherliness as was envisaged in the bilateral cooperation framework handed over to us by our two Presidents and expressed in the Ngurdoto Agreement.

Against that background, I propose **THAT**: -

***(a) A set of parameters or criteria for admissibility of a claim should be discussed and agreed upon by both parties to facilitate negotiation and computation of the final compensation.***

*I have pointed out some of the critical considerations that may be included in respect of each claim*

***(b) We create subcommittees along the major categories of claims to study the category and make recommendations after applying the agreed parameters.***

***The subcommittees may be established to consider them thematically as below***

1. Subcommittee 1- Acts of killing and death
2. Subcommittee 2- Acts of torture and personal injury
3. Subcommittee 3- Loss of buildings, clothing and other personal property
4. Subcommittee 4- Loss of profits and business
5. Subcommittee 5- Counter claims

*(c) The subcommittee recommendations should be presented to the council of Ministers for adoption before they are presented to our Heads of State for final conclusion of this matter.*

I THANK YOU  
FOR GOD AND MY COUNTRY

**Annex 5-A**

Ministry of Foreign Affairs of Uganda, *Letter to the Solicitor General, Ministry of Justice and Constitutional Affairs, in regard to measurements for the Uganda renovated building located at plot 17 avenue Tombalbaye, District of Gombe, City of Kinshasa, Democratic Republic of Congo* (26 Sep. 2016)





Telegram: EXTERIOR, KAMPALA  
 Telephone: 345661/257525/258252  
 Fax: 258722/232874/230911  
 Website: www.mofago.ug  
 E-mail: ps@mofago.ug



Ministry of Foreign Affairs  
 P. O. Box 7048,  
 KAMPALA,  
 UGANDA.

THE REPUBLIC OF UGANDA

In any correspondence on  
 this subject please quote no: RST/34/100/01

26<sup>th</sup> September 2016

The Solicitor General  
 Ministry of Justice and Constitutional Affairs  
 KAMPALA

**MEASUREMENTS FOR THE UGANDA RENOVATED BUILDING LOCATED AT  
 PLOT 17 AVENUE TOMBALBAYE, DISTRICT OF GOMBE, CITY OF KINSHASA,  
 DEMOCRATIC REPUBLIC OF CONGO**

I write to inform you that the renovated and modified building owned by the Uganda Embassy (Ambassade d'Ouganda) on No.17 Avenue Tombalbaye, Commune Gombe, Kinshasa has the following features:

- (i) The Main Building comprises of the ground (which used to serve as the chancery of the Embassy of Uganda); the second floor with Apartment Flat No. 1 and Apartment Flat No.2 (which used to serve as residences for the diplomatic staff of the Uganda Embassy), and the upper floor with Apartment Flat No.3 (which used to serve as residence of the Diplomatic Staff of the Uganda Embassy) and Apartment Flat No. 4 (which is a newly added unit)
- (ii) The Annex Building comprises of a ground floor (which used to serve as stores and garage) and an upper floor with Annex Flat 1 (formerly a residence of the Embassy staff) and Annex Flat 2 (which is a newly added unit).

The above described premises have the following sizes of usable:

- (i) The Main Block has 1,080 (One thousand eighty) square meters of which 180 (one hundred eighty) square meters were added as modifications in respect of Apartment Flat no. 4.
- (ii) Annex Block has 268 (Two hundred sixty eight) square meters of which 58 (fifty eight) square meters were added as a new Annex Flat no.2

Therefore the total measured usable space for the entire structure totals to 1,348 square meters out of which 238 square meters (17.65%) were added as modifications to the old structure.

*S/Dave*  
 Benon Kayemba

For: **PERMANENT SECRETARY**

cc. The Ambassador, Uganda Embassy, Brussels





## **Annex 6**

Government of Uganda and the Government of the Democratic Republic of Congo, *Agreed Minutes of the Ministerial Level Meeting between the Republic of Uganda and the Democratic Republic of Congo (25 May 2010)*







*DRC  
Head/ERC  
Head/RC*

*Let us discuss  
follow up  
Jan 25/05*

**AGREED MINUTES OF THE MINISTERIAL LEVEL MEETING BETWEEN THE REPUBLIC OF UGANDA AND THE DEMOCRATIC REPUBLIC OF CONGO HELD ON 25<sup>TH</sup> MAY, 2010**

Ugandan Delegation	DRC Delegation
1. Hon. Sam Kutesa, Minister of Foreign Affairs	1. Hon. Alexis Thambwe Mwamba, Minister of Foreign Affairs
2. Hon. Khiddu Makubuya, Attorney General / Minister of Justice & Constitutional Affairs	2. Hon. Emmanuel Luzolo Bambi, Minister of Justice & Human Rights
3. Hon. Crispus Kiyonga, Minister of Defence	3. Amb Jean Charles Okto, DRC Ambassador/Uganda
4. Amb James Kinobe, Uganda Ambassador/DRC	

The DRC delegation arrived in Uganda on 24<sup>th</sup> and departed on 26<sup>th</sup> May, 2010.

The purpose of the meeting was to consider the ICJ case ruling pursuant to Article 8 of the Ngurdoto – Tanzania Agreement between the Democratic Republic of Congo and the Republic of Uganda on Bilateral Cooperation Ngurdoto, Tanzania 8<sup>th</sup> September, 2007.

Article 8 of the Ngurdoto Agreement, provides that: Implementation of the judgment of the International Court of Justice (ICJ). The parties agree to constitute, with each party nominating no more than 7 members, an ad Hoc committee to study the ICJ judgment in case concerning Armed Activities on the DRC Territory (DRC v Uganda) and recommend to the JPC modalities of implementing its orders on the question of Reparations.

The composition of the Ad Hoc committee in Annex 1 is Uganda side and the Congolese side is Annex 2.

The Joint Team will adopt a Workplan, rules of procedure and determine timeframes for completing work.

As per Article 8 of the Ad Hoc committee shall report to the JPC; including the modalities for implementing the work plan.

The DRC Report which has been received by Uganda at this Session and Uganda's response to it will constitute some of the working documents before the joint Ad Hoc Committee.

Done at Kampala this 25<sup>th</sup> day of May, 2010



Hon. Sam Kutesa  
MINISTER OF FOREIGN AFFAIRS



Hon. Alexis Thambwe Mwamba  
MINISTER OF FOREIGN AFFAIRS

ANEX 1

COMMISSION OF DR CONGO EXPERTS

- 1 MR TSHIBANGU KALALA
- 2 MR KALENGA KA NGOYI
- 3 PROFESSEUR LEON MBADU KONDE
- 4 PROFESSEUR LWAMBA KATANSI
- 5 MRS PAUNI TUPA
- 6 MR MABAYA MASENGULA EMMANUEL
- 7 MR BONGI EFOLOTE

DONE IN KAMPALA - 25 MAY 2010

  
ALEXIS THAMBWE MWAMBA

MINISTRE DES AFFAIRES ETRANGERES






ANNEX 2

COMMISSION OF UGANDAN EXPERTS

- 1 AMB ALEXIE KYEYUNE
- 2 MR JOHN B R SUUZA
- 3 MAJ TIMOTHY KANYOGONYA
- 4 MR MARTINEZ A MANGUSHO
- 5 MR C BWIRAGURA
- 6 MR MIKE BUGASON
- 7 REPRESENTATIVE OF MINISTRY OF FINANCE, PLANNING & ECONOMIC DEV

DONE IN KAMPALA – 25 MAY 2010



SAM K KUTESA

MINISTER OF FOREIGN AFFAIRS



**Annex 7**

Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the Ministerial Meeting between the Republic of Uganda and the Democratic Republic of Congo* (13-14 Sept. 2012)



**MINUTES OF THE MINISTERIAL MEETING BETWEEN THE REPUBLIC OF UGANDA AND  
THE DEMOCRATIC REPUBLIC OF CONGO**

13th – 14th September 2012  
JOHANNESBURG, SOUTH AFRICA

Congoese Delegation	Ugandan Delegation
Hon. Wivine MUMBA MATIPA, Minister of Justice and Human Rights	Hon. Sam K. KUTESA, Minister of Foreign Affairs
Hon. TUNDA YA KASENDE, Deputy Minister of Foreign Affairs	Amb. James MUGUME, Permanent Secretary, Ministry of Foreign Affairs
Mr BENE MPOKO, Ambassador of DRC in South Africa	Mr. James KINOBE, Ambassador of Uganda in DRC
Hon. OKOTO LOLAKOMBE, Ambassador of DRC in Uganda	
Mr. Me Nehemie MWILANYA, Legal Adviser of the President	

**I. INTRODUCTION**

In line with Article 8 of the Ngurdoto agreement (Tanzania) of 8<sup>th</sup> September 2007, the Ministerial meeting of both Governments held in Johannesburg, South Africa on 13<sup>th</sup>-14<sup>th</sup> September 2012 to assess Uganda's response relating to the claim made by DRC in its damages assessment report handed over to the Ugandan Government during the joint meeting held in Kampala (Uganda) on the 25<sup>th</sup> May 2010.

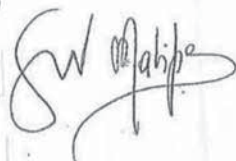
The Ministers were accompanied by their respective experts and members of the Ad Hoc Committees as per the annexed list.

**II OPENING SESSION**

The meeting was jointly opened by the Honorable Minister of Foreign Affairs of Uganda and Her Excellency the Minister of Justice and Human Rights of the DRC.

In his opening remarks, Hon. Sam K. KUTESA, Minister of Foreign Affairs of Uganda thanked the Congoese delegation for accepting Uganda's proposed date for the Joint Ad hoc Committee meeting.

1/4





He commended the DRC on successful elections and took note of positive developments in Uganda and the DRC bilateral relations. He also reiterated Uganda Government's commitment to further strengthen bilateral relations and to reach a fair and speedy settlement in the matter between the two parties as per the ruling of the International Court of Justice.

Her Excellency Mrs. Wivine MUMBA MATIPA, Minister of Justice and Human Rights of DRC, expressed the gratitude of the Congolese Government for the positive role played by Uganda in the stabilization of the Great Lakes region. She further expressed the commitment of the DRC Government to resolve the dispute in order to respond to the legitimate aspirations of our people in order to focus on the matters of interest to both countries namely social and economic development, peace and stability in the region.

#### CONTENT OF UGANDA'S RESPONSE

1. Uganda, in presenting the response to the DRC claim for damages, highlighted that the DRC claim for damages was excessive and exaggerated and does not observe the parameters of the International Court of Justice.
2. Uganda therefore requested the DRC to review its claim and present a more realistic figure that takes into account the parameters set by the International Court of Justice to determine reparations.

#### IV. DRC'S RESPONSE

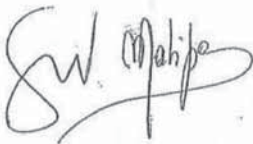
Regarding the Uganda Financial claim relating to the assault of its embassy, DRC feels that it is exaggerated, disproportionate and unfounded according to relevant and credible proofs. The DRC has instead proposed to pay an amount of USD 10,000 on the basis of the premises assessment report done by both parties in 2002.

With regard to Uganda's response to the claim formulated by DRC, the Congolese party insisted that Uganda should propose an amount which they consider to be reasonable and proportionate in the settlement of the reparation claim made by DRC.

#### V. CONCLUSION

After discussion, both parties have agreed on the following:

1. Within a period of six (6) months from the date of this meeting, the two parties should work together to present respective proofs to support any figures that will be ultimately agreed upon in respect of both claims in order to reach a negotiated settlement of the dispute.



2. Pursuant to Paragraph 1 above:

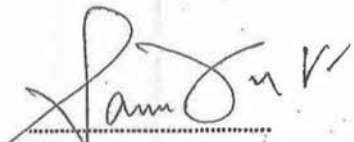
- a. The first meeting shall take place between October and November 2012 in Kinshasa, during which the experts from Uganda will verify supporting documents/proofs as the basis of the financial claim by the DRC, on the same occasion Uganda shall present proofs relating to the caused damages at the Ugandan embassy in Kinshasa;
  - b. There shall be a second meeting of experts in South Africa in February, 2013 at which both parties will respectively present their concrete offers;
  - c. The third meeting between both countries shall be held at Ministerial level in Johannesburg, South Africa in March 2013 in order to conclude negotiations related to the ruling of the International Court of Justice of 19<sup>th</sup> December 2005;
3. The International Court of Justice shall be fully informed by both parties on the conclusions of current negotiations in accordance with the provisions of its ruling dated 19<sup>th</sup> December 2005.

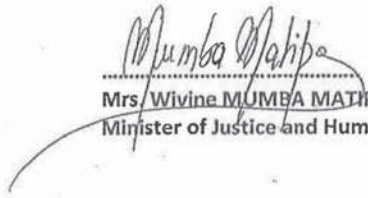
VI These Minutes are written and signed in both French and English, both versions being equally authentic.

Done in Johannesburg, South Africa on 14<sup>th</sup> day of September 2012

For the Republic of Uganda

For the Democratic Republic of Congo

  
Hon. Sam K. KUTESA  
Minister of Foreign Affairs

  
Mrs. Wivine MUMBA MATIPA  
Minister of Justice and Human Rights

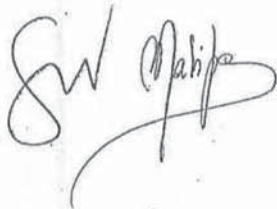
**ANNEX**

**THE UGANDA DELEGATION:**

1. Hon. Sam K. Kutesa, Minister of Foreign Affairs
2. Amb. James Mugume
3. Amb. James Kinobe
4. Amb. Alexie Kyeyune
5. Amb. Juliet Kalema
6. Mr. John Bosco Suuza
7. Mr. Timothy Kanyogonya
8. Mr. Gilbert Kermundu
9. Dr. Albert Musisi
10. Mr. Francis Wanyina
11. Mrs. Kasule Margaret
12. Mr. Ssenabulya Steven
13. Ms. Patricia Habu
14. Mr. Benon Kayemba
15. Mr. Ssekabembe Daniel

**THE DEMOCRATIC REPUBLIC CONGO DELEGATION:**

1. Hon. Wivine Mumba Matipa, Minister of Justice
2. Hon. Ntunda Ya Kasende, Deputy Minister of Foreign Affairs
3. Prof. Nyabirungu Mwene Songa
4. Mr. Me Nehemie Mwilanya
5. Prof. Tshibangu Kalala
6. Mr. Kilomba Ngozi Mala
7. Ms. Paoni Tupa Melanie
8. Mr. John MuambaTshibangu
9. Mr. Ntendayi Nshimba
10. Mr. Manono Ndala Ulrich



## **Annex 8**

Government of Uganda and the Government of the Democratic Republic of Congo, *Minutes of the 3rd Meeting of Uganda and Congolese Experts on the Implementation of the Ruling of the International Court of Justice of 19 December 2005* (14 Dec. 2012)





**MINUTES OF THE 3<sup>RD</sup> MEETING OF UGANDA AND CONGOLESE EXPERTS ON  
THE IMPLEMENTATION OF THE RULLING OF THE INTERNATIONAL COURT OF  
JUSTICE OF 19 DECEMBER 2005**

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**I. INTRODUCTION**

In conformity with Article 8 of the Ngurdoto Agreement (Tanzania) of 8<sup>th</sup> September 2007 the DRC and Uganda delegations sat in a meeting in Johannesburg (South Africa) on 13<sup>th</sup> and 14<sup>th</sup> September 2012 to examine the response to the DRC financial claim in its evaluation report submitted to the Government of Uganda during the meeting organized between both parties at Kampala on 25<sup>th</sup> May 2012.

During the working meeting above held in Johannesburg, both parties concluded a bilateral Agreement on 14<sup>th</sup> September 2012 as indicated in part V that within six months from that date both parties will work together to assemble evidence of their respective claims in order to reach an acceptable agreement in the different presentations.

That the first meeting was to be held Kinshasa in which the Ugandan Experts will receive and verify documents supporting the DRC claim and at the same occasion the Ugandan Experts were to presents documents to prove the damages claimed against Uganda Embassy in Kinshasa.

The working meetings at Kinshasa are organized in conformity of the Ngurdoto Agreement and the Johannesburg meetings cited above. The list of the experts of the ADHOC committee of both parties is attached in this document.

**II. OPENING OF WORKING SESSION**

The working session started on Monday 10 December 2012. During this occasion, Mrs. Mumba Wivine Matipa, Minister of Justice and Human Rights, in her introductory remarks welcomed the Uganda delegation to Kinshasa, indicated that the DRC and Uganda are friendly and brotherhood countries that are bound to live together and to hold amicable

relations of good neighborhood and requested experts of both parties to work in spirit of trust and amicable transparency.

### III. WORKING PROCEDURE

The actual technical work of the Experts Committee started on Tuesday 11 December 2012, after the brief speech made by Honorable Tunda Ya Kasende, Vice Minister of Foreign Affairs to the participants. In his speech the Vice Minister insisted on the fraternal and excellent relation that does not only exist between the Uganda and Congolese people but also between their Excellencies, Presidents Yoweri K. Museveni and Joseph Kabange. He also requested the experts of both parties to work in a spirit of trust and amicable transparency.

During the working session the Uganda experts saw, photocopied the evidence presented by the Congolese Party of the damages caused in Ituri, Kisangani, Benim Butembo and Djamena; and documents related to the physical and moral damages and to the Congolese State.

They have therefore photocopied approximately 10950 documents and taken them to Kampala for evaluation of the proof of the claim made by the DRC. The Democratic Republic of Congo will transmit the Verbal Note to the Embassy of Uganda in Kinshasa related to identification of the photocopies that were made.

The Congolese experts on their side received documents of evidence supporting the claim to the damages of the Embassy at Kinshasa amounting to 141 pages.

The both parties in conformity with part V 2/a of the Johannesburg Agreement agreed to meet again in February 2012 in Johannesburg to discuss the proposed amounts presented by both parties in the execution of the decision of the International Court of Justice of 19 December 2005.

**IV. CLOSING OF WORKING SESSION**

The experts working session of both parties ended on Friday 14 December 2012 by Honorable Tunda Ya Kasende, Vice Minister of Foreign Affairs. During the occasion, he wished a safe journey to the return of the Uganda delegation to Kampala

**V. WORKING LANGUAGE**

The text of this document was drafted in English and French, both texts being equally authentic.

Done at Kinshasa this 14<sup>th</sup> day of December 2012.

For the Democratic Republic of Congo

Mr Yvon Kalonda Kele Oma  
**Head of Congolese delegation**



For the Republic of Uganda



**AMB. JAMES KINOBE**  
**Ambassador of the**  
**Republic of Uganda**



**ATTACHEMENT**

**LIST OF DELEGATIONS**

**Ugandan Delegation**

- 1- Amb. James W.L. KINOBE, *Head of Delegation*
- 2- Amb. Alexie KYEYUNE, *Head of the Technical Expert Team/ Ministry of Foreign Affairs*
- 3- Mr. John Bosco R. SUUZA
- 4- Mr. Timoty KANYOGONYA
- 5- Ms. Lucy KABEGE
- 6- Ms. Patricia HABU
- 4- Mr. MBABAZI ARAALI
- 8- Mr. Steven MUHUMUZA
- 9- Benon KAYEMBA

**DRC delegation**

- 1- KALONDA KELE-OMA Yvon, *Head of the Delegation, Director of Cabinet/Min. Justice and Human Rights*
- 2- Prof. TSHIBANGU KALALA, *Lawyer of the Congolese Government*
- 3- NTUMBA KAPITA Patrice
- 4- KASONGO KIOMBA Dominique
- 5- MUJAMBA TSHIBANGU John
- 6- KITENGE OTUL Patrick
- 7- Mrs. PAONI TUPA Mélanie
- 8- KILOMBA NGOZI MALA Noël
- 9- NTENDAYI NSHIMBA Honoré
- 10- NGALU KALALA Jules

## **Annex 9**

Government of Uganda and the Government of the Democratic Republic of Congo, *Agreed Minutes of the 2nd Ministerial Meeting of the Ad Hoc Committee of Uganda/Democratic Republic of Congo on the Implementation of the Ruling of the ICJ (2005) (24-27 Nov. 2014)*



<p>AGREED MINUTE OF THE 2ND MINISTERIAL MEETING OF THE AD HOC COMMITTEE OF UGANDA / DEMOCRATIC REPUBLIC OF CONGO ON THE IMPLEMENTATION OF THE RULING OF THE ICJ (2005) WAS HELD ON 24-27 NOVEMBER 2014 AT INDABA, JOHANNESBURG</p>	<p>COMMUNIQUE FINAL DE LA 2ème REUNION MINISTERIELLE DU COMITE AD HOC REPUBLIQUE D'UGANDA/REPUBLIQUE DEMOCRATIQUE DU CONGO SUR L'EXECUTION DE L'ARRET DE LA CIJ(2005) TENUE DU 24 au 27 NOVEMBRE 2014 A INDABA, JOHANNESBURG</p>
<p><b>1.0. INTRODUCTION:</b></p> <p>The 2nd Ministerial Meeting of the Ad hoc Committee of Uganda / Democratic Republic of Congo on the Implementation of the Ruling of the ICJ (2005) was held on 24-27 November 2014 at Indaba, Johannesburg in line with Article 8 of the Ngurdoto Agreement (2007).</p> <p><b>1.1. List of Delegation</b></p> <p>Uganda delegation was led by Hon Peter Nyombi, Attorney General of Uganda and included Hon. Kahinda Otafire, Minister of Justice and Constitutional Affairs, Hon. Daudi Migereko, Minister of Lands, Housing and Urban Development, Hon. Henry Oryem Okello, Acting Minister of Foreign Affairs, and Hon. Jeje Odongo, Minister of State for Defence.</p>	<p><b>1.0. INTRODUCTION</b></p> <p>La 2ème Réunion Ministérielle du Comité ad hoc République d'Ouganda / République Démocratique du Congo sur l'exécution de l'Arrêt de la CIJ (2005) s'est tenue du 24 au 27 Novembre 2014 à Indaba, Johannesburg en conformité avec l'Article 8 de l'Accord de Ngurdoto (2007).</p> <p><b>1.1. Liste des délégations</b></p> <p>La délégation de la République d'Ouganda était conduite par l'Honorable Attorney General de l'Ouganda et comprenait l'Honorable Kahinda Otafire, ministre de la Justice et des Affaires Constitutionnelles, Hon. Daudi Migereko, Ministre des Terres, Habitat et Développement Urbain, Hon. Henry Oryem Okello, Ministre a.i. des Affaires Etrangères et Hon. Jeje Odongo,</p>

No





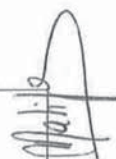
<p>DRC Delegation was led by H.E Wivine MUMBA Matipa, Minister of Justice and Human Rights of DRC, Principal Advisor of the DRC President in Charge of Legal Affairs, H.E. Bene L. MPOKO, DRC Ambassador in Pretoria and H.E. Jean-Charles OKOTO LOLAKOMBE.</p> <p>A list of the delegations is attached as <b>Annex A</b>.</p> <p><b>1.3. AGENDA</b></p> <p>The meeting adopted the following agenda:</p> <ol style="list-style-type: none"> <li>1) Registration</li> <li>2) Opening Statements</li> <li>3) Response by Uganda on DRC Claim</li> <li>4) Consideration of the Report of the Committee of Experts</li> <li>5) Response by DRC on Counter claim</li> <li>6) Any other Business (AOB)</li> </ol>	<p>Ministre d'Etat à la Défense.</p> <p>La délégation de la RDC était conduite par S.E. M. Wivine MUMBA Matipa, Ministre de la Justice et Droits Humains et comprenait le Conseiller Principal du Président de la République en charge du college Juridique, Mr Néhémie Mwilanya, S.E.M. L'Ambassadeur Plénipotentiaire de la RDC à Pretoria, Bene L. MPOKO et S.E.M. L'Ambassadeur de la RDC à Kampala, Jean-Charles OKOTO LOLAKOMBE.</p> <p>La liste des délégués est jointe en <b>Annexe A</b>.</p> <p><b>1.3. ORDRE DU JOUR</b></p> <p>La réunion a adopté l'ordre du jour ci-après:</p> <ol style="list-style-type: none"> <li>1) L'Enregistrement</li> <li>2) Les discours d'ouverture</li> <li>3) La réponse de l'Ouganda à la réclamation de la RDC</li> <li>4) L'examen du rapport des Experts</li> <li>5) La réponse de la RDC à la demande reconventionnelle de l'Ouganda</li> <li>6) Divers</li> </ol>
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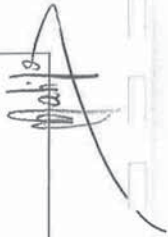
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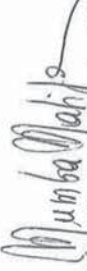
Matipa

<p><b>2.0. OPENING STATEMENTS</b></p> <p><b>2.1. Statements by the delegation of Uganda</b></p> <p>Hon. Oryem Okello, Acting Minister of Foreign Affairs of Uganda delivered the opening remarks on behalf of Uganda. The statement is attached as Annex B.</p> <p><b>2.2. Statement by the delegation of DR Congo</b></p> <p>H.E Wivine MUMBA Matipa delivered opening remarks on behalf of the DR Congo. The statement is attached as Annex C.</p> <p><b>3.0. RESPONSE BY UGANDA ON THE CLAIM OF DR Congo</b></p> <p>Hon. Peter Nyombi, the Attorney General of Uganda presented a speech on the general response to the DR Congo Claim. The speech is attached as Annex D.</p>	<p><b>2.0. LES DISCOURS D'OUVERTURE</b></p> <p><b>2.1. Discours de la délégation de la République d'Ouganda</b></p> <p>L'Hon. Oryem Okello, Ministre a.i. des Affaires Etrangères de la République d'Ouganda a fait le discours d'ouverture au nom de l'Ouganda. Le discours est joint en Annexe B.</p> <p><b>2.2. Le discours de la délégation de la DR Congo</b></p> <p>S.E.M Wivine MUMBA Matipa a livré le discours d'ouverture au nom de la DR Congo. Le discours est joint en Annexe C.</p> <p><b>3.0. LA REPOSE DE REPUBLIQUE D'UGANDA A LA RECLAMATION DE LA DR Congo.</b></p> <p>L'Hon. Peter Nyombi, Attorney General de la République d'Ouganda a présenté le discours en guise de réponse générale à la réclamation de la DR Congo. Le discours est joint en Annexe D.</p>
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ds



<p><b>4.0 CONSIDERATION OF THE REPORT OF EXPERTS</b></p> <p>(i) The Ministers took note of the Report of Experts in Annex E.</p> <p>(ii) Ministers directed that the two positions be harmonized as soon as possible. Thereafter, the two parties shall meet before mid February 2015 in South Africa to conclude the negotiations.</p> <p>(iii) DRC proposes that Uganda look at the parameters used by DRC and Uganda will be at liberty to criticize them and make a response on what is right instead of coming with new parameters. The response should be done within one month.</p>	<p><b>4.0. EXAMEN DU RAPPORT DES EXPERTS</b></p> <p>(i) Les Ministres ont pris acte du rapport des experts en Annexe E.</p> <p>(ii) Les Ministres ont décidé que les deux positions soient harmonisées dès que possible. Dès lors, les deux parties ont convenu de se réunir à nouveau avant mi-février 2015 en Afrique du Sud pour conclure les négociations.</p> <p>(iii) La RDC propose que l'Ouganda examine les paramètres utilisés par la RDC et reconnait à la République d'Ouganda la latitude de les critiquer et de faire une contre proposition sur ce qu'il estime approprié plutôt que de proposer des nouveaux paramètres. La réponse devrait être donnée dans un mois.</p>
<p>do</p>	<p></p>

<p>Done at Johannesburg, South Africa on 27<sup>th</sup> November 2014</p> <p> Hon. Daudi Migereko, MP Minister of Lands, Housing and Urban Development For and on behalf of the Republic of Uganda</p>	<p>Fait à Johannesburg, Afrique du Sud le 27 Novembre 2014</p> <p> S.E.M. Wivine Mumba Matipa Ministre de la Justice et Droits Humains Pour la République Démocratique du Congo</p>
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## **Annex 10**

Government of Uganda and the Government of the Democratic Republic of Congo, *The Joint Report of the Meeting of Experts of the Democratic Republic of Congo and the Republic of Uganda on the Implementation on the Judgment of the ICJ of 19th December 2005* (13-17 Mar. 2015)



Annex 7.

<p align="center"><u>THE JOINT REPORT OF THE MEETING OF EXPERTS OF THE DEMOCRATIC REPUBLIC OF CONGO AND THE REPUBLIC OF UGANDA ON THE IMPLEMENTATION OF THE JUDGEMENT OF ICJ OF 19<sup>TH</sup> DECEMBER 2005 HELD, IN PRETORIA, SOUTH AFRICA ON 13<sup>TH</sup> - 17<sup>TH</sup> MARCH 2015</u></p>	<p align="center"><u>RAPPORT CONJOINT DE LA REUNION DES EXPERTS DE LA REPUBLIQUE DEMOCRATIQUE DU CONGO (RDC) ET DE LA REPUBLIQUE DE L'UGANDA EN RAPPORT AVEC L'EXECUTION DE L'ARRET DE LA CIJ DU 19 DECEMBRE 2005 TENUE A PRETORIA, REPUBLIQUE D'AFRIQUE DU SUD, DU 13 AU 17 MARS 2015</u></p>
<p><b>I. INTRODUCTION</b></p> <p>1.1. on 13-17 March 2015, at Burgers Park Hotel, Pretoria, the delegations of Uganda and DRC of senior officials co-chaired Advocate Andrew Kalenga-Ka-Ngoyi, Deputy Director of Cabinet of the Ministry of Justice, Guardian of the official seal and Human Rights of the DRC, and Ambassador James Mugume, Permanent Secretary, Ministry of Foreign Affairs of the Republic of Uganda.</p> <p>1.2. <i>In conformity with Para 4 of the Agreed Minutes of the 3<sup>rd</sup> Ad Hoc Joint Committee of Uganda /DRC Ministerial Meeting held from 24<sup>th</sup> to 27<sup>th</sup> November 2014 at Indaba, Johannesburg, and determined to give effect to paragraph 4 of the Agreed Minutes which states that DRC proposes that Uganda looks at the parameters used by DRC and will be at liberty to criticize them and make a response of what is right instead of coming with new parameters within one month.</i> Uganda</p>	<p><b>I. INTRODUCTION</b></p> <p>1.1. Du 13 au 17 mars 2015, il s'est tenu à Burgers Park Hotel, à Pretoria, en République Sud-Africaine (RSA), la réunion des experts co-présidée par Me André Kalenga Ka-Ngoyi, Directeur de cabinet adjoint de Monsieur le Ministre de la Justice, Garde des Sceaux et Droits humains de la République Démocratique du Congo et l'Ambassadeur James Mugume, Secrétaire général du Ministère des Affaires étrangères de la République de l'Ouganda.</p> <p>1.2. En effet, en rapport avec le quatrième paragraphe du communiqué final de la 3<sup>ème</sup> Réunion ministérielle du Comité ad hoc RDC-Ouganda sur l'exécution de l'arrêt de la CIJ du 19 décembre 2005 tenue à Indaba (Johannesburg) du 24 au 27 novembre 2014, il avait été demandé à l'Ouganda (i) d'examiner les paramètres utilisés par la RDC, (ii) de les critiquer, (iii) de faire une contre-proposition sur ce qu'il estimait approprié, au lieu de proposer de nouveaux</p>

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<p>submitted its official response to the DRC Government on 19<sup>th</sup> February 2015.</p> <p><b>II. AGENDA</b></p> <p>The meeting adopted the following agenda</p> <ol style="list-style-type: none"> <li>1. Registration of the delegates</li> <li>2. Adoption of the program of work</li> <li>3. Opening remarks by Heads of Delegations</li> <li>4. Designation of rapporteurs</li> <li>5. Methodology of Work</li> <li>6. Technical Presentations by both delegations</li> <li>7. Observations and Way forward</li> <li>8. Conclusion</li> </ol> <p><b>III. REGISTRATION OF DELEGATES</b></p> <p>The lists of members of two delegations are attached as Annex A (DRC) and B (Uganda)</p> <p><b>IV. PROGRAM OF WORK</b></p> <p>The meeting adopted its program of work attached as annex C.</p> <p><b>V. OPENING REMARKS</b></p> <p>Both heads of delegations made opening remarks during the</p>	<p>paramètres et (iv) de répondre dans un délai d'un mois. L'Ouganda a soumis sa réponse officielle au Gouvernement de la RDC le 19 février 2015.</p> <p><b>II. ORDRE DU JOUR</b></p> <p>La réunion a adopté l'ordre du jour ci-après :</p> <ul style="list-style-type: none"> <li>- Enregistrement des délégués ;</li> <li>- Adoption du programme de travail ;</li> <li>- Mot d'ouverture par les chefs de délégation ;</li> <li>- Désignation des rapporteurs ;</li> <li>- Méthodologie de travail ;</li> <li>- Présentation par les deux délégations ;</li> <li>- Constats et perspectives d'avenir</li> <li>- Conclusion</li> </ul> <p><b>III. ENREGISTREMENT DES DELEGUES</b></p> <p>Les listes des membres de deux délégations sont reprises aux annexes A (RDC) et B (Ouganda) du présent rapport.</p> <p><b>IV. ADOPTION DU PROGRAMME DE TRAVAIL</b></p> <p>La réunion a adopté le programme de travail repris à l'annexe C.</p> <p><b>V. MOTS D'OUVERTURE PAR LES CHEFS DE</b></p>
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<p>opening session of the meeting. These are annexed as D (Uganda) and E (DRC).</p> <p><b>VI. DESIGNATION OF RAPORTEURS</b></p> <p>The DRC designated Mr. Marc MUKABA N'KIEL (Prime Minister's Office) and Valence BOLEBE EKOSSO'GOMBE (Advisor of the Minister of Justice, Guardian of the official seals and Human Rights) as rapporteurs</p> <p>Uganda designated by Mr. Benon Kayemba (Ministry of Foreign Affairs) and Mr. Geoffrey Madete (State Attorney, Ministry of Justice and Constitutional Affairs as rapporteurs.</p> <p><b>VII. METHODOLOGY OF WORK</b></p> <p>Both Parties agreed on the following methodology of work:</p> <p>(i) To use the following reference documents: The Judgment of the ICJ of 2005, the Ngurdoto Agreement of 2007, the DRC Claim report submitted on 25<sup>th</sup> May 2010 in Kampala; the Uganda's Response resubmitted on 19<sup>th</sup> February 2015 through diplomatic channels; the Agreed Minutes and Reports of the previous Meetings.</p>	<p><b>DELEGATION</b></p> <p>Les chefs de délégation ont eu à adresser des mots de circonstance à l'ouverture de la session, repris aux annexes D (Ouganda) et E (RDC).</p> <p><b>VI. DESIGNATION DES RAPORTEURS</b></p> <p>La partie congolaise a désigné Messieurs Marc Mukaba N'kiel (Conseiller au Cabinet du Premier Ministre) et Valence Bolebe Ekosso'Gombe (Conseiller du Ministre de la Justice, Garde des Sceaux et Droits humains) en qualité des rapporteurs de la délégation.</p> <p>Du côté ougandais, ont été désignés rapporteurs Messieurs Benon Kayemba (Ministère des Affaires étrangères) et Jeff Madete (Ministère de la Justice et des Affaires constitutionnelles).</p> <p><b>VII. METHODOLOGIE DE TRAVAIL</b></p> <p>Les deux délégations ont accepté de travailler sur base de la méthodologie suivante :</p> <p>(i) Faire recours aux différents documents de travail ci-après : Arrêt de la CIJ de 2005, Accord de Ngurdoto de 2007, Document d'évaluation de la RDC de 2010, document de contre-proposition de la République de l'Ouganda de 2015 et les divers procès-verbaux.</p> <p>(ii) Procédure de travail : les deux délégations ont montré des</p>
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<p>(ii) Procedure of Work. The two delegations had divergent views on the subject:</p> <ul style="list-style-type: none"> <li>▪ Uganda preferred to consider item by item of the DRC claim in a systematic manner;</li> <li>▪ DRC preferred to make general comments in response to Uganda's presentation.</li> </ul> <p><b>VIII. PRESENTATION BY THE DELEGATIONS</b></p> <p><u>Uganda</u></p> <p>1.Uganda made its presentation entitled "RESPONSE OF THE GOVERNMENT OF UGANDA TO: "EVALUATION OF THE DAMAGE SUFFERED BY THE DRC BECAUSE OF THE INTERNATIONALLY ILLEGAL ACTS COMMITTED BY UGANDA BETWEEN 1998 AND 2003, SUCH AS FOUND BY THE INTERNATIONAL COURT OF JUSTICE IN ITS DECISION OF 19 DECEMBER 2005" AND UGANDA'S COUNTER CLAIM RELATING TO THE ATTACKS ON AND SEIZURE OF THE UGANDAN EMBASSY IN KINSHASA, AND THE MALTREATMENT OF UGANDAN DIPLOMATS AND OTHER NATIONALS."</p> <p>2.Without prejudice, Uganda presented her response that was officially submitted to the DRC on 19<sup>th</sup> February 2015 through diplomatic channels. A copy of Uganda's Response is attached as Annex F</p>	<p>divergences à ce sujet :</p> <ul style="list-style-type: none"> <li>- L'Ouganda a opté pour une présentation point par point des deux documents d'évaluation ;</li> <li>- La RDC a opté pour une réponse globale aux différents points évoqués par la partie ougandaise.</li> </ul> <p><b>VIII. PRESENTATION PAR LES DEUX DELEGATIONS</b></p> <p><u>Partie ougandaise</u></p> <p>1..L'Ouganda a fait sa présentation intitulée « REPONSES DU GOUVERNEMENT DE L'OUGANDA A L'« EVALUATION DES DOMMAGES SOUFFERTS PAR LA RDC SUITE AUX ACTES INTERNATIONALEMENT CRIMINELS COMMIS PAR L'OUGANDA ENTRE 1998 ET 2003, TELS QUE JUGES PAR LA COURT INTERNATIONALE DE JUSTICE DANS SA DECISION DU 19 DECEMBRE 2005 » ET LA CONTRE-EVALUATION DE L'OUGANDA EN RAPPORT AVEC LES ATTAQUES SUR ET LA SAISIE DE L'AMBASSADE DE L'OUGANDA A KINSHASA, ET LE MAUVAIS TRAITEMENT INFLIGE AUX DIPLOMATES OUGANDAIS ET D'AUTRES RESSORTISSANTS».</p> <p>2.Sans préjudice, la partie ougandaise a présenté sa réponse qui avait été officiellement transmise à la RDC en date du 19 février 2015 par voie diplomatique. Ci-joint comme annexe F une copie de la réponse de l'Ouganda.</p>
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<p>3. Uganda contended that:</p> <p>(a) While collecting data, the DRC did not follow the internationally acceptable standards of collection of data which include collection of primary evidential materials, verification, analysis and evaluation. The DRC relied on the figures proposed by the claimants without any verification, analysis or evaluation.</p> <p>(b) Some of the claims contained in the DRC Claim are outside the scope of the ICJ judgment in terms of time, nature and geographical areas. The DRC included claims relating to:</p> <p>(i) rape and compensation for the members of the armed forces.</p> <p>(ii) damage for the events after 2<sup>nd</sup> June 2003; and</p> <p>(iii) Zongo, Bomanga and Bongadanda.</p> <p>All these are outside the scope of the Ruling of the ICJ</p> <p>(c) The autonomous foreign experts (the International Cell) which was used by DRC seems to have just rubber stamped what the DRC had submitted to them instead of doing their own independent analysis.</p> <p>(d) The two cases of <i>Iraq vs Kuwait</i> and <i>Lockerbie</i> that the DRC seems to be strongly relying on are distinguishable because they relate to countries with socio economic circumstances that are different from</p>	<p>3. L'Ouganda a argumenté que:</p> <p>(a) Le processus de collecte des données de la RDC n'a pas obéi aux standards internationalement acceptables en la matière, lesquels incluent la collecte des éléments de preuve élémentaires, la vérification, l'analyse et l'évaluation. La RDC s'est fiée aux chiffres proposés par les victimes sans vérification, analyse ou évaluation aucunes.</p> <p>(b) Certaines des réclamations de la RDC outrepassent le champ d'application de l'arrêt de la CIJ en termes des facteurs temporels, substantiels et spatiaux. La RDC a inséré des réclamations relatives aux :</p> <p>(i) viols et indemnisations des membres des forces armées.</p> <p>(ii) dégâts pour des faits postérieurs au 2 juin 2003; et</p> <p>(iii) Zongo, Bomanga et Bongadanda.</p> <p>Tous ces éléments sortent du champ d'application de l'arrêt de la CIJ.</p> <p>(c) Les experts indépendants étrangers (la Cellule internationale) auxquels la RDC a eu recours semblent n'avoir fait rien d'autre qu'avaliser ce que la RDC leur a transmis au lieu d'effectuer leur propre analyse indépendante.</p> <p>(d) Les deux affaires <i>Irak-Koweït</i> et <i>Lockerbie</i> sur</p>
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<p>DRC and Uganda.</p> <p>(e) According to the ICJ Judgment of December 2005 the DRC bears the evidentiary burden to prove the exact injury that it suffered as a result of the specific actions of Uganda for which it is responsible under international law.</p> <p>(f) The DRC seeks compensation in three broad categories: macroeconomic damages; material and non-pecuniary damages suffered by DRC; and material and non-pecuniary damages suffered by natural/legal entities. No specific proof, much less of specific injuries caused by Uganda, is offered to support the claims in any of these categories.</p> <p>(g) The DRC Submission is not only inconsistent with the express ruling of the Court, it is also inconsistent with elementary principles concerning the duty to make reparation in international law. The law of State responsibility in international law is clear that to be compensatable, damages must be non-speculative and proved with a reasonable degree of certainty. Each and every element of damage claimed falls short</p>	<p>lesquelles la RDC se base pour défendre sa position ne sont pas les mêmes, vu les conditions socioéconomiques de ces pays avec la RDC et l'Ouganda.</p> <p>(e) D'après l'arrêt de la CIJ de décembre 2005, la charge de la preuve incombe à la RDC pour démontrer le préjudice exact qu'elle a subi, les actions spécifiques de l'Ouganda dont il est responsable en vertu du droit international.</p> <p>(f) La RDC réclame des indemnisations dans trois larges catégories : dommages macroéconomiques ; dommages matériels et non pécuniaires subis par la RDC ; et dommages non pécuniaires subis par des personnes physiques/morales. Aucune preuve spécifique, encore moins des préjudices spécifiques causés par l'Ouganda, n'est offerte pour appuyer les revendications dans une quelconque de ces catégories.</p> <p>(g) Non seulement le document d'évaluation de la RDC contredit les prescrits de l'arrêt de la Cour, mais aussi il énerve les principes élémentaires du droit international en matière de l'obligation de paiement des réparations. Le principe de la responsabilité étatique dans le droit international est clair que pour prétendre à l'indemnisation, les dommages doivent être non spéculatifs and prouvés avec une certitude raisonnable. Aucun des éléments des dommages ne</p>
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<p>of these basic standards.</p> <p>(h) There is no evidence that the DRC segregated the damages in the areas where there was more than one military group and where Uganda was not the occupying force such as Kisangani, where the Court took judicial notice of the presence of other forces.</p> <p>After critiquing the DRC methodology and evaluation, Uganda used the internationally accepted principles derived from the jurisprudence on reparation and state responsibility in matters of compensation.</p> <p>Uganda proposed that a sum of <b>USD 25, 500,000</b> should be offered by Uganda to the DRC as reparation for the damage suffered by the DRC and in satisfaction of the ICJ Ruling of 19<sup>th</sup> December, 2005</p> <p>Uganda also presented a counterclaim of <b>USD 3,760,000</b> after reviewing the evidence available in respect of the destruction of the property of the Embassy of Uganda in DRC.</p> <p>Uganda proposed that the rates and amount of reparation should be referred to the Ministers</p>	<p>satisfait à ces standards de base.</p> <p>(h) Dans les zones où il y avait plus d'un groupe militaire et où l'Ouganda n'était pas la seule force d'occupation, tel qu'à Kisangani, il n'y a pas de preuve que RDC ait fait le distinguo avec les dommages prétendument causés par d'autres groupes armés dans ces zones.</p> <p>Après avoir critiqué la méthodologie et l'évaluation de la RDC, l'Ouganda a eu recours aux principes internationalement acceptés découlant de la jurisprudence en matière de réparation et de responsabilité étatique dans les questions touchant à l'indemnisation.</p> <p>L'Ouganda a proposé un montant de <b>USD 25,500,000</b> à titre de réparation offerte par l'Ouganda à la RDC pour le dommage subi par cette dernière et ce pour satisfaire à l'arrêt de la CIJ du 19 décembre 2005.</p> <p>L'Ouganda a présenté une contre-évaluation de <b>USD 3,760,000</b> après avoir examiné les preuves disponibles concernant la destruction des biens de l'Ambassade de l'Ouganda en RDC.</p> <p>L'Ouganda a proposé que les taux et montants de la réparation soient référés aux Ministres</p> <p><b>Partie congolaise</b></p> <p>Par courtoisie, la partie congolaise a laissé à la partie</p>
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<p><b>Democratic Republic of Congo Response</b></p> <p>Out of courtesy, the DRC delegation left the discretion to the Uganda delegation to present its own, technical document which led to a bigger under estimation of the different damages inflicted to the Congolese populations as a result of armed activities exercised on the DRC territory, valued at less than 1% of the amount claimed.</p> <p>In reaction, the DRC found that Uganda presentation had the following shortcomings:</p> <ol style="list-style-type: none"> <li>1. it is not consistent with the theory of evidence in that Uganda is asking DRC to prove, while it was on the same basis of evidence provided by the DRC that the ICJ condemned Uganda. The DRC further states that the complementary evidence gathered during five years in application of the ICJ judgment was submitted to the Uganda Government in 2010;</li> <li>2. the onus was on Uganda, which rejected evidence presented by the DRC, to come up with its own evidence on which it bases the paltry sum of the proposed reparation;</li> <li>3. it is indecent at this stage for Uganda to ask the DRC to present evidence regarding infringing acts it committed in areas it occupied;</li> </ol>	<p>ougandaise le soin d'exposer son document technique qui a conduit à une trop grande sous-estimation des différents préjudices causés à la population congolaise, suite aux activités armées exercées sur le territoire de la RDC, soit ± 1% du montant réclamé.</p> <p>Pour toute réaction, la RDC trouve que cet exposé pêche sur les points suivants :</p> <ol style="list-style-type: none"> <li>1. l'Ouganda exige encore à la RDC de prouver, pendant que c'est sur base de preuves fournies que la CIJ l'a condamné, et que les preuves supplémentaires, réunies pendant 5 ans en exécution de l'arrêt de la CIJ, ont été remises en mai 2010 au Gouvernement ougandais;</li> <li>2. il appartient à l'Ouganda, en rejetant en bloc les preuves avancées par la RDC, de présenter les preuves contraires sur lesquelles il s'est appuyé pour arrêter le montant dérisoire de la réparation proposée actuellement;</li> <li>3. c'est donc une turpitude pour l'Ouganda que de demander, une fois de plus, à la RDC de présenter à ce niveau les preuves des actes délictueux commis dans</li> </ol>
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<p>4. according to the principle of <i>Nemo auditur suam turpitudinem allegans</i>, Uganda cannot absolve itself from liability for acts committed by other military forces in the occupied areas which were under its control and administration, therefore under its responsibility;</p> <p>5. It is clear that legally, in citing the fact that Uganda was not the only occupying military power, nor the only force to have looted and committed various violations, intended to excuse itself from exclusive responsibility imposed by the ICJ judgment.</p> <p>6. By proposing an amount of reparation for the deaths, Uganda thereby acknowledges that its armed occupation led to deaths but the issue would be in terms of amount for reparations.</p> <p>7. Consequently, the amount proposed by Uganda for death seems to be the same amount which it seeks from DRC for the renovation of its chancery building, which gives the impression that the Congolese deaths are less valuable than a building, even if it is an Embassy's</p>	<p>la partie par lui occupée ;</p> <p>4. en vertu du principe « <i>Nemo auditur suam turpitudinem allegans</i> », l'Ouganda ne peut s'exonérer des actes commis par d'autres forces militaires dans la partie occupée qui était à la fois sous son contrôle et sous son administration ;</p> <p>5. il est évident que juridiquement, en excipant du fait qu'il n'aurait pas été la seule force militaire occupante, ni la seule force à avoir pillé et commis les divers méfaits lui imputés, la responsabilité lui incombe exclusivement conformément au dispositif de l'arrêt de la CIJ ;</p> <p>6. à titre purement illustratif, en proposant le montant d'indemnisation pour les morts (soit ±308 USD par personne décédée), l'Ouganda reconnaît par là que son occupation armée avait engendré des cas de décès, mais le problème se poserait en termes de montant de réparation.</p> <p>7. Aussi, ledit montant proposé sur ce point (mort d'hommes) équivaut pratiquement à ce que l'Ouganda réclame au titre de rénovation de sa chancellerie à Kinshasa qui n'avait connu que quelques dégâts matériels, ce qui donne l'impression que les morts congolais valent moins qu'un immeuble, fut-il celui d'une ambassade ;</p>
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<p>8. the DRC rejects Uganda's position whereby it is incumbent on the Ministers to focus on the issue of determining the amount of reparation, and yet the Ngurdoto Accords vested such authority with both parties' experts;</p> <p>9. finally, Uganda is referring to international law and jurisprudence which it interprets selectively for its own convenience.</p> <p><b>Clarification by Uganda</b></p> <p>Uganda expressed the view that the methodology, relevant documents with credible data and relevant jurisprudence are duly contained in its Response. Uganda's view was that in order to arrive at any quantum of reparation, the Parties must engage in technical discussions on the basis of the reparation.</p> <p>In view of the disagreement between the Parties, Uganda proposes the matter of quantum of reparation payable by each of the Parties should be referred to the Ministers.</p> <p>Uganda further proposes that DRC presents a detailed response its offer giving reasons why its not acceptable. Uganda also requests that the DRC makes concrete response</p>	<p>8. la RDC réfute la position de l'Ouganda selon laquelle il appartiendrait aux Ministres de se concerter pour pouvoir déterminer le montant de l'indemnisation, alors même que l'accord de Ngurdoto confère cette compétence aux experts de deux parties (article 8) ;</p> <p>9. enfin, l'Ouganda allègue les règles et jurisprudences internationales qu'il interprète à sa guise rien que pour le besoin de la cause.</p> <p><b>Clarification par l'Ouganda</b></p> <p>La partie ougandaise a défendu la position que la méthodologie, les pièces pertinentes avec des données fiables et la jurisprudence appropriée étaient dument reflétées dans son document d'évaluation. L'Ouganda est d'avis qu'afin de déterminer un quelconque quantum ou réparation, les Parties devraient s'engager dans des discussions techniques basées sur la réparation.</p> <p>Vu le désaccord entre Parties, la question du quantum des réparations payables par chaque Partie devrait être référée aux Ministres. L'Ouganda a par ailleurs appelé la RDC à répondre à sa proposition en soumettant sa contre-proposition.</p> <p>L'Ouganda a par ailleurs proposé que la RDC réponde à sa proposition en fournissant une contre-proposition sur base de la contre-évaluation de l'Ouganda.</p>
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<p>to its counter claim..</p> <p><b>OBSERVATIONS AND WAY FORWARD:</b></p> <p>(i) <u>Areas of agreement</u></p> <p>Parties noted the following as points of agreement :</p> <ul style="list-style-type: none"> <li>▪ That the parties agree to implement the ruling of the Court (ICJ).</li> <li>▪ As recommended by the ICJ both parties agree that bilateral process is the best way to reach a mutually acceptable settlement.</li> </ul> <p>(ii) <u>Areas of disagreement</u></p> <p>The Parties noted the following as points of disagreement:</p> <p><u>DRC position</u></p>	<p><b>CONSTATS ET PERSPECTIVES D'AVENIR</b></p> <p>A. <u>Constats</u></p> <p>Il s'est dégagé de la position prise par les deux parties, les points de convergence et de divergence suivants :</p> <p>1. <i>Points de convergence</i></p> <p>Les deux parties reconnaissent la pertinence de l'arrêt de la CIJ du 19 décembre 2005.</p> <p>Elles respectent la décision de la Cour leur demandant de se mettre d'accord sur le montant de la réparation.</p> <p>2. <i>Points de divergence</i></p> <p>Les deux parties ne s'accordent pas sur les points suivants :</p> <p><u>RDC</u></p> <p>L'Ouganda rejette certains dommages retenus par la RDC, notamment les dommages environnementaux, les dommages macro-économiques, éducatifs, sanitaires et les lésions corporelles.</p> <p><b>2°. le montant de la réparation.</b></p> <p>La délégation ougandaise trouve que le montant de 23.514.943.928 USD proposé par la RDC est excessif et spéculatif.</p>
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<p><u>UGANDA'S PROPOSAL</u></p> <p>Whereas the RDC claims USD 23,514,943,928 which includes unverified claims like the 3,589 death claims and other numerous claims which are outside the scope of the judgment and the principles on reparations, Uganda proposes a sum of USD 25,500,000 calculated in accordance with the international principles governing the payment of reparations.</p> <p>(a) Uganda rejects the following claims which are not verified and /or compensatable according to the principles of international law:</p> <ul style="list-style-type: none"> <li>(i) Damage to environment</li> <li>(ii) Wounded soldiers</li> <li>(iii) Macro- economic damages</li> </ul>	<p>tandis que la RDC trouve que le montant de 25.500.000 USD proposé par l'Ouganda est dérisoire et inacceptable.</p> <p><b>3°. la responsabilité</b></p> <p>L'Ouganda soutient actuellement que sa responsabilité doit être partagée avec d'autres acteurs qui étaient avec lui sur le terrain des hostilités.</p> <p>La RDC s'en tient aux termes de l'arrêt de la CIJ qui condamne clairement et seul l'Ouganda à réparer tous les dégâts causés du fait de son occupation armée et du non contrôle des forces irrégulières ayant opéré son occupation avérée.</p> <p><u>OUGANDA</u></p> <p>Alors que la RDC réclame le montant de USD 23.514.943.928, lequel inclut des réclamations non vérifiées tels les 3.589 morts qui n'ont pu être vérifiées ou évaluées par la RDC ainsi que diverses réclamations qui ne sont en dehors du champ d'application du jugement et des principes régissant les réparations, l'Ouganda propose un montant de USD 25.500.000 calculé en accord avec les principes internationaux en matière des réparations.</p> <p>(a) L'Ouganda rejette les réclamations suivantes qui ne sont pas payables en droit international:</p> <ul style="list-style-type: none"> <li>(i) Dommages causés à l'environnement</li> <li>(ii) les soldats blessés</li> <li>(i) les dommages macro-économiques</li> <li>(ii) Pertes de trésorerie</li> </ul>
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<p>(iv) loss on the treasury (v) Breakdown of civil order and economic chaos</p> <p>(b) Whereas Uganda presents USD 3,760,000 as its counterclaim for the damage to her Embassy in DRC, the DRC is offering a paltry USD 10,000 without any justification.</p> <p><b>B. WAY FORWARD</b></p> <p>Reiterating the wishes as expressed in the spirit of the Ngurdoto Accords and other discussion frameworks between the two countries, the experts have resorted to their respective Ministers to give appropriate directions.</p> <p>The Parties take note with concerns that this is the forth meeting without reaching a mutually acceptable conclusion and recommend notably to:</p> <ul style="list-style-type: none"> <li>- Continue the discussions and find a political solution within the spirit of Ngurdoto;</li> <li>- Refer the matter for decision by the two Heads of State;</li> </ul> <p>The Parties note that there has been some progress in the Negotiations between the Parties as illustrated by the mutual efforts expended so far to reach a negotiated settlement. However, in order to take the process further, Parties</p>	<p>(iv) Rupture de l'ordre civil et chaos économique</p> <p>(b) Alors que l'Ouganda réclame USD 3.760.000 comme contre-évaluation pour le dommage causé à son Ambassade en RDC, la RDC n'offre que la somme dérisoire de USD 10.000</p> <p><b>B. PERSPECTIVES</b></p> <p>Réitérant les vœux tels qu'il ressort de l'esprit des accords de Ngourdoto et d'autres cadres de discussion entre les deux pays, les experts s'en remettent à leurs Ministres respectifs pour donner des directives appropriées.</p> <p>Les experts prennent en compte avec préoccupation que c'est la quatrième rencontre sans résultat satisfaisant et recommandent, notamment, de :</p> <ul style="list-style-type: none"> <li>- continuer les discussions et de trouver une solution politique, selon l'esprit des accords de Ngourdoto ;</li> <li>- soumettre la question à l'appréciation des deux Chefs d'Etat ;</li> </ul> <p>Les Parties notent qu'il y a eu progrès dans les Négociations. Elles recommandent que tout point de désaccord soit soumis à la Session Ministérielle de la Grande Commission Mixte sous les auspices de l'Accord de Ngurdoto.</p>
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<p>recommend that identified point of agreement or disagreement should be referred to the Ministerial Session of the Joint Permanent Commission under the Ngurdoto Agreement for consideration and guidance.</p> <p><b>X. CONCLUSION</b></p> <p>The experts of the two countries acknowledged that discussions took place in a cordial atmosphere</p>	<p><b>X. CONCLUSION</b></p> <p>Les experts de deux pays reconnaissent que les pourparlers se sont déroulés dans une atmosphère empreinte de cordialité.</p>
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Fait à Pretoria, à Burgers Park Hotel, le 17 mars 2015

Done at Burgers Hotel, Pretoria this 17<sup>th</sup> Day of March 2015

Amb. James Mugume  
FOR REPUBLIC OF UGANDA

Me André Kalenga Ka-Ngoyi  
LE CHEF DE LA DELEGATION, RDC

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## **Annex 11**

Government of Uganda and the Government of the Democratic Republic of Congo, *The Agreed Minutes of the 4th Meeting of Ministers of the Democratic Republic of Congo and the Republic of Uganda on the Implementation of the Judgment of the ICJ of 19th December 2005* (17-19 Mar. 2015)





Annex 1

THE AGREED MINUTES OF THE 4<sup>TH</sup> MEETING OF MINISTERS OF  
THE DEMOCRATIC REPUBLIC OF CONGO AND THE REPUBLIC OF  
UGANDA ON THE IMPLEMENTATION OF THE JUDGEMENT OF ICJ  
OF 19<sup>TH</sup> DECEMBER 2005 HELD, IN PRETORIA, SOUTH AFRICA ON  
17<sup>TH</sup> - 19<sup>TH</sup> MARCH 2015

PREAMBLE

CONSIDERING the ruling of the International Court of Justice of 19<sup>th</sup> December 2005 in the case entitled "*Armed Activities on Territory of the Congo (Democratic Republic of the Congo v. Uganda)*"

RECALLING the contents of paragraphs 260 and 261 of the ruling of the International Court of Justice of 19<sup>th</sup> December 2005, which provided for negotiations to be conducted between the two parties in good faith to determine the amount of reparation due to the DRC and Uganda;

GUIDED by the Ngurdoto-Tanzania Agreement between the Democratic Republic of Congo and the Republic of Uganda on Bilateral Cooperation of 8<sup>th</sup> September 2007 signed by the Heads of State and determined to give full effect to Article 8 on the implementation of the Judgment of the International Court of Justice (ICJ) of 19<sup>th</sup> December 2005);

THEREFORE :

1. The Ministerial Delegations of the Democratic Republic of Congo and Republic of Uganda met in a cordial manner for the 4<sup>th</sup> Joint Ad Hoc Committee Ministerial Committee from 17<sup>th</sup> to 19<sup>th</sup> March, 2015 in Pretoria, Republic of South Africa.
2. The Delegation of Democratic Republic of Congo led by H.E. Mr. Alexis Thambwe Mwamba, Minister of Justice and Human Rights and Guardian of Official Seals, accompanied by H.E. Mr. Aime Ngoi Mukena Lusa



Diese, Minister of National Defence, Veterans and Re-integration; H.E Mr Bene L. M'Poko, Ambassador of the DRC in Pretoria; H.E Mr. Charles Okoto Lolakombe, Ambassador of the DRC in Kampala, and Mr. Nehemie Mwilanya Wilondja, Legal Advisor of the President of the DRC.

3. The delegation of the Republic of Uganda was led by Hon. Maj. General Kahinda Otafiire, Minister of Justice and Constitutional Affairs and accompanied by Hon. Fred Ruhindi, Minister / Attorney General of Uganda; Hon. Daudi Migereko, Minister of Lands, Housing and Urban Development; Hon. Henry Okello Oryem, Acting Minister of Foreign Affairs; Hon. General Jeje Odongo, Minister of State for Defence; and H.E Mr. James Kinobe, Ambassador of Uganda in Kinshasa
4. The Meeting considered the following documents:
  - (a) The Joint report of the Senior Officials and Experts of the two countries dated 17<sup>th</sup> March 2015,
  - (b) The proposed criteria by the Republic of Uganda, and
  - (c) Specific Response by the DRC to the new proposed criteria by Uganda
5. Uganda proposes that:
  - (a) There is need for the parties to agree on the criteria which should be used as a basis for the compensation payable to the DRC.
  - (b) The DRC and Uganda should conduct Joint verification and analysis of the 7400 documents provided by the DRC based on the agreed criteria.
6. In the spirit of brotherhood and good neighborliness and without prejudice,:
  - (a) Uganda withdrew its counter claim in respect of the damage on its Embassy property in Kinshasa.



(b) Uganda revised her initial offer of reparations payable to the DRC from USD 25,500,000 to USD 37,028,368.

7. The Democratic Republic of Congo :

- (a) Objected to using any criteria to assess her claim.
- (b) The DRC insisted that there should be no further negotiations at technical and Ministerial level following the spirit of the 3<sup>rd</sup> Joint Ad Hoc Ministerial Committee Meeting of 24-27 November 2014..
- (c) The DRC accepts the withdrawal of Uganda's counter's claim of USD 3,760,000, which DRC had admitted as due and owing but rejects the offer by Uganda of the USD37,280,368 as being insignificant.
- (d) The DRC insists that since there is no agreement, the matter should be referred to the ICJ.

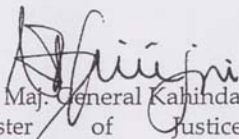
**NOW THEREFORE:**

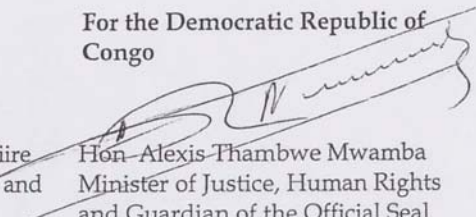
Since there is no consensus reached, the Parties resolved that there should be no further negotiations at technical and Ministerial level and that the matter should be referred to the Heads of State within the framework of the Ngurdoto Agreement on Bilateral Cooperation between Uganda and the DRC of 2007 for further guidance.

Done on this 19<sup>th</sup> day of March, 2015, at Pretoria in the Republic of South Africa in both French and English languages and both texts are equally authentic.

For the Republic of Uganda

For the Democratic Republic of  
Congo

  
Hon. Maj. General Kahinda Otafiire  
Minister of Justice  
and  
Constitutional Affairs

  
Hon. Alexis Thambwe Mwamba  
Minister of Justice, Human Rights  
and Guardian of the Official Seal

Annex 3

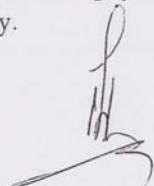
PROPOSED CRITERIA

1. We propose that we be guided by the ICJ Judgment of 19<sup>th</sup> December 2005; thus excluding claims outside the scope of the Judgment. These include:
  - a) Rape
  - b) Claims arising in the period outside 8<sup>th</sup> August 1998 to 2<sup>nd</sup> June 2003.
  - c) Areas court said Uganda was not present; Zongo, Bomanga and Bongadanga
2. Follow principles of international law and exclude the following claims; Macro Economic damages, wounded soldiers, loss to the treasury, breakdown of civil order and economic chaos, disorganization of health and education system, delay of the economic and social development plan and other war related damages.
3. We propose that in arriving at a mutually acceptable compensatable amount for acts of killing and death, reliance should be made on judicial precedents/authorities.
4. In the case of personal injury, the amount payable should take into consideration the level of injury and disability.
5. In case of loss of property and other related claims, we propose that upon proof, the assessment should be based on equitable considerations and the fair market value of the property destroyed at the time.
6. Loss of business and profits: we propose that claims in this category should be based on the lost future profits of the income generating activity, assets of the business, anticipated profits and basic accounting principles.
7. Looting, plundering and exploitation of natural resources: we propose to rely on the DRC's submissions to the United Nations Security Council, reports of UN Agencies and other humanitarian organizations.



8. Violation of International Human Rights law and international Humanitarian law in Ituri province as an occupying power also referred to as moral prejudice: we propose an ex gratia payment that is mutually acceptable to both parties.
9. A joint verification and analysis of the 7400 documents provided by the DRC should be carried to isolate credible claims from unrealistic and exaggerated claims.

We believe that if the two parties can agree on specific criteria on which to base the amount of compensation payable to the DRC we shall be able to resolve the matter amicably.

A handwritten signature consisting of a stylized, looped letter 'D'.A handwritten signature consisting of a tall, vertical stroke with a loop at the top and a horizontal base.



Ann.

COMMUNIQUE CONJOINT DE LA 4<sup>ème</sup> REUNION DES MINISTRES DE  
LA REPUBLIQUE DEMOCRATIQUE DU CONGO ET DE LA  
REPUBLIQUE DE L'UGANDA SUR L'EXECUTION DE L'ARRÊT DE LA  
COUR INTERNATIONALE DE JUSTICE DU 19 DECEMBRE 2005, TENUE  
A PRETORIA, AFRIQUE DU SUD, DU 17 AU 19 MARS 2015

PREAMBULE

Considérant l'arrêt de la Cour Internationale de Justice du 19 décembre 2005 dans la cause intitulée « *Activités armées sur le territoire du Congo (République Démocratique du Congo contre Ouganda)* » ;

Rappelant le contenu des paragraphes 260 et 261 de l'arrêt de la Cour Internationale de Justice du 19 décembre 2005 qui recommande des négociations de bonne foi entre les deux parties, en vue de déterminer le montant de la réparation dû à la République Démocratique du Congo par la République de l'Ouganda ;

Guidées par l'Accord de Ngourdoto en Tanzanie, signé le 08 septembre 2007 entre la République Démocratique du Congo et la République de l'Ouganda sur la coopération bilatérale, plus spécialement en son article 8 qui recommande notamment aux parties de trouver les modalités pratiques de l'exécution de l'arrêt du 19 décembre 2005 de la Cour Internationale de Justice ;

Pour ce faire,

1. Les délégations ministérielles de la République Démocratique du Congo et de la République de l'Ouganda se sont rencontrées dans une ambiance empreinte de cordialité, pour la 4<sup>ème</sup> Réunion ministérielle du Comité conjoint ad hoc, tenue à Pretoria en République Sud-Africaine, du 17 au 19 mars 2015.
2. La délégation de la République Démocratique du Congo était conduite par S.E Monsieur Alexis THAMBWE MWAMBA, Ministre de la Justice, Garde des Sceaux et Droits humains, accompagné de S.E Monsieur Aimé NGOI MUKENA LUSA DIESE, Ministre de la Défense nationale, Anciens combattants et Réinsertion, Monsieur BENE L. M'POKO, Ambassadeur de la République Démocratique du Congo à Pretoria, Monsieur Jean Charles OKOTO LOLAKOMBE, Ambassadeur de la République Démocratique du Congo à Kampala, Monsieur Néhémie MWILANYA WILONDJA, Conseiller principal du Chef de l'Etat chargé des questions juridiques et administratives.



ex 2

3. La délégation de l'Ouganda était conduite par S.E Monsieur le General Major KAHINDA OTAFIIRE, Ministre de la Justice et des Affaires Constitutionnelles, accompagné par Monsieur FRED RUHINDI, Ministre/Procureur Général de la République, S.E Monsieur DAUDI MIGEREKO, Ministre des Affaires Foncières, de l'Habitat et du Développement Urbain, S.E. Monsieur HENRY OKELLO ORYEM, Ministre des Affaires Etrangères a.i, S.E. Monsieur le Général JEJE ODONGO, Vice-Ministre de la Défense, S.E Monsieur JAMES KINOBE, Ambassadeur de la République d'Ouganda à Kinshasa.

**4. La réunion a examiné les documents suivants :**

- a) les rapports respectifs de Hauts Fonctionnaires et Experts de deux pays du 17 mars 2015 ;
- b) les nouveaux critères d'évaluation proposés par la République de l'Ouganda ;
- c) la réponse spécifique de la République Démocratique du Congo auxdits critères.

**5. L'Ouganda a proposé :**

- a) la nécessité pour les parties de s'accorder sur des critères à utiliser comme base de calcul pour la compensation à payer à la RDC ;
- b) la vérification conjointe et une analyse commune de 7.400 pièces à conviction produites par la République Démocratique du Congo, conformément aux critères à accepter de commun accord ;

**6. L'Ouganda s'est résolu en outre :**

- a) de renoncer, dans un esprit de fraternité et de bon voisinage, à sa réclamation du montant de 3.760.000 USD, en rapport avec les dommages causés à l'immeuble de son ambassade à Kinshasa et aux mauvais traitements infligés à son personnel diplomatique ;
- b) de revoir à la hausse sa proposition initiale de réparation du montant de 25 500 000 US, en le portant à 37. 028.368 USD ;

En définitive, la République de l'Ouganda a vivement souhaité de voir se poursuivre les négociations entre les deux parties.

7. Pour sa part, la République Démocratique du Congo a réagi à la position de la partie ougandaise de la manière ci après :

- a) elle a fait objection à l'utilisation d'autres critères pour évaluer sa demande de réparation ;
- b) elle a insisté sur le fait qu'il ne devrait plus y avoir d'autres négociations, tant au niveau technique que ministériel, conformément à la résolution de la 3<sup>ème</sup> réunion ministérielle tenue à Indaba, Johannesburg, du 24 au 27 novembre 2014 ;
- c) elle a pris acte de la renonciation par la partie ougandaise de sa réclamation du montant de 3 760 000 US ; néanmoins, elle a fermement rejeté l'offre de l'Ouganda de 37.028.368 USD comme étant toujours insignifiante, au regard des préjudices causés ;
- d) enfin, force a été pour elle de constater que le désaccord persiste entre les deux parties, ce qui l'amène à envisager de retourner devant la Cour Internationale de Justice pour la suite de la procédure ;

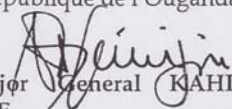
DE CE QUI PRECEDE,

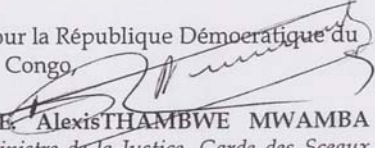
Vu le désaccord persistant entre les parties, celles-ci ont résolu de clôturer les négociations à leur niveau, conformément à la résolution susmentionnée de la troisième réunion ministérielle, et de s'en remettre à la disposition des Chefs d'Etat, dans l'esprit de l'Accord de Ngourdoto de 2007 sur la coopération bilatérale entre l'Ouganda et la République Démocratique du Congo, pour une orientation.

Fait à Pretoria, en Afrique du Sud, à Burgers Park Hôtel, le 19 Mars 2015, en deux exemplaires originaux, en français et en anglais, les deux faisant également foi

Pour la République de l'Ouganda,

Pour la République Démocratique du Congo,

  
S.E. Major General KAHINDA OTAFIIRE  
Ministre de la Justice et des  
Constitutionnelles Affaires

  
S.E. Alexis THAMBWE MWAMBA  
Ministre de la Justice, Garde des Sceaux  
et Droits humains

7. Pour sa part, la République Démocratique du Congo a réagi à la position de la partie ougandaise de la manière ci après :

a) elle a fait objection à l'utilisation d'autres critères pour évaluer sa demande de réparation ;

b) elle a insisté sur le fait qu'il ne devrait plus y avoir d'autres négociations, tant au niveau technique que ministériel, conformément à la résolution de la 3<sup>ème</sup> réunion ministérielle tenue à Indaba, Johannesburg, du 24 au 27 novembre 2014 ;

c) elle a pris acte de la renonciation par la partie ougandaise de sa réclamation du montant de 3 760 000 US ; néanmoins, elle a fermement rejeté l'offre de l'Ouganda de 37.028.368 USD comme étant toujours insignifiante, au regard des préjudices causés ;

d) enfin, force a été pour elle de constater que le désaccord persiste entre les deux parties, ce qui l'amène à envisager de retourner devant la Cour Internationale de Justice pour la suite de la procédure ;

DE CE QUI PRECEDE,

Vu le désaccord persistant entre les parties, celles-ci ont résolu de clôturer les négociations à leur niveau, conformément à la résolution susmentionnée de la troisième réunion ministérielle, et de s'en remettre à la disposition des Chefs d'Etat, dans l'esprit de l'Accord de Ngourdoto de 2007 sur la coopération bilatérale entre l'Ouganda et la République Démocratique du Congo, pour une orientation.

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Pour la République de l'Ouganda,

Pour la République Démocratique du Congo,

S.E. Major General KAHINDA OTAFIIRE  
Ministre de la Justice et des  
Constitutionnelles Affaires

S.E. Alexis THAMBWE MWAMBA  
Ministre de la Justice, Garde des Sceaux

et des Droits humains



Annex 4

REPONSES SPECIFIQUES DE LA RDC AUX NOUVEAUX CRITERES PROPOSES PAR  
LA PARTIE OUGANDAISE

La délégation congolaise a pris connaissance du document lui transmis par la délégation ougandaise et, après analyse approfondie, donne sa réponse ci-après :

*I. De la proposition d'être guidé par l'arrêt de la CIJ pour exclure certaines réclamations*

La RDC réaffirme, comme l'Ouganda, son adhésion sans réserve aux termes de l'arrêt de la CIJ du 19/12/2005.

1° Cela s'entend par une réparation intégrale des préjudices causés, ce qui n'exclut pas certains préjudices particuliers. En effet, l'arrêt dit : « *l'Ouganda a l'obligation, envers la RDC, de réparer le préjudice causé* (paragraphe 345.3 et 345.5 de l'arrêt).

2° La RDC affirme qu'elle s'en est tenue à la période d'occupation effective allant du 08/08/1998 au 02/06/2003. Aucune réclamation ne porte ni sur la période antérieure, ni encore sur la période postérieure.

3° Quant aux territoires occupés, la réclamation de la RDC ne fait pas allusion aux localités de Zongo, Bomongo et Bongandanga.

4° S'agissant d'autres forces qui opéraient sur le territoire de la RDC dans la partie occupée par l'Ouganda, la Cour elle-même reconnaît en des termes l'on ne peut plus clairs la responsabilité de l'Ouganda (paragraphe 345.1), unique puissance occupante.

*II. Recours aux principes du droit international et de la jurisprudence pour exclure certains dommages*

L'arrêt consacre le principe de la réparation intégrale et à ce sujet, rappelle la jurisprudence des usines de Chorzow, en Pologne. L'on ne peut dès lors y



revenir, sous peine de vouloir remettre en cause ledit arrêt déjà coulé en force de chose jugée.

**III. Proposition d'une compensation mutuellement acceptable pour les cas des tueries et des décès.**

En réponse, la RDC affirme que les congolais tués, dont du reste l'identité de chacun a été précisée, sont des êtres humains, et à ce sujet, elle invoque une jurisprudence plus appropriée relative à l'affaire Irak-Koweït.

**IV. Prise en compte du degré des blessures et du handicap physique dans le cas des lésions corporelles**

Pour ce faire, la commission d'enquête était descendue sur terrain pour constater les lésions et leurs degrés, puis les a décrites avec précision dans le document dont dispose l'Ouganda, où les montants des dommages sont ventilés avec précision. Comment l'Ouganda qui n'a pas été sur terrain peut-il, après coup, tout contester en bloc, sans offrir la moindre preuve contraire ?

**V. Perte de propriété**

La RDC renvoie l'Ouganda au rapport établi par la Commission d'enquête étayé par plus de 7000 pièces à conviction.

**VI. Perte en matière commerciale et manque à gagner**

Le principe en droit veut que l'on indemnise non seulement pour les pertes subies (valeur des biens perdus), mais encore pour le manque à gagner (gains futurs).

**VII. Cas de pillage et d'exploitations illégales des ressources naturelles**

La RDC est guidée par l'arrêt de la Cour (paragraphe 345.4) en ce que l'Ouganda n'a pas empêché les actes de pillage et d'exploitation des ressources




naturelles congolaises. Au demeurant, comment l'Ouganda, partie occupant, peut-il ignorer ce que lui ont rapporté ces activités illicites qui ont positivement impacté sur sa balance commerciale.

***VIII. Violations des règles du droit international humanitaire et des droits de l'homme : paiement ex gracia***

La RDC estime que s'agissant de cette réparation, elle ne peut être laissée au bon vouloir de l'Ouganda tant l'arrêt de la Cour (paragraphe 345.2, 3) stigmatise la violation par l'Ouganda des droits de l'homme et du droit international humanitaire. Par ailleurs, il s'impose de faire la distinction entre les dommages causés aux individus et ceux subis par l'Etat congolais.

***IX. Vérification conjointe des 7400 pièces présentées par la RDC***

Quant à la vérification demandée, cela équivaudrait à reprendre toutes les enquêtes faites pendant 6 ans, alors que l'Ouganda dispose de la réclamation de la RDC depuis le mois de mai 2010 et de toutes les pièces à conviction depuis au moins 2 ans. Ce serait revenir à la case du départ, partant un éternel recommencement que la RDC ne peut en aucune manière accepter.

Fait à Pretoria, le 18 mars 2015

Pour la République Démocratique du Congo,

S.E. Monsieur Alexis THAMBWE MWAMBA,

Ministre de la Justice, Garde des Sceaux et Droits Humains



## Annex 5

*Translated Copy***DRC'S SPECIFIC RESPONSES TO NEW CRITERIA PROPOSED BY THE UGANDAN SIDE**

The Congolese side took cognizance of the document transmitted to it by the Ugandan side and, following in-depth analysis, is providing its response as follows:

***I. On the Proposal to be guided by the ICJ judgement to exclude certain claims***

The DRC reaffirms, just like Uganda, its unreserved adherence to the terms of the ICJ ruling of 19/12/2005.

1° This entails full reparation of damages caused, which does not exclude certain specific damages. In fact, the ruling says: "*Uganda has the obligation towards the DRC to repair the damage caused* (paragraphs 345.3 and 345.5 of the ruling).

2° The DRC states that it stuck to the actual period of occupation running from 08/08/1998 to 02/06/2003. No claim does pertain to the period prior or subsequent to that one.

3° As for the occupied territories, the DRC claim does not allude to the localities of Zongo, Bomongo and Bongandanga.

4° Regarding other forces which were operating on the DRC territory in the part occupied by Uganda, the Court itself recognized in no uncertain terms Uganda's responsibility (paragraph 345.1), as the sole occupying power.

***II. Resort to principles of international law and jurisprudence to exclude certain damages***

The ruling enshrines the principle of full reparation and in this regard, recalls the jurisprudence of the Chorzow plants in Poland. One cannot therefore question that lest one questions the said ruling which already acquired the force of res judicata.

***III. Proposal of a mutually acceptable compensation for cases of murder and deaths***

In response, the DRC submits that the killed Congolese, whose individual identity was even revealed, are human beings, and in this regard, it invokes the more appropriate jurisprudence pertaining to the case Iraq-Kuwait.

***IV. Taking into account the level of injury and physical disability in the case of bodily injuries***

To this end, the investigation commission went to the field to observe the injuries and their levels, then described them precisely in the document at the disposal of Uganda, where amounts

of damages were described precisely. How can Uganda which was not in the field be able after the fact to dispute the whole thing, without providing any single proof to the contrary?

*V. Loss of property*

The DRC refers Uganda to the report issued by the Investigation Commission backed up by over 7,000 pieces of incriminating evidence.

*VI. Business losses and loss of profit*

The principle in law requires compensating not only for losses incurred (value of loss goods), but also for the loss of profit (future gains).

*VII. Cases of looting and illegal exploitation of natural resources*

The DRC is guided by the Court ruling (paragraph 345.4) in that Uganda did not prevent the acts of lootings and exploitation of Congolese natural resources. In fact, how can Uganda, the occupying power, ignore the gains it got from these illicit activities which positively impacted on its trade balance.

*VIII. Violations of rules of international humanitarian law and human rights: ex gratia payment*

The DRC is of the view, regarding such compensation, that it cannot be left up to Uganda to decide since the Court ruling (paragraph 345.2,3) castigates the violation by Uganda of human rights and international humanitarian law. Furthermore, it is self-evident to make a distinction between damage caused to individuals and damage incurred by the Congolese State.

*IX. Joint verification of 7,400 pieces of evidence submitted by the DRC*

As for the requested verification, this would be tantamount to redoing all investigations conducted for 6 years, while Uganda has the DRC claim at its disposal since May 2010 and received pieces of incriminating evidence since at least 2 years. This would be getting back to square one, thereby an endless repetitive cycle which the DRC can in no way accept.

Done at Pretoria, 18 March 2015



For the Democratic Republic of Congo,

**H.E. Alexis THAMBWE MWAMBA,**

*(signed)*

*Minister of Justice, Keeper of the Seals and Human Rights*



## **Annex 12**

GEOCODES sprl, *Travaux de Rehabilitation de la Residence de l'ambassadeur de la Republique de l'Ouganda a Kinshasa (July 2007)*



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DRC  
Kobho

ORIGINAL BOQS - 2007

REPUBLIQUE DEMOCRATIQUE DU CONGO  
GECODES sprl  
ENTRPRISE DE CONSRUCTION  
7<sup>ème</sup> RUE n°315 LIMETE  
Tél. : 0815089982  
B.P. 11083 KINSHASA I

TRAVAUX DE REHABILITATION DE LA  
RESIDENCE DE L'AMBASSADEUR DE LA  
REPUBLIQUE DE L'UGANDA  
A KINSHASA

JUILLET 2007



DEVIS QUANTITATIFS SE RAPPORTANT AUX TRAVAUX  
DE REHABILITATION DE LA RESIDENCE DEV L'AMBASSADEZ DE  
LA REPUBLIQUE DE L'UGANDA A KINSHASA SISE SUR  
L'AVENUE DE L'UGANDA COMMUNE DE LA GOMBE  
A KINSHASDA - R.D.C.

N°	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
I	<u>INSTALLATION DU CHANTIER</u>				
	Elagage des gros arbres empêchant la visibilité et lumière	FF	FF	FF	250
	Nettoyage en produit et lumière chimique c'est-à-dire désinfection de l'espace	FF	FF	FF	200
	Evacuation de toute immondice et mauvaises herbes poussées	FF	FF	FF	250 200 ok 900 ✓
	<u>AMENAGEMENT DU JARDIN</u>				
	- Construction de mûr de soutènement de terre en briques (15x20x40) séparant les trois jardins				
	- Achat de gazon et mise en terre	FF	FF	FF	1.200 ok 1.200 ✓
	- Achat terre noire et engrains dans toute la parcelle,				
	- Arrangement des fleurs				
II.	<u>MAÇONNERIE</u>				
I.1.	- Remplacement et rose de faïence dans la cuisine	m2	8	15	120
	- Remplacement et pose de faïence cassés dans la salle de bains				
	• Salle de bains parents	m3	22	15	330
	• Salle de bains enfants	m3	22	15	330

DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
- Remplacement faïence (hall service cuisine)	m	21	15	315
- Remplacement faïence et pose w.c. visiteur	m	18	15	270
- Remplacement seuil des portes et fenêtres au moitié de ciment	m	12	25	300
- Décapage carreaux dégradé à la marche escaliers entrée cuisine, fourniture, pose	m	16	20	320
- Colmatage en béton « b » la cour de l'entrée principale et façade principale	m	24	15	360
- Paiement en béton « b » la cour de l'entrée principale	m	36,8	25	920
- Pavement en béton « b » la cour devant la cuisine (façade postérieure)	m	35	25	875
- Décapage de tôle transparente abîmées fourniture et pose (protection pluie, soleil	m	12	18	216
				4.286
				2.200
				2.086
				1.086
				1.000

	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
	<u>MAISON ANNEXE</u> (2 pièces, buanderie, w.c., douche)				
1	- Décapage fond-plafond dégradés fourniture et pose de triplex 5 mm sur gîtage existant	m2	20	26	520
2	- Fourniture de bottes, lattes couvre-joints en bois au plafonds	Pce	5	3	175
3	- Pavement en béton « b » l'intérieure de l'annexe et verranda (séjours) en ciment lissé	m2	25	26	650
4	- Pavement en maçonnerie (mur et pavement dans les chambres)	m2	14	20	280
5	- Réparation bac de douche ou garage et le mur dégradé (abîmé)	m2	3	30	
	- Réparation des escaliers	m2	1	50	50
	- Tôles GB 28 B	m2	5	10	50
	<u>ELECTRICITE</u>				1,815 ✓
7	Tube PVC 5/8	pce	250	0,5	125
	Tube PVC 3/4	pce	50	1	50
	Tube PVC 4	pce	2	2	4
	Manchons PVC 5/8	pce	100	0,5	50
	Coude PVC 5/8	pce	100	0,5	50
6	Boîte dérivation	pce	60	0,5	30
7	Boîte cuisinière	pce	1	5	5
	Clou de 5 mm	pce	3	2	6
9	Rouleau FIL ,VOB 15	pce	15	30	450
10	Rouleau Fil VOB 25	pce	15	40	600
11	Fil de terre 75	pce	10	7	70
12	Paquets connexe	kg	3	22	66
13	Prises simple (ENC)	pce	25	8	280
14	Prises avec terre (ENC)	pce	23	8	184
15	Prises hermétique avec terre	pce	10	10	100

DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
Interrupteur simple (ENC)	pce	23	6	138
Interrupteur va et vient (ENC)	pce	12	8	96
Interrupteur bipolaire (ENC)	pce	10	9	90
Interrupteur bipolaire hermétique	pce	5	10	50
Interrupteur à étirette (ENC)	pce	4	10	40
Plafonnière	pce	14	35	490
Réglette 1x20w	pce	8	12	96
Fil VOB 42	pce	6	70	420
Plafonnière 4 x 20 w	pce	6	80	480
Boîte étanche	pce	10	5	50
Réglette 1x40w	pce	20	15	300
Armature de globe droit	pce	3	15	45
Applique mural (intérieur)	pce	2	50	100
Applique mural (extérieur)	pce	3	50	150
Tubes TL de 20w	pce	10	2	20
Tubes de 40w	pce	22	2	44
Ampoules E 27 60w	pce	30	0,3	15
Cables VFVB 4x5'	pce	60	6	360
Cables VFVB 4x102	pce	20	8	160
Tableau divisionnaire 240/C	pce	2	60	120
Tableau divisionnaire 120/C	pce	2	40	80
CLOTURE ET JARDIN				5.179
Cable 2,15	pce	2	130	260
Globis (pour clôture)	pce	10	50	500
Reglettes hermeture 1x40w	pce	10	35	350
Tube TL de 40w	pce	10	2	20
Boîte etanche	pce	10	1	10
Ampoule le E 27 100w	pce	5	3	15
Interrupteur hermetique sch 2	pce	2	10	20
				4000
				204179
				504175



DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
<u>II PAILLOTE ET GUERRITE</u>				
Câble 3x25	M	1	160	160
Interrupteur sch 5	pce	2	5	10
Ventilateur plafonnières	pce	1	50	50
Prise avec terre	pce	4	5	20
Applique mural (intérieure)	pce	3	50	150
Réglette 1x20w	pce	2	10	20
Tube TL 20w	pce	2	2	4
Bête encastrée et dérivation	pce	12	-	5
Accessoires, vis, toille, cheville	pce	FF	FF	10 OK 429\$ ✓
<u>III CLIMATISATION</u>				
Contacteur GV2 10-16A	Pce	9	80	720
Split système 12.000 BTU	pce	1	480	480
Split système 18.000 BTU	pce	5	650	3250
Split système 24.000 BTU	pce	5	800	4000
Armaflex	pce	5	10	50
Armaflès	pce	5	10	50
TYAU ½	pce	5	20	100
TYAU ¾	pce	5	25	125
Cable 3x25	M	50	2	100
Scoth	pce	10	1	10
Bitane	pce	9	7	61
Baguette	pce	10	0,5	5
Freon 22	Kg	5	15	75
				8.896
				- 7730 ✓
				OK 1166 ✓
<u>CLOISONNEMENT (Bureau)</u> En bois				
Chevron lifaki 4,50x7x7	pce	16	13	208
Chevron lifaki 5,00x5c5	pce	18	12	216
Triplex	pce	14	15	210
Madrier ouvrante portes	pce	2	13	26
Triplex de 4 mm	pce	2	15	30
Lattes supports vitres et joints	pce	FF	FF	35



1°	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
	Feuilles vitres de 5 mm	pce	4	50	200
	Boîte colle froide	pce	2	5	10
	Boîte pire nationale	L	5	7	35
	Vernis national	L	5	8	40
	Thinner	L	4	6	24
	Chevilles de 10,12cm	Pqt	2	5	10
	Vis de 2,5	Pqt	1	20	20
	Papiers de verre	Pqt	FF	FF	5
	Papiers fines	pce	15	4	60
	Clous de 3,4,5,8 et 10 cm	Kg	12	15	180
	Serrures portes	pce	2	40	80
	Paumelles (charnière)	pce	2	4	8
	<u>APPAREILS SANITAIRES</u> (PLOMBERIES)				1.397 01
	Robinets équerres complets Ø ½	Pce	20	8	160
	Paire fixabo	pce	3	3	9
	Flexibles Ø ½ de ± 40 cm à pression	pce	5	10	50
	Tubes de siliconnas marines blanches	Pce	3	8	24
	Manchons galvanisés Ø 1/2"	pce	10	1	10
	Niples galvanisés Ø 1/2 "	pce	15	1	15
	Paires de vis de fixation wc	pce	4	2,5	10
	Tuyaux galvanisés Ø 1/2 "	pce	2	13	26
	Coudes galvanisés Ø 1/2 "	pce	22	1	22
	Tés galvanisés Ø 1/2 "	pce	5	1	5
	PVC Ø 50 coude 90°	pce	12	3	36
	Colliers Ø 1/2 " ou CU complet	pce	6	1,5	9
	Robinets doubles services Ø 1/2 "	pce	3	7	21

1°	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
1	Vanne encastrée Ø 1/2 "	pce	1	10	10
1	Pomme à douche Ø 1/2 "	pce	1	10	10
16	Tuyau PVC Ø 40/3	pce	1	8	8
	Raccords urrions coniques galvanisés	pce	3	5,5	16,50
3	Boîte colle TANGIT HENKEL	Bt	2	11	22
	Salles de bains complètes avec accessoires	pce	2	550	1.100
	Chauffe-eau de 80l	pce	2	180	360
2	WC monobloc soritP.	pce	2	140	280
22	Evier de cuisine complète 90	pce	1	140	140
	Chauffe-eau de 50 l ARSTON	pce	1	150	150
24	Lavabo complet toilette visiteurs	pce	1	100	100
10	Evier dans la maison annexe	pce	1	140	140
26	Bac de douche	pce	1	90	90
20	Bec mobil chromé Ø 1/2 "	pce	1	15	15
20	Coudes manchettes	pce	1	35	35
	Imprévu	FF	FF	70	70
XI	<u>MENUISSERIE METALLIQUE</u>				
	Fabrication et pose des ouvrants de toutes les fenêtres et portes déplacées				
	Tubes rectangulaires (35x25)	pce	17	25	425
	Tube rectangulaire (20x10)	pce	17	15	225
	Toiles moustiquaires	m2	25	20	500
	Tôle noire ½	m2	3	60	180
5	Crochet de panne	pce	10	40	400
	Boîte de baguettes 3,2	Pqt	3	30	90
	Boîte de couleur anti-rouille	ml	12	10	120

2.932\$US

420 ✓

2512

-1670

842

-500

342 ✓

	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
	Fer plat de (30x2mm)	pce	3	60	60
	Paquet vis parqueur de Ø 30	pce	2	25	50
	Vitre de 5 mm pour toutes les fenêtres	Pce	10	50	500
	Réparation portail (entrée principale)	Pce	1	175	175
	Paire de paumelle	pce	24	3	62
	Serrures	pce	4	10	40
					2.972
					<del>2.500</del>
					472
II	<u>PARTIE GARAGE TRANSFORMEE EN SALLE DE REUNION</u>				2.972
					<del>2.500</del>
					472
	Tubes rectangulaires (35x25)	Pce	25	25	650
	Tubes rectangulaire (20x10)	pce	25	15	360
	Tôles noir ½	pce	2	50	100
	Cléchet de panne	m2	4	40	156
	Boîte de baguette 3,5	Pce	1	20	20
	Boîte de couleur anti-rouille	Pqt	2	10	20
	Fer plat (30x2 mm)	ml	3	15	45
	Paquet vis parqueur de Ø 30	Pqt	1	10	10
	Vitre de 5 mm (portes salle de réunion)	Pce	7	50	350
					1.611
					700
XIII	<u>MENUISERIE EN BOIS</u>				0.911
					1.870
	Remplacement des portes bico abîmées sans encadrement (0,90 x 2,30) avec serrures en cylindre et pose	m2	22,5	85	1.870

°	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
	Remplacement des portes abîmées avec encadrement (0,90x2,30) serrures et pose	m2	2,14	115	247
	Remplacement de portes de douche et wc toilette (0,80x2,30)	m2	2,50	40,4	101
	Remplacement de porte de cuisine en (0,79x0,87x2,10)	m2	2,30	46	105
	Fabrication et pose de caches rails en bois posées, vernissée, au bureau de l'ambassadeur et chambres à coucher	m2	5,1	27	135
	Fabrication et remplacement de placards servant la garde robe au couloir et dans les chambres à coucher avec plusieurs compartiments	m2	3,16	170	324
					<u>2.327</u>

$\frac{2.000}{2.327}$   
 OK 327  
 5



	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
IV	<u>GUERRITE</u>				
	Fondation en brique bétonné	m3	1,5	60	90
	Maçonnerie en briques	m3	16	12	198
	Elévation de mur en bloc de brique 15x20x40	m3	200	2	400
	Crepissage (intérieur et extérieur) en moitié de ciment lissé	m3	10	5	50
	Pavement en béton « b »	m3	6	15	90
	Fer à béton	Pce	7	4	28
	Fer à béton	Pce	7	4	28
	Fil recuit	Kg	5	2	10
	Sable du fleuve	T	5	30	150
					<del>150</del> 1.016
V	<u>TOITURE</u>				
	Chevrans	pce	4	13	52
	Madriers	pce	4	13	52
	Tôles galvanisées BG 28 B	pce	7	10	70
	Rondelles des tôles	pqt	3	2	6
	Clous ordinaires 12,8,10 cm	Kg	4	2	8
	Clous de tôles	pce	2	2	4
	Plafond en triplex 4 mm	pce	3	15	45
	Hatte couvre joints	pce	FF	FF	10
	Porte en bois et ordinaire	pce	1	20	20
	Fenêtre en bois ordinaire	pce	1	20	20
					<del>20</del> 287
VI	<u>PAILLOTE</u>				
	Elévation un mur d'un mètre en briques (15x20x40)	m2	FF	FF	372
	Pavement en béton « b »	m2	5	15	75
	Pieds (madrier,chevron)	pcé	8	10	80



N°	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
	Toiture				
	- Tôles	Pce	7	10	70
	- Madrier	Pce	1	6	6
	- Chevron	Pce	1	6	6
	- Clous	kg	2	2	4
					1.103
(VII)	<u>PEINTURE</u>				
	Préparation de surface intérieure	m2	280	1	280
	Latex blanc sur mûr intérieur et plafond	m2	140	5	700
	Peinture email blanc cassée sur portes et fenêtres métalliques	m2	46,7	7	233,5
	Latex blanc mentholé sur mur et plafond chambre en fauts (1)	m2	36		180
	Latex blanc mentholé chambre (2)	m2	32,6		180
	Latex blanc mentholé dégagement service cuisine	m2	12	5	163
	Latex blanc salle de bains	m2	25	5	60
	parents	m2	25		125
	Latex blanc salle de bains enfants	m2	13	5	125
0	Latex blanc cuisine			5	
1	Latex ou email blanc au wc visiteurs	m2	6,8	7	91
					20,60
	Masticage et peinture sur mûr extérieur	m2	125	3	625
		m2	40		285
4	Façade principale	m2	57	5	275
4	Façade postérieure	m2	55	5	350
5	Façade latérale gauche	m2	50	5	
5	Façade latérale droite			5	
	Email plinthe et décoration mûr				

N°	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX UNITAIRE \$ US	PRIX TOTAL \$ US
VIII	<u>MAISON ANNEXE</u>				
	Latex blanc menthol, salon et plafond	m2	32	5	160
	Latex deux chambres à couché	m2	26	5	130
	Latex à l'extérieur de l'annexe et toutes les façades	m2	50,2	5	250
	<u>CLOTURE</u>				
	Chaulage de clôture en carbure blanc	m2	200	1,5	300
	Rouleaux d'anti-vol (fil barbelés)	m2	20	35	700

TOTAL GENERAL : 43.457 \$US

Nous disons : Quarante trois mille quatre cent cinquante sept dollars  
Américains

Fait à Kinshasa, le 09 / 07 / 2007

LEOZIMATHY KOKO G.

Administrateur Gérant



RECAPITULATIF

I. Installation de chantier	: 900
II. Aménagement du jardin	: 1.200
III. Maçonnerie et maison annexe	: 6.000
IV Electricité :	
- Grande maison	: 5.179
- Clôture et jardin	: 1.179
- Paillote et guerrite	: 429
- Climatisation	: 8.896
V. Cloisonnement avec vitre bureau (secrétariat)	: 1.397
VI. Plomberie (installations sanitaire)	: 2.932
VII. Menuiserie métallique	
- Fafrication de fenêtres	: 2.972
- Portes salle de réunion	: 1.611
VIII Menuiserie en bois	: 2.824
IX. Guerrite	: 1.303
X. Paillote	: 1.103
XI. Fil anti-vol sur la clôture	: 520
XII. Peinture :	
- Grande maison	}
- Maison annexe	
- clôture	
	: 7.012

TOTAL GENERAL ~~43.457\$US~~

Nous disons : Quarante trois mille quatre cent cinquante sept dollars Américains



Fait à Kinshasa, le 09 / 07 / 2007

GECODES OZIMATHY KOKO G.

S.P.R.L.  
KINSHASA

Administrateur Gérant

### **Annex 13**

*GEOCODES sprl, Devis Supplémentaire des Travaux de la Réhabilitation de la Résidence de l'Ambassadeur de l'Ouganda à Kinshasa - Gombe R.D.C. (Jan. 2008)*





*Copie  
d'archive*

SUPPLEMENTAIRE BOQS - 2008

**A4**

REPUBLIQUE DEMOCRATIQUE DU CONGO

**GECODES sprl**

ENTREPRISE DE CONSTRUCTION

7<sup>ème</sup> RUE N° 315 LIMETE

Tél. : 0815089982

B.P. 110833 KINSHASA I

DEVIS SUPPLEMENTAIRE DES TRAVAUX DE LA  
REHABILITATION  
DE LA RESIDENCE DE L'AMBASSADEUR DE  
L'OUGANDA  
A KINSHASA - GOMBE  
'R.D.C

JANVIER 2008

**DEVIS QUANTITATIF SUPPLEMENTAIRE AUX TRAVAUX DE REHABILITATION DE LA  
RESIDENCE DE L'AMBASSADE DE LA REPUBLIQUE DE L'UGANDA A KINSHASA  
AVENUE DE L'UGANDA COMMUNE DE LA GOMBE  
KINSHASA/RDC**

ORD	DESIGNATION DES TRAVAUX	UNITE	QUANTITE	PRIX \$ UNITAIRE	PRIX TOTAL \$
	<u>MACONNERIE</u>				
	- <u>Parking intérieur avec abri</u>				
	Colmatage en béton « b » et les allées et devant la paillote	m <sup>3</sup>	113	22	2.486
	Charpente en bois	m <sup>3</sup>	2	825	1.650
	Tôles GB 28' B	m <sup>2</sup>	30	25	750
	Socles et posse ports verniss	pce	10	26	260
			25	5	125
					5.758 OK
	- <u>PARKING EXTERIEUR</u>				
	Colmatage en béton « b » toute la partie devant l'ambassade	m <sup>3</sup>	198	22	4.456
	- <u>CARRELAGE</u>				
	- <u>Salle de réunion</u>				
	- décapage granite abime et pose de carreaux	m <sup>2</sup>	70	23	1.610
	- Bureaux et W.C.	m <sup>2</sup>	65	23	1.495
	- Revêtement en faïence	m <sup>2</sup>	120	23	2.760
					5.860

N° ORD	DESIGNATION	UNITE	QUANTITE	PRIX \$ UNITAIRE	PRIX TOTAL \$
II.	<u>INSTALLATION SANITAIRE</u>				
	W.C. Urinoire, Lavabo				
	- Tuyau φ 110	Pce	20	20	40
	- Tuyau φ 50	Pce	3	10	30
	- Tuyau φ 1/c	Pce	5	12	60
	- Tuyau φ 3/4	Pce	4	15	60
	- Tuyau φ 110	Pce	5	5	25
	- Coude φ 110	Pce	12	2	24
	- Coude φ 50	Pce	25	2	50
	- Coude φ 1/6	Pce	10	15	150
	- Coude φ 3/4	Pce	5	20	100
	- Coude φ 110	Pce	5	20	100
	- Thé φ 110	Pce	5	20	100
	- Thé φ 50	Pce	5	10	50
	- Thé φ ¾	Pce	2	15	30
	- Thé φ ½	Pce	1	10	10
	- Colle tangit	Pce	5	10	50
	- Chambre	Pce	5	10	50
	- Niple φ ¾	Pce	3	10	30
	- Niple φ ½	Pce	4	5	30
	- Colliers φ¾	Pce	3	10	30
	- Vanne φ1/4	pce	4	5	20
	- Imprévu u	FF	FF	FF	100
					1.129 <i>OK</i>
	- WC monobloc sorit P	Pce	4	140	560
	- Urinoir à dot plat	pce	2	35	70
	- Lavabo (lave-main)	Pce	4	50	150
	- Miroir	Pce	2	30	120
	- Etagère	Pce	3	30	120
	- Porte papier hygiénique	Pce	4	30	90
	- Porte essuie-mains	Pce	4	30	90
	- Attache M.	Pce	3	30	60
	- Robinet équerre	Pce	3	15	150
	- Chipson 1 ¼	Pce	2	10	30
	- Fixabot	Pce	10	5	15
	- Robinet lavabo	Pce	3	15	45
	- Robinet urinoir	Pce	3	20	40

ORD	DESIGNATION	UNITE	QUANTITE	PRIX \$ UNITAIRE	PRIX TOTAL \$
	Syphon urinoir Imprévu	Pce FF	2 FF	15 FF	30 <u>100</u> 1.570
	<u>INSTALLATION HYDROPHORE</u>				
	Citerne 200 L	Pce	1	600	600
	Hydrophore (moteur)	Pce	1	450	450
	Tuyau $\phi$ $\frac{3}{4}$	Pce	2	15	30
	Coude $\phi$ $\frac{3}{4}$	Pce	10	2	20
	Niple $\phi$ $\frac{3}{4}$	Pce	1	10	10
	Kacc. U $\phi$ $\frac{3}{4}$	Pce	4	10	40
	Clajet $\phi$ $\frac{3}{4}$	Pce	2	10	20
	Réduction $\phi$ $\frac{3}{4}$	Pce	4	10	40
	Réduction $\phi$ - $\frac{3}{4}$	Pce	1	10	10
	Vanne $\phi$ $\frac{3}{4}$	Pce	2	15	30
	Chambre Imprévu	Pce FF	2 FF	15 FF	30 <u>150</u> 1.430
	<u>ELECTRICITE</u>				
	Disjoncteur	Pce		50	150
	Interrupteur bipolaire encastré	Pce		5	15
	Boîtes hermétiques chauffe-eau	Pce		5	30
	Fil souple 3/2,5	Pce		2	12
	Prise simple	Pce		2	10
	Prise avec terre encastré	Pce		2	4
	Réglettes de 40W	Pce		6	24
	Réglettes de 20W	Pce		6	24
	Rouleau de fil V.O.1.1/2	Pce		25	25
	Rouleau de fil V.O.B.21/2	Pce		30	<u>30</u>
					324

ORD	DESIGNATION	UNITE	QUANTITE	PRIX \$ UNITAIRE	PRIX TOTAL \$
	<b>DECORARATION</b>				
	<u>RIDEAUX</u>				
	- Bureaux Ambassadeur	m	180	7	1.260
	- Secrétariat				
	- Salle d'attente				
	- Couloir chambres				
	- 4 chambres à coucher				
	- Salle à manger				
	<u>VOILS (RIDEAUX)</u>	m	180	5	900
	- Bureaux Ambassadeur				
	- Secrétariat				
	- Salle d'attente				
	- Couloir chambres				
	- 4 chambres à coucher				
	- Salle à manger				
	- Refflet	m	264	0,5	132
	- Rails	Pce	56	3	168
	- Sifflets	Pce	58	2	116
	- Roulettes	Pqt	28	5	140
	- Cache rail en bois	Pce	22	25	550
	- Arrêts rails	pce	80	1	80
					1.186
	<u>MOQUETTES</u>				
	- Bureaux Ambassadeur	m2	210	20	4.200
	- Secrétariat				
	- Réception (salle d'attente)				
	- Couloir Ambassadeur 4				
	- chambres à coucher colle	bt	45	6	270
	- patex				
					4.470



DESIGNATION	UNITE	QUANTITE	PRIX \$ UNITAIRE	PRIX TOTAL \$
<u>GOUTIERES</u>				
Goutière	Pcè	15	55	825
Ressuces	Pce	4	20	80
Crochets (attaches)	Pce	45	5	225
Jonctions	Pce	16	5	80
Fonds Goutières	Pce	4	5	20
Fonds ressources	Pce	4	5	20
Amplés	Pce	4	5	80
PNC φ 110	Pce	6	20	130
Coude φ 110	pce	6	25	60
				1.520

TOTAL GENERAL : 28.325 \$ US\$

Nous disons : Vingt huit mille trois cent vingt cinq dollars américains

Fait à Kinshasa, le 01.02.2008



Ir. OZIMATHY KOLO  
Administrateur Gérant

## RECAPITULATION

### I. MACONNERIE

- Parking intérieur avec abri en tôles : 5.785\$
- Parking extérieur en béton « b » : 4.456\$
- Carrelage, salle de réunion et toilette : 5.865\$

### II. INSTALLATION SANITAIRE

- WC et toilette pour hommes et femmes : 2.699\$  
(salle de conférence)
- Installation hydrophore pour réserve d'eau : 1.430\$

### III. ELECTRICITE

- Eclairage dans les nouvelles installations : 324\$

### IV. DECORATION

- Rideaux, voils et accessoires : 3.206\$


### V. GOUTIERES

- Façades principale, latérale droite, maison annexe : 1.520\$

TOTAL GENERAL : 28.325 \$ US

Nous disons : vingt huit mille trois cent vingt cinq dollars américains

Fait à Kinshasa, le 01/02/2008.


  
**GEORGE OZIMATHY KOLO**  
 Administrateur Gérant



**Annex 14**

*Letter from GEOCODES sprl to the Ambassador of Uganda to Democratic Republic of Congo  
(29 July 2008)*





A 5

*DRR Ash  
copy*

**GECODES Sprl**  
**ENTREPRISE DE CONSTRUCTION**  
 7<sup>ème</sup> Rue N°315 LIMETE  
 Tél : 0815089982  
 BP 110833  
 KINSHASA I

Kinshasa, le 29.07.2008.

**Concerne:** Rapport sur le Fonds demandé  
 pour les travaux de réhabilitation  
 de l'AMBASSADE

**AMBASSADE DE L'OUGANDA**  
 Avenue de l'Ouganda n°12  
KINSHASA-GOMBE

Nous avons le plaisir de vous informer sur le rapport de fonds de nos deux demande supplémentaire faites le 01.02.2008 à l'ordre de 28.325\$ US (vingt huit mille trois cent vingt cinq dollars américains) plus 1.600\$ US (dollars mille six cents) sur le montant de 43.475 \$ US (quarante mille quatre cent septante cinq dollars) de notre premier devis du 09.07.2007 et 20.185\$ (vingt mille cent quatre vingt dollars) pour d'autres travaux que vous trouverez les documents y enferment pour réhabiliter la résidence officielle de Son Excellence Monsieur l'Ambassadeur, aujourd'hui qui sert comme bureau de l'Ambassade sur l'avenue de l'Ouganda .

Cela étant, compte tenu de l'inflation de notre monnaie nationale, et le coût de matériaux de construction importé de l'étranger augmenté presque chaque mois comme le ciment et autres..., ne reflétait plus la réalité des prix sur le marché.

*fil\** C'est pourquoi, nous confirmons les montants supplémentaires sollicités pour terminer les travaux, le total s'élevé à : **93.585\$ US (DOLLARS NONANTE TROIS MILLE CINQ CENT QUATRE VINGT CINQ)** \*

Nous vous remercions d'avance pour la compréhension et la bonne collaboration.

**GECODES**  
 S.P.R.L.  
 KINSHASA

**Ir. OZIMATHY - KOLO**  
 Administrateur Gérant



## **Annex 15**

**SAFRICAS Invoices and Wire Transfer Receipts of Payments by Uganda's Embassy in Respect of Renovation of the Ugandan Chancery Located at No. 17 Tombalbaye Avenue de Travailure, Gombe, Kinshasa (2013-2016)**



**SAFRICAS**



*signe  
in rule  
contract committee  
Decision  
R-Ind-acc-2013-10*

Kinshasa, le 18/09/2013

Affaire 13/1/08

**AMBASSADE DE L'OUGANDA**  
à Kinshasa

*Acct 8*  
① pay from Ecu Bank &  
the bal from  
Standard Bank.

② Lets recon firm  
the Adv  
guarantee  
paper with  
Access Bank  
first

*S. Bende  
Accounting Officer*

*cc: H.O.M.  
18/9/2013*

**TRAVAUX DE RENOVATION DE LA CHANCELLERIE DE LA REPUBLIQUE  
DE L'OUGANDA A KINSHASA.**

Messieurs,

Veillez nous payer l'avance de démarrage pour les travaux de rénovation  
de votre Chancellerie à Kinshasa, conformément à nos engagements contractuels,

Soit : **247 988,00 USD**

Nous disons : Deux cent quarante-sept mille neuf cent quatre-vingt-huit  
dollars américains.

A payer sur le compte de : SAFRICAS - CONGO S.A.R.L.

N° de compte : 300 2100 2045 35501 / USD

Banque : ACCESS BANK R.D. CONGO

Banque Intermédiaire : Citi Bank N.Y.

Swift code : CITIUS33

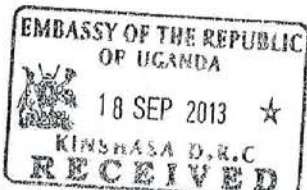
Numero IBAN (CITI BANK NY) : 36253309

Swift code ACCESS BANK : ABNGCDKI

Filipe FERNANDES  
Directeur des travaux



*EU → 140,000  
Std → 107,98  
\$ 247,98*





MINISTRY OF WORKS AND TRANSPORT (MoWT)  
 CONTRACT NO  
 CONTRACT NAME  
 CONTRACTOR  
 CONTRACT PRICE  
 REVISED CONTRACT PRICE  
 CONTRACT SIGNED  
 CONTRACT PERIOD  
 SITE POSSESSION DATE  
 START DATE  
 INTENDED COMPLETION DATE  
 REVISED COMPLETION DATE  
 INTERIM VALUATION NO. 5 (REVISED)

MoFAWRKS/12-13/00090  
 RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING,  
 AVENUE TOMBALBAYE, KINSHASA DRC FOR MoFA  
 SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
 Q. KINGABWA, KINSHASA LIMETE, DRC  
 USD, 1,438,332.73= (VAT of 16% Inclusive)  
 NIL  
 16 September 2013  
 12 Calendar Months from Start Date  
 30 September 2013  
 14 October 2013  
 14 October 2014  
 (Change Order yet to be issued)  
 DATE: 12 JAN 2016

*A/C*  
 Complete the circulation  
 balances to date  
 & process  
 Payment  
 indicate  
 not the balance  
 paid.  
 2. Add the  
 Payment School  
 & Copies of Proc  
 Certificates  
 P

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED			
					QTY	RATE (USD)	QTY	RATE (USD)	AMOUNT (USD)	AMOUNT (USD)
			<b>SUMMARY OF CONTRACT</b>							
			<b>Bill No. 1: Preliminaries</b>							
			<b>Bill No.2: Site preparation and demolltions</b>					57,435.40		
			<b>Bill No.3A : Main Building</b>					77,849.10		
			Section No. 1: RC Superstructures					7,101.88		
			Section No. 2: Staircases					108,196.82		
			Section No. 3: Roof and Rainwater Disposal					60,794.18		
			Section No. 4: Walls and Balcony Railing					61,055.74		
			Section No. 5: Windows and external doors					61,811.80		
			Section No. 6: Internal doors					167,893.30		
			Section No. 7: Finishes							
			<b>Bill No.3B : Annex Building</b>							
			Section No. 1: Substructures							
			Section No. 2: RC Superstructures							
			Section No. 3: Staircases							
			Section No. 4: Roof and Rainwater Disposal							
			Section No. 5: Walls and Balcony Railing							
			Section No. 6: Windows and external doors							
			Section No. 7: Internal doors							
			Section No. 8: Finishes					210,171.68		
			<b>Bill No. 4: External Civil Works</b>					117,829.72		
			<b>Bill No. 5: Day Works</b>					23,618.90		
			<b>Bill No. 6: Electrical Installations</b>					153,330.66		
			<b>Bill No. 7: Mechanical Installations</b>					22,130.85		
			<b>Bill No. 8: Surveillance, motion detection, access control</b>							
			<b>SUB-TOTAL 1</b>					1,127,220.01		
			Contingency Sum: Add 10% of Sub-total 1					112,722.00		
			<b>SUB-TOTAL 2</b>					1,239,942.01		
			<b>ADD Approved Variations/Addendum:</b>							
			Addendum No. 1							
			Addendum No. 2							
			<b>SUB-TOTAL 3</b>					1,239,942.01		
			Add VAT 16%					198,390.72		
			<b>CONTRACT PRICE</b>					1,438,332.73		

4/3

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED	
					QTY	RATE (USD)	AMOUNT (USD)	QTY
ITEM	ITEM	ITEM						
<b>VALUATION NO. 5 SUMMARY</b>								
1. Value of work executed to-date								
a) By Main Contractor								
Bill No. 1: Preliminaries								
Bill Nos. 2 - 8 (as submitted in Contractor's claim dated 05.11.2015 and assessed 12.01.2016)								
Add Variations under documentation								
								1,066,689.34
								80,000.00
b) Materials on site								
c) Advance payments: USD 1,239,942.01 x 20%								
								247,988.40
								1,394,677.74
2. Gross Value								
3. Deduct								
a) Retention : (5% of USD 1,239,942.01)								
b) Recovery of advance payments : USD 247,988.40 x 100%								
c) Damages : 0 Days								
d) Previous payments								
Certificate No. 1								
Certificate No. 2								
Certificate No. 3								
Certificate No. 4								
								61,997.10
								247,988.40
								0.00
								247,988.40
								80,000.00
								196,291.70
								291,740.28
								1,126,815.86
4. Net value payable (excluding VAT)								
								267,861.88
5. Add VAT (18% of Item 4)								
								42,857.90
								110,719.78
<b>6. AMOUNT RECOMMENDED DUE TO CONTRACTOR IN INTERIM CERT. NO. 5 (VAT Incl)</b>								

VALUATION PREPARED BY:

Name : Giles O. Odongo  
 Designation : Ag. AC/QS  
 Date : 13.01.2016

Notes/Limitations to the above valuation:

- Measurements were taken on site jointly with undersigned Contractor personnel
- Variations identified and included have supporting documents in form of instructions, drawings and specs under preparation
- Test certificates and reports are under preparation as part of completion documents
- Project Manager has no objection to quality of any of the work included
- Authorization for extension of the Intended Completion Date, approval of relevant securities are available with Embassy
- Other completion documents are under preparation by Contractor

The undersigned members of the CMT have no objection to the recommendation of the above valuation:

1. Mr. Ben Kumumanya - US/F&A, MoFA, Chairman CMT

2. Mr. Godfrey Kwoba - Head PMTF, MoFA

3. Mr. Omar Wamala - Accountant

4. Ms. Jane Nameyanya - SE/MoFPED

5. Mr. Geoffrey Muhanguzi - P.Arch/MoWT

6. Mr. Mugimbya Nimbasa - SE/MoFPED

WABU  
 [Signature]  
 [Signature]  
 [Signature]  
 [Signature]  
 [Signature]

2/3

Head Item **PAYABLE BY MINISTRY OF FOREIGN AFFAIRS (MoFA)**

M.O.W Form 759  
**ORIGINAL**

THE REPUBLIC OF UGANDA  
MINISTRY OF WORKS AND TRANSPORT  
**INTERIM PAYMENT CERTIFICATE NO. 5 (FIVE)**

Contract No. MoFA/WRKS/2013-1 T.B. Sanction : MoFA CC Meeting of 9.08.2013  
Project RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING, AVENUE TOMBALBAYE, KINSHASA DRC  
Contractor : SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
Address P.O. BOX, Tel., Fax, Email: KINSHASA DRC  
Commencement Date 14/10/2013 Completion Date 31/01/2016  
Amount of Tender USD. 1,438,332.73 Maximum Retention USD. 71,916.64

	USD	cts	USD	cts	
<b>1. VALUE OF WORK EXECUTED TO DATE</b>					
(i) By Main Contractor			1,146,689.34	=	
(ii) By Nominated Sub-Contractor					
(iii) Materials on Site					
(iv) Direct Labour Works (see reverse)			247,988.40		
(v) Advance payment : USD 1,239,942.01 X 20%					
<b>GROSS TOTAL</b>			1,394,677.74	=	
<b>2. DEDUCT</b>					
(i) Retention <u>5</u> per cent of USD. <u>1,239,942.01</u>	61,997.10	=			
(ii) Damages <u>    </u> days @ USD. <u>    </u> per day/week					
(iii) Value of Stores issued by MOWT Stores					
(iv) Value of Direct Labour by MOWT					
(v) Recovery of Advance Payment:	247,988.40	=			
<b>TOTAL DEDUCTION</b>			309,985.50	=	
<b>NET TOTAL</b>			1,084,692.24	=	
<b>DETAILS OF PREVIOUS PAYMENTS</b>					
Cert No.	USD	cts	Cert No.	USD	cts
1	247,988.40	=	Total h/f		
2	80,809.98		11		
3	196,291.07		12		
4	291,740.28		13		
5			14		
6			15		
7			16		
8			17		
9			18		
10			19		
Total c/f	816,830.36	=	20		
			Total		
* Advance Payment					
<b>AMOUNT NOW DUE TO CONTRACTOR</b>				USD	
					310,719.78 =

Certifying Officer [Signature] Approved by       
Title **PRINCIPAL QUANTITY SURVEYOR** Title **AG. ASSIST. COM. (QUANTITY SURVEYING)**  
Date of certificate 13/01/2016 Approved by Engineer-in-Chief       
ORIGINAL-H.Q. Accounts; DUPLICATE-E-in-C; TRIPLICATE-Contractor; QUADRUPPLICATE-Q.S. file; QUINTUPLICATE-Spares PTO

3/B

*Advance payment instalments*

Uganda Embassy Kinshasa

September 26, 2013



Government of Uganda

Payee/Received From: Safricas Ltd  
 Reference No. PV-1503  
 Payment Reference No. N344563  
 Date 09/26/13

Advance Details:

Description	Amount
Safricas Ltd	107,988.00
<b>Total Amount USD</b>	<b>107,988.00</b>

The sum of: \*\*\*\* ONE HUNDRED SEVEN THOUSAND NINE HUNDRED EIGHTY EIGHT USD AND 0 CENTS ONLY \*\*\*\*

Prepared By *[Signature]*

Received By

Approved By *[Signature]*

Date *26/9/13*

Date

Accounting Officer





AMB D'UGANDA

STANDARD BANK 19/05/13 11:26

STANDARD BANK 1 STANDARD BANK RDC s.a.r.l.  
Kinshasa NRC 3230  
République Démocratique du Congo  
12, av. de la Mongala  
B.P. 16297 Kinshasa

024080172301

Adressé par: [illegible]

ORDRE DE PAIEMENT N 344563

Veuillez effectuer le paiement suivant par le débit de notre/mon compte ci-dessus.

Options: 1. Chèque en monnaie locale 2. Chèque en devise 3. Compensation crédit 4. Transfert compte en compte 5. Chèque de voyage 6. Transfert télégraphique 7. Compensation débit 8. Espèce en devise	
Monnaie: USD	Montant à payer: (en chiffres et en lettres) ONE HUNDRED SEVENTY THOUSAND NINE HUNDRED EIGHTY EIGHT DOLLARS ONLY.
Bénéficiaire: SAFRICA - CONGO S.A.R.L	
Banque et N° de compte: ACCESS BANK R.D. A/C No: 3002100201535501 KINSHASA. WIF CODE: ABNGCDKI	
Communications ou références: ADVANCE PAYMENT ON RENOVATION CONTRACT OF THE REPUBLIC OF UGANDA	

Tous frais à notre charge  
Tous frais à charge du bénéficiaire

Cachet et signature (s) autorisée (s)  
(Acceptation des conditions au verso)

[Signature]

PV 1503



Uganda Embassy Kinshasa

September 26, 2013



Government of Uganda

Payee/Received From: Safricas Ltd  
 Reference No. PV-1504  
 Payment Reference No. N14404  
 Date 09/26/13

Advance Details:

Description	Amount
Safricas Ltd	140,000.00
<b>Total Amount</b>	<b>USD 140,000.00</b>

The sum of: \*\*\*\* ONE HUNDRED FORTY THOUSAND USD AND 0 CENTS ONLY \*\*\*\*

Prepared By *[Signature]*

Received By

Approved By *[Signature]*

Date 26/9/13

Date

Accounting Officer



**AFRICAS**



Kinshasa, le 24 / 01 / 2014

FACTURE NO 1301/08 / 13 / 12 / 01

Affaire 13 / 1 / 08

*Accounts  
Process Payment  
S.M.T / T.  
S. Delwa  
A/O  
4/2/14*

**AMBASSADE DE L'OUGANDA  
à Kinshasa**

**TRAVAUX DE RENOVATION DE LA CHANCELLERIE DE LA REPUBLIQUE  
DE L'OUGANDA A KINSHASA.**

Décompte provisoire no 1 des travaux arrêté en décembre 2013 suivant détails en annexe :

Montant des travaux exécutés : 101 012,47 Usd  
Remboursement avance : 20 % 20 202,49 Usd

**TOTAL A PAYER : 80 809,98 USD**

Nous disons : Quatre-vingt mille huit cent neuf dollars américains  
quatre-vingt-dix-huit cents

A payer sur le compte de : SAFRICAS - CONGO S.A.R.L.

No de compte : 300 2100 2045 35501 / USD

Banque : ACCESS BANK R.D. CONGO

Banque intermédiaire : Citi Bank N.Y.

Swift code : CTRUS33

Numéro IBAN (CITI BANK N.Y.) : 36253309

Swift code ACCESS BANK : ABNGCDKI

**Luis CASTELANOS**  
Gestionnaire de chantier

**Filipe FERNANDES**  
Directeur Général Adjoint

*P.c.*

**SAFRICAS-CONGO S.A.R.L.**



MINISTRY OF WORKS AND TRANSPORT (MoWT)  
 CONTRACT NO  
 CONTRACT NAME  
 CONTRACTOR  
 CONTRACT PRICE  
 REVISED CONTRACT PRICE  
 CONTRACT SIGNED  
 CONTRACT PERIOD  
 SITE POSSESSION DATE  
 START DATE  
 INTENDED COMPLETION DATE  
 REVISED COMPLETION DATE  
 INTERIM VALUATION NO. 5 (REVISED)

*A/C*  
 Complete the circulation balances to date of process  
 MoFAWRKS/12-13/00090  
 RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING, DAYMEN AVENUE TOMBALBAYE, KINSHASA DRC FOR MoFA  
 SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS, Q. KINGABWA, KINSHASA LIMETE, DRC  
 USD, 1,438,332.73= (VAT of 16% Inclusive)  
 NIL  
 16 September 2013  
 12 Calendar Months from Start Date  
 30 September 2013  
 14 October 2013  
 14 October 2014  
 (Change Order yet to be issued)  
 DATE: 12 JAN 2016  
 Not Paid.  
 2. Add the payment schedule & copies of proc certificates  
 B A

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED	
					QTY	RATE (USD)	AMOUNT (USD)	QTY
			SUMMARY OF CONTRACT					
			Bill No. 1: Preliminaries					
			Bill No. 2: Site preparation and demolitions			57,435.40		
			Bill No. 3A : Main Building					
			Section No. 1: RC Superstructures			77,849.10		
			Section No. 2: Staircases			7,101.88		
			Section No. 3: Roof and Rainwater Disposal			106,196.82		
			Section No. 4: Walls and Balcony Railing			60,794.18		
			Section No. 5: Windows and external doors			61,055.74		
			Section No. 6: Internal doors			61,811.80		
			Section No. 7: Finishes			167,893.30		
			Bill No. 3B : Annex Building					
			Section No. 1: Substructures					
			Section No. 2: RC Superstructures					
			Section No. 3: Staircases					
			Section No. 4: Roof and Rainwater Disposal					
			Section No. 5: Walls and Balcony Railing					
			Section No. 6: Windows and external doors					
			Section No. 7: Internal doors					
			Section No. 8: Finishes					
			Bill No. 4: External Civil Works			210,171.66		
			Bill No. 5: Day Works			117,829.72		
			Bill No. 6: Electrical Installations			23,618.90		
			Bill No. 7: Mechanical Installations			153,330.66		
			Bill No. 8: Surveillance, motion detection, access control			22,130.85		
			SUB-TOTAL 1			1,127,220.01		
			Contingency Sum: Add 10% of Sub-total 1			112,722.00		
			SUB-TOTAL 2			1,239,942.01		
			ADD Approved Variations/Addendum: Addendum No. 1 Addendum No. 2					
			SUB-TOTAL 3			1,239,942.01		
			Add VAT 16%			198,390.72		
			CONTRACT PRICE			1,438,332.73		

4/3

To be used for other material Realizing the certificate.

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED		
					QTY	RATE (USD)	AMOUNT (USD)	QTY	RATE (USD)
			<b>VALUATION NO. 6 SUMMARY</b>						
			1. Value of work executed to-date						
			a) By Main Contractor						
			Bill No.1: Preliminaries						1,066,689.34
			Bill Nos. 2 - 8 (as submitted in Contractor's claim dated 05.11.2015 and assessed 12.01.2016)						80,000.00
			Add Variations under documentation						
			b) Materials on site						
			c) Advance payments: USD 1,239,942.01 x 20%						247,988.40
			<b>2. Gross Value</b>						<b>1,394,677.74</b>
			3. Deduct						
			a) Retention : (5% of USD 1,239,942.01)						61,997.10
			b) Recovery of advance payments : USD 247,988.40 x 100%						247,988.40
			c) Damages : 0 Days						0.00
			d) Previous payments						
			Certificate No. 1						247,988.40
			Certificate No. 2						80,809.99
			Certificate No. 3						196,291.70
			Certificate No. 4						291,740.28
									1,126,815.86
			<b>4. Net value payable (excluding VAT)</b>						<b>267,861.88</b>
			5. Add VAT (18% of Item 4)						42,857.90
			<b>6. AMOUNT RECOMMENDED DUE TO CONTRACTOR IN INTERIM CERT NO. 6 (VAT Incl)</b>						<b>310,719.78</b>

VALUATION PREPARED BY :

*Giles O. Odongo*

Name : Giles O. Odongo  
 Designation : Ag. AC/QS  
 Date : 13.01.2016

Notes/Limitations to the above valuation:

1. Measurements were taken on site jointly with undersigned Contractor personnel
2. Variations identified and included have supporting documents in form of instructions, drawings and specs under preparation
3. Test certificates and reports are under preparation as part of completion documents
4. Project Manager has no objection to quality of any of the work included
5. Authorization for extension of the Intended Completion Date, approval of relevant securities are available with Embassy
5. Other completion documents are under preparation by Contractor

The undersigned members of the CMT have no objection to the recommendation of the above valuation:

1. Mr. Ben Kumumanya - US/F&A, MoFA, Chairman CMT

*Ben Kumumanya*

2. Mr. Godfrey Kwoba - Head PMTF, MoFA

*Godfrey Kwoba*

3. Mr. Omar Wamala - Accountant

*Omar Wamala*

4. Ms. Jane Namayanya - SE/MoFPED

*Jane Namayanya*

5. Mr. Geoffrey Muhanguzi - P.Arch/MoWT

*Geoffrey Muhanguzi*

6. Mr. Mugimbya Nimbasa - SE/MoFPED

*Mugimbya Nimbasa*

2

2/3



Head **PAYABLE BY MINISTRY OF FOREIGN AFFAIRS (MoFA)**  
Item \_\_\_\_\_

M.O.W Form 759  
**ORIGINAL**

THE REPUBLIC OF UGANDA  
MINISTRY OF WORKS AND TRANSPORT  
**INTERIM PAYMENT CERTIFICATE NO. 5 (FIVE)**

Contract No. MoFA/WRKS/2013-1 T.B. Sanction : MoFA CC Meeting of 9.08.2013  
Project RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING, AVENUE TOMBALBAYE, KINSHASA DRC  
Contractor SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
Address P.O. BOX , Tel. , Fax , Email KINSHASA DRC  
Commencement Date 14/10/2013 Completion Date 31/01/2016  
Amount of Tender USD. 1,438,332.73 Maximum Retention USD. 71,916.64

	USD	cts	USD	cts	
<b>1. VALUE OF WORK EXECUTED TO DATE</b>					
(i) By Main Contractor			1,146,689.34	=	
(ii) By Nominated Sub-Contractor					
(iii) Materials on Site					
(iv) Direct Labour Works (see reverse)					
(v) Advance payment : USD 1,239,942.01 X 20%			247,988.40		
<b>GROSS TOTAL</b>		USD	1,394,677.74	=	
<b>2. DEDUCT</b>					
(i) Retention <u>5</u> per cent of USD. <u>1,239,942.01</u>	61,997.10	=			
(ii) Damages <u>      </u> days @ USD. <u>      </u> per day/week					
(iii) Value of Stores issued by MOWT Stores					
(iv) Value of Direct Labour by MOWT					
(v) Recovery of Advance Payment:	247,988.40	=			
<b>TOTAL DEDUCTION</b>		USD	309,985.50	=	
<b>NET TOTAL</b>		USD	1,084,692.24	=	
<b>DETAILS OF PREVIOUS PAYMENTS</b>					
Cert No.	USD	cts	Cert No.	USD	cts
1	247,988.40	=	Total h/f		
2	80,809.98		11		
3	196,291.07		12		
4	291,740.28		13	<b>LESS PREVIOUS PAYMENTS</b>	
5			14	816,830.36	
6			15	267,861.88	=
7			16		
8			17		
9			18		
10			19		
Total c/f	816,830.36	=	20		
			Total		
* Advance Payment					
<b>AMOUNT NOW DUE TO CONTRACTOR</b>			310,719.78	=	

Certifying Officer [Signature] Approved by \_\_\_\_\_  
Title **PRINCIPAL QUANTITY SURVEYOR** Title **AG. ASSIST. COM. (QUANTITY SURVEYING)**  
Date of certificate 13/01/2016 Approved by Engineer-in-Chief \_\_\_\_\_

ORIGINAL-H.Q. Accounts; DUPLICATE-E-in-C; TRIPLICATE-Contractor; QUADRUPPLICATE-Q.S. file; QUINTUPLICATE-Spares PTO

3/B

Interim Cert 2

Uganda Embassy Kinshasa

February 6, 2014



Government of Uganda

Payee/Received From: Safricas Ltd  
 Reference No. PV-1980  
 Payment Reference No. 00915  
 Date 02/06/14

Advance Details:

Description	Amount
Works Completed at Old Chancery	80,809.98
<b>Total Amount</b>	<b>USD 80,809.98</b>

The sum of: \*\*\*\* EIGHTY THOUSAND EIGHT HUNDRED NINE USD AND 98 CENTS ONLY \*\*\*\*

Prepared By *[Signature]*

Received By

Approved By *[Signature]*

Date 06/02/14

Date

Accounting Officer



# FORMULAIRE DE TRANSFERT DE FONDS

N° 00915 **Ecobank**  
La Banque Panafricaine

IL FAUT REMPLIR CE FORMULAIRE EN LETTRES CAPITALES ET COCHER SI NECESSAIRE

DATE:           REF:

TRANSFERT INTRABANQUE (CPTE A CPTE):  MANAGER'S CHEQUE / BANKER'S PAYMENT  
 TRANSFERT LOCAL (Lcy)  LOCAL / FOREIGN CURRENCY DRAFT  TRANSFERT VERS L'ETRANGER (Fcy)

DEVISE:       MONTANT:

MONTANT EN LETTRES: UN MILION CINQ CENT MILLE FRANCS CFA

### INFORMATIONS DU BENEFICIAIRE

NOM:

PRENOMS:

ADRESSE: 1 Avenue des Palmiers  
Centre Commercial

TELEPHONE:

BANQUE:

ADRESSE DE L'AGENCE BANCAIRE: Centre Commercial

N° DE COMPTE:

IBAN N°:

CODE SWIFT:

BANQUE INTERMEDIAIRE:

CODE SWIFT:

N° DE COMPTE DE L'INTERMEDIAIRE:

MOTIF DE TRANSFERT: PAIEMENT DE LOYER N° 750710043/2017

### INFORMATIONS DE L'EXPEDITEUR

NOM:

PRENOMS:

ADRESSE: 12 Rue Ouganda  
Centre Kigali

N° DE TELEPHONE:

E-MAIL:

N° DE COMPTE A DEBITER:

N° DE COMPTE DES FRAIS DE DEBIT:

FRAIS DU CORRESPONDANT:

A CHARGE DE: 1. DONNEUR D'ORDRE   
2. BENEFICIAIRE

### RÉSERVE A LA BANQUE

N° DE LA TRANSACTION:

TAUX:

CONTREPARTIE EN MONNAIE LOCALE:

COMMISSION:

CODE COMMISSION:

AUTRES FRAIS:

MONTANT TOTAL:

SAISI PAR:

AUTORISE PAR:

### SIGNATURE DE L'ENVOYEUR

En signant ce formulaire, je reconnais et confirme avoir lu et compris les conditions ci-dessus et au verso et consens à être lié par elles.

J'autorise Ecobank à débiter mon compte de la somme principale, des frais des commissions pour effectuer mes instructions. J'accepte que la Banque puisse édiger que je fournisse des détails supplémentaires par écrit avant l'exécution des instructions.

*[Signature]*



Blanc: Exemple service Jaune: Exemple client

06/02/19 12:30

PA 1980

\*: DIFFER MENTION INUTILE

AFRICAS



Kinshasa, le 15 / 08 / 2014

FACTURE NO 130108 / 14 / 08 / 02

Date 13/1/08

AMBASSADE DE L'OUGANDA  
à Kinshasa

TRAVAUX DE RENOVATION DE LA CHANCELLERIE DE LA REPUBLIQUE  
DE L'OUGANDA A KINSHASA.

Décompte provisoire no 2 des travaux exécutés au 2 août 2014 suivant détails en annexe

Montant des travaux exécutés cumulés :	309 899,94 Usd
Avance facturée à la commande :	247 988,40 Usd
<b>Total facturé</b>	<b>643 847,94 Usd</b>
Retenue de garantie : 10%	39 585,95 Usd
Remboursement avance : 20 %	79 171,91 Usd
<b>Total à déduire</b>	<b>118 757,86 Usd</b>
<b>Total à payer</b>	<b>525 090,08 Usd</b>
Paiements effectués	247 988,40 Usd
	80 809,98 Usd
<b>Montant des travaux à payer</b>	<b>196 291,70 Usd</b>
Tva sur travaux cumulés : 16 %	63 337,53 Usd
<b>TOTAL A PAYER :</b>	<b>259 629,22 USD</b>

Nous disons : Deux cent cinquante-neuf mille six cent vingt-neuf dollars américains  
vingt-deux cents.

A payer sur le compte de : SAFRICAS - CONGO S.A.R.L.  
N° de compte : 300 2100 2045 35501 / USD  
Banque : ACCESS BANK R.D. CONGO

Ou

Bénéficiaire : SAFRICAS - CONGO S.A.R.L.  
Numéro de compte : 33 000 67 66 01 - 46 USD  
Banque : Banque Internationale pour l'Afrique au Congo (BIAC)

N.B. : Présenter un arrêté d'exonération des taxes

Ivan YSEBOOT  
Directeur Général-Adjoint

SAFRICAS-CONGO S.A.R.L.  
Société Africaine de Construction au Congo S.A.R.L.  
E-mail : safricas@safricas.com

Siege social  
1. Route des POIDS LOURDS  
Q. KINGABWA  
KINSHASA LIMETE

Reg Commerce KIN N° NRC 2228  
Identification Nat A 04574 X  
N° Impôts A 0700407 B

BCDC KINSHASA 101-094.7639-69 CDF  
BCDC KINSHASA 101-01117991-52 USD  
101-119341-44 EUROS

MINISTRY OF WORKS AND TRANSPORT (MoWT)  
 CONTRACT NO  
 CONTRACT NAME

CONTRACTOR

CONTRACT PRICE  
 REVISED CONTRACT PRICE  
 CONTRACT SIGNED  
 CONTRACT PERIOD  
 SITE POSSESSION DATE  
 START DATE  
 INTENDED COMPLETION DATE  
 REVISED COMPLETION DATE  
 INTERIM VALUATION NO. 5 (REVISED)

*A/C*  
 Complete the calculation  
 balances to date  
 of progress  
 MoFAWRKS/12-13/00090  
 RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING,  
 AVENUE TOMBALBAYE, KINSHASA DRC FOR MoFA  
 : SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
 Q. KINGABWA, KINSHASA LIMETE, DRC  
 : USD, 1,438,332.73= (VAT of 16% Inclusive)  
 : NIL  
 : 16 September 2013  
 : 12 Calendar Months from Start Date  
 : 30 September 2013  
 : 14 October 2013  
 : 14 October 2014  
 : (Change Order yet to be issued)  
 DATE: 12 JAN 2016

*Indicate  
 MoFA Paid.  
 2. Add the  
 Payment Schedule  
 + Copies of Proc  
 Certificates*

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ			WORK EXECUTED		
					QTY	RATE (USD)	AMOUNT (USD)	QTY	RATE (USD)	AMOUNT (USD)
			SUMMARY OF CONTRACT							
			Bill No. 1: Preliminaries							
			Bill No.2: Site preparation and demolitions				57,435.40			
			Bill No.3A : Main Building							
			Section No. 1: RC Superstructures				77,849.10			
			Section No. 2: Staircases				7,101.88			
			Section No. 3: Roof and Rainwater Disposal				106,196.82			
			Section No. 4: Walls and Balcony Railing				60,794.18			
			Section No. 5: Windows and external doors				61,055.74			
			Section No. 6: Internal doors				61,811.80			
			Section No. 7: Finishes				167,893.30			
			Bill No.3B : Annex Building							
			Section No. 1: Substructures							
			Section No. 2: RC Superstructures							
			Section No. 3: Staircases							
			Section No. 4: Roof and Rainwater Disposal							
			Section No. 5: Walls and Balcony Railing							
			Section No. 6: Windows and external doors							
			Section No. 7: Internal doors							
			Section No. 8: Finishes							
			Bill No. 4: External Civil Works				210,171.66			
			Bill No. 5: Day Works				117,829.72			
			Bill No. 6: Electrical Installations				23,618.90			
			Bill No. 7: Mechanical Installations				153,330.66			
			Bill No. 8: Surveillance, motion detection, access control				22,130.85			
			SUB-TOTAL 1				1,127,220.01			
			Contingency Sum: Add 10% of Sub-total 1				112,722.00			
			SUB-TOTAL 2				1,239,942.01			
			ADD Approved Variations/Addendum: Addendum No. 1 Addendum No. 2							
			SUB-TOTAL 3				1,239,942.01			
			Add VAT 16%				198,360.72			
			CONTRACT PRICE				1,438,332.73			

4/3



VAL ITEM	BOQ ITEM	VAR ITEM	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED	
					QTY	RATE (USD)	AMOUNT (USD)	QTY
<b>VALUATION NO. 6 SUMMARY</b>								
1. Value of work executed to-date								
a) By Main Contractor								
Bill No. 1: Preliminaries								
Bill Nos. 2 - 8 (as submitted in Contractor's claim dated 05.11.2015 and assessed 12.01.2016 )								
And Variations under documentation								
1,066,889.34								
80,000.00								
b) Materials on site								
c) Advance payments: USD 1,239,942.01 x 20%								
247,988.40								
<b>2. Gross Value</b>								
<b>1,394,677.74</b>								
3. Deduct								
a) Retention : (5% of USD 1,239,942.01)								
61,997.10								
b) Recovery of advance payments : USD 247,988.40 x 100%								
247,988.40								
c) Damages : 0 Days								
0.00								
d) Previous payments								
Certificate No. 1								
247,988.40								
Certificate No. 2								
80,809.98								
Certificate No. 3								
196,291.70								
Certificate No. 4								
291,740.28								
<b>1,126,815.86</b>								
4. Net value payable (excluding VAT)								
267,861.88								
5. Add VAT (16% of Item 4)								
42,857.90								
<b>6. AMOUNT RECOMMENDED DUE TO CONTRACTOR IN INTERIM CERT. NO. 6 (VAT Incl)</b>								
<b>310,719.78</b>								

VALUATION PREPARED BY:

*[Signature]*

Name : Giles O. Odongo  
 Designation : Ag. AC/QS  
 Date : 13.01.2016

Notes/Limitations to the above valuation:

1. Measurements were taken on site jointly with undersigned Contractor personnel
2. Variations identified and included have supporting documents in form of instructions, drawings and specs under preparation
3. Test certificates and reports are under preparation as part of completion documents
4. Project Manager has no objection to quality of any of the work included
5. Authorization for extension of the Intended Completion Date, approval of relevant securities are available with Embassy
6. Other completion documents are under preparation by Contractor

The undersigned members of the CMT have no objection to the recommendation of the above valuation:

1. Mr. Ben Kumumanya - US/F&A, MoFA, Chairman CMT

*[Signature]*

2. Mr. Godfrey Kwoba - Head PMTF, MoFA

*[Signature]*

3. Mr. Omar Wamala - Accountant

*[Signature]*

4. Ms. Jane Namayanya - SE/MoFPED

*[Signature]*

5. Mr. Geoffrey Muhanguzi - P.Arch/MoWT

*[Signature]*

6. Mr. Mugimbya Nimbasa - SE/MoFPED

*[Signature]*

2/3

Head Item **PAYABLE BY MINISTRY OF FOREIGN AFFAIRS (MoFA)**

M.O.W Form 759  
**ORIGINAL**

THE REPUBLIC OF UGANDA  
MINISTRY OF WORKS AND TRANSPORT  
**INTERIM PAYMENT CERTIFICATE NO. 5 (FIVE)**

Contract No. MoFA/WRKS/2013-1 T.B. Sanction : MoFA CC Meeting of 9.08.2013  
Project RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING, AVENUE TOMBALBAYE, KINSHASA DRC  
Contractor : SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
Address P.O. BOX Tel. Fax Email KINSHASA DRC  
Commencement Date 14/10/2013 Completion Date 31/01/2016  
Amount of Tender USD. 1,438,332.73 Maximum Retention USD. 71,916.64

		USD	cts	USD	cts
<b>1. VALUE OF WORK EXECUTED TO DATE</b>					
(i)	By Main Contractor			1,146,689.34	=
(ii)	By Nominated Sub-Contractor				
(iii)	Materials on Site				
(iv)	Direct Labour Works (see reverse)				
(v)	Advance payment : USD 1,239,942.01 X 20%			247,988.40	
<b>GROSS TOTAL</b>			USD	1,394,677.74	=
<b>2. DEDUCT</b>					
(i)	Retention <u>5</u> per cent of USD. <u>1,239,942.01</u>	61,997.10	=		
(ii)	Damages <u>    </u> days @ USD. <u>    </u> per day/week				
(iii)	Value of Stores issued by MOWT Stores				
(iv)	Value of Direct Labour by MOWT				
(v)	Recovery of Advance Payment:	247,988.40	=		
<b>TOTAL DEDUCTION</b>			USD	309,985.50	=
<b>NET TOTAL</b>			USD	1,084,692.24	=
<b>DETAILS OF PREVIOUS PAYMENTS</b>					
Cert No.	USD	cts	Cert No.	USD	cts
1	247,988.40	=	Total b/f		
2	80,809.98		11		
3	196,291.07		12		
4	291,740.28		13		
5			14		
6			15		
7			16		
8			17		
9			18		
10			19		
Total c/f	816,830.36	=	20		
			Total		
* Advance Payment					
<b>AMOUNT NOW DUE TO CONTRACTOR</b>			USD	310,719.78	=

Certifying Officer [Signature] Approved by       
Title **PRINCIPAL QUANTITY SURVEYOR** Title **AG. ASSIST. COM. (QUANTITY SURVEYING)**  
Date of certificate 13/01/2016 Approved by Engineer-in-Chief       
ORIGINAL-H.Q. Accounts; DUPLICATE-E-in-C; TRIPPLICATE-Contractor; QUADRUPPLICATE-Q.S. file; QUINTUPLICATE-Spares PTO

3/B

Uganda Embassy Kinshasa

September 2, 2014



Government of Uganda

Payee/Received From: Safricas Congo S.A.R.L  
 Reference No. PV-2712  
 Payment Reference No. N 344588  
 Date 09/02/14

Advance Details:

Description	Amount
Interim Payment-Part	100,000.00
<b>Total Amount</b> USD	<b>100,000.00</b>

The sum of: \*\*\*\* ONE HUNDRED THOUSAND USD AND 0 CENTS ONLY \*\*\*\*

Prepared By *[Signature]*

Received By

Approved By *[Signature]*

Date *2/9/14*

Date

Accounting Officer

*paid to 2 del a/c  
 as instructed by  
 Che b*



**Standard Bank**

AMB D'UGANDA

Standard Bank RDC

9248001372301

05 SEP 2014

CUSTOMER CONSULTANT  
1002

STANDARD BANK RDC s.a.r.l.  
Kinshasa NRC 3230  
République Démocratique du Congo  
12, av. de la Mongala  
B.P. 16297 Kinshasa 1

Membre du Groupe Standard Bank Afrique du Sud

Adressé par:

N° de compte:

**ORDRE DE PAIEMENT N 344590**

Veuillez effectuer le paiement suivant par le débit de notre/mon compte ci-dessus.

Options :	1. Chèque en monnaie locale 2. Chèque en devise 3. Compensation crédit 4. Transfert compte en compte	5. Chèque de voyage 6. Transfert télégraphique 7. Compensation débit 8. Espèce en devise
Monnaie : USD	Montant à payer: (en chiffres et en lettres) #50.000= fifty thousand dollars only	
Bénéficiaire :	SAFRICAL-LONGO S.A.R.L	
Banque et N° de compte :	BANQUE INTERNATIONALE POUR L'AFRIQUE ET LE LÉVANT (BIAC) SWIFT CODE: BIA CCDKI	
Communications ou références :	PART PAY-INVOICE #150108/14/08/07	

Tous frais à notre charge  
Tous frais à charge du bénéficiaire

Cachet et signature (s) autorisée (s)  
(Acceptation des conditions au verso)

Fait à Kinshasa, le 04/09/2014

*Quen*  
*Sphen*

PN 2712 (BIAC)



STANDARD BANK RDC s.a.r.l.  
Kinshasa NRC 3230  
République Démocratique du Congo  
12, av. de la Mongela  
B.P. 16297 Kinshasa  
Membre du Groupe Standard Bank Afrique du Sud

AMB D'UNABA

02400137201

Standard Bank

Standard Bank RDC

05 SEP 2014

CUSTOMER CONSULTANT  
1002

N° de compte:

ORDRE DE PAIEMENT N 344589

Veuillez effectuer le paiement suivant par le débit de notre/mon compte ci-dessus.

Options: 6	1. Chèque en monnaie locale 2. Chèque en devise 3. Compensation crédit 4. Transfert compte en compte	5. Chèque de voyage 6. Transfert télégraphique 7. Compensation débit 8. Espece en devise
Monnaie: USD	Montant à payer: (en chiffres et en lettres) <i>500000000 dollars only</i>	
Bénéficiaire: AFRICA - CONGO S.A.R.L	A/C NO: 5001100200500000	
banque et N° de compte: KINSHASA SWIFT CODE: ARINGCDKI		
Communications ou références: PARI PAY - INVOICE #1301081408102		

Fait à Kinshasa, le

Cachet et signature (s) autorisée (s)  
(Acceptation des conditions au verso)

Tous frais à notre charge  
Tous frais à charge du bénéficiaire

*Signature*

04/01/2014

PN 2712 (Access)



Uganda Embassy Kinshasa

September 30, 2014



Government of Uganda

Payee/Received From: Safricas Congo S.A.R.L  
 Reference No. PV-2771  
 Payment Reference No. N 43131/N 64506  
 Date 09/30/14

Advance Details:

Description	Amount
Interime Payment-Certificate 3	96,291.70
Total Amount USD	96,291.70

The sum of: \*\*\*\* NINETY SIX THOUSAND TWO HUNDRED NINETY ONE USD AND 70 CENTS ONLY \*\*\*\*

Prepared By

*[Signature]*

Received By

Approved By

*[Signature]*

Date

30/09/14

Date

Accounting Officer

*Hand 2 left AKS as  
indicated by client*









Kinshasa, le 05 / 03 / 2015

FACTURE NO 130108 / 15 / 02 / 03

Affaire 13 / 1 / 08

AMBASSADE DE L'UGANDA  
à Kinshasa

TRAVAUX DE RENOVATION DE LA CHANCELLERIE DE LA REPUBLIQUE  
DE L'UGANDA A KINSHASA.

Décompte provisoire no 3 des travaux exécutés au 05 mars 2015 suivant détails en annexe :

Montant des travaux exécutés de la période :		392 689,28 Usd
Retenue de garantie : 5%	39 585,95 déjà retenu sur fact 14/04/02	22 411,15 Usd
Remboursement avance : 20 %		78 537,85 Usd
<b>Total à déduire</b>		<b>100 949,00 Usd</b>

**Total à payer pour cette facture : 291 740,28 Usd**

Nous disons : Deux cent quatre-vingt-onze mille sept cent quarante dollars américains vingt-huit cents.

A payer sur le compte de : SAFRICAS - CONGO S.A.R.L.  
No de compte : 300 2100 2045 35501 / USD  
Banque : ACCESS BANK R.D. CONGO

*(Signature)*  
David BLATTNER  
Directeur Général Statutaire

*I received 9 funds  
to \$s*



*A/C*  
*Given that it is over  
a month since the  
invoice was submitted,  
please proceed to  
pay in 2 instalments  
of \$13000 and later  
the balance. This is  
necessary in order to  
close our payment  
terms.*

MINISTRY OF WORKS AND TRANSPORT (MoWT)  
 CONTRACT NO  
 CONTRACT NAME  
 CONTRACTOR  
 CONTRACT PRICE  
 REVISED CONTRACT PRICE  
 CONTRACT SIGNED  
 CONTRACT PERIOD  
 SITE POSSESSION DATE  
 START DATE  
 INTENDED COMPLETION DATE  
 REVISED COMPLETION DATE  
 INTERIM VALUATION NO. 5 (REVISED)

**A/C**  
 Complete the available balances to date of process  
 MoFAWRKS/12-13/00090  
 RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING, AVENUE TOMBALBAYE, KINSHASA DRC FOR MoFA  
 SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS, Q. KINGABWA, KINSHASA LIMETE, DRC  
 USD, 1,438,332.73\* (VAT of 16% Inclusive)  
 : NIL  
 : 18 September 2013  
 : 12 Calendar Months from Start Date  
 : 30 September 2013  
 : 14 October 2013  
 : 14 October 2014  
 : (Change Order yet to be issued)  
 DATE: 12 JAN 2016  
 Not the balance  
 2. Add the Payment Schedule  
 4 Copies of Prelim Certificates

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED	
					QTY	RATE (USD)	AMOUNT (USD)	QTY
			SUMMARY OF CONTRACT					
			Bill No. 1: Preliminaries					
			Bill No.2: Site preparation and demolitions			57,435.40		
			Bill No.3A : Main Building					
			Section No. 1: RC Superstructures			77,849.10		
			Section No. 2: Staircases			7,101.88		
			Section No. 3: Roof and Rainwater Disposal			106,196.82		
			Section No. 4: Walls and Balcony Railing			60,794.18		
			Section No. 5: Windows and external doors			61,055.74		
			Section No. 6: Internal doors			61,811.80		
			Section No. 7: Finishes			167,893.30		
			Bill No.3B : Annex Building					
			Section No. 1: Substructures					
			Section No. 2: RC Superstructures					
			Section No. 3: Staircases					
			Section No. 4: Roof and Rainwater Disposal					
			Section No. 5: Walls and Balcony Railing					
			Section No. 6: Windows and external doors					
			Section No. 7: Internal doors					
			Section No. 8: Finishes					
			Bill No. 4: External Civil Works			210,171.66		
			Bill No. 5: Day Works			117,829.72		
			Bill No. 6: Electrical Installations			23,818.90		
			Bill No. 7: Mechanical Installations			153,330.66		
			Bill No. 8: Surveillance, motion detection, access control			22,130.85		
			SUB-TOTAL 1			1,127,220.01		
			Contingency Sum: Add 10% of Sub-total 1			112,722.00		
			SUB-TOTAL 2			1,239,942.01		
			ADD Approved Variations/Addendum: Addendum No. 1 Addendum No. 2					
			SUB-TOTAL 3			1,239,942.01		
			Add VAT 16%			198,380.72		
			CONTRACT PRICE			1,438,332.73		

4/3



VAL ITEM	BOQ ITEM	VAR ITEM	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED	
					QTY	RATE (USD)	AMOUNT (USD)	QTY
<b>VALUATION NO. 5 SUMMARY</b>								
1. Value of work executed to-date								
a) By Main Contractor								
Bill No.1: Preliminaries								
Bill Nos. 2 - 8 (as submitted in Contractor's claim dated 05.11.2015 and assessed 12.01.2016 )								
Add Variations under documentation								
								1,066,689.34
								80,000.00
								<b>247,988.40</b>
b) Materials on site								
c) Advance payments: <b>USD 1,239,942.01 x 20%</b>								
								1,394,677.74
2. Gross Value								
3. Deduct								
a) Retention : (5%of USD 1,239,942.01)								
								61,997.10
b) Recovery of advance payments : USD 247,988.40 x 100%								
								247,988.40
c) Damages : 0 Days								
								0.00
d) Previous payments								
Certificate No. 1								
								247,988.40
Certificate No. 2								
								80,809.96
Certificate No. 3								
								196,291.70
Certificate No. 4								
								<b>291,740.28</b>
								1,126,815.86
4. Net value payable (excluding VAT)								
								267,861.88
5. Add VAT,(16% of Item 4)								
								42,857.90
								<b>310,719.78</b>
<b>6. AMOUNT RECOMMENDED DUE TO CONTRACTOR IN INTERIM CERT NO: 6 (VAT Incl)</b>								

2

VALUATION PREPARED BY:

*Giles O. Odongo*

Name : Giles O. Odongo  
 Designation : Ag. AC/QS  
 Date : 13.01.2016

Notes/Limitations to the above valuations:

1. Measurements were taken on site jointly with undersigned Contractor personnel
2. Variations identified and included have supporting documents in form of Instructions, drawings and specs under preparation
3. Test certificates and reports are under preparation as part of completion documents
4. Project Manager has no objection to quality of any of the work included
5. Authorization for extension of the Intended Completion Date, approval of relevant securities are available with Embassy
5. Other completion documents are under preparation by Contractor

The undersigned members of the CMT have no objection to the recommendation of the above valuation:

1. Mr. Ben Kumumanya - US/F&A, MoFA, Chairman CMT

*Ben Kumumanya*

2. Mr. Godfrey Kwobs - Head PMTF, MoFA

*Godfrey Kwobs*

3. Mr. Omar Wamala - Accountant

*Omar Wamala*

4. Ms. Jane Namayanya - SE/MoFPED

*Jane Namayanya*

5. Mr. Geoffrey Muhanguzi - P.Arch/MoWT

*Geoffrey Muhanguzi*

6. Mr. Mugimbya Nimbasa - SE/MoFPED

*Mugimbya Nimbasa*

2/3

Uganda Embassy Kinshasa

April 27, 2015



Government of Uganda

Payee/Received From: Safricas Congo S.A.R.L  
 Reference No. PV-3184  
 Payment Reference No. N48433  
 Date 04/27/15

Advance Details:

Description	Amount
Interim Certificate 4-Final Payment	161,740.28
<b>Total Amount</b> USD	<b>161,740.28</b>

The sum of: \*\*\*\* ONE HUNDRED SIXTY ONE THOUSAND SEVEN HUNDRED FORTY USD AND 28 CENTS ONLY \*\*\*\*

*only*

Prepared By *[Signature]*

Received By

Approved By *[Signature]*

Date *27/4/15*

Date

Accounting Officer

*Other Documents on PV 3183*







**SAFRICAS**

Kinshasa, le 20 / 10 / 2015

Affaire 13 / 1 / 08

INVOICE NO 130108 / 15 / 10 / 04

**UGANDA AMBASSY**  
 at Kinshasa

A/C  
 Scan & Send  
 to QS + JSG  
 Write my  
 letter  
 BA

**TRAVAUX DE RENOVATION DE LA CHANCELLERIE DE LA REPUBLIQUE**  
**DE L'OUGANDA A KINSHASA.**

Bill no 4 of works executed until october 15 2015 with respect to details enclosed

Amount of the works during the time interval	310 270,55	Usd
Down payment deduction : 20 %	-62 054,11	Usd
<b>Total</b>	<b>248 216,44</b>	<b>Usd</b>
Garanty retention : 5 %	7 056,13	Usd
Total garanty retained ( preceding months ) : 61 997,10	Usd	
Total garanty retained ( including current month )		
1 098 819,37 x 5 % = 54 940,97	Usd	
Over due garanty retained : 54 940,97 - 61 997,10 = ( 7 056,13 )		
<b>Total</b>	<b>255 272,57</b>	<b>Usd</b>
<b>Balance due on this bill : United States of America dollars</b>	<b>255 272,57</b>	<b>Usd</b>

Two hundred fifty five thousand and two hundred seventy two dollars and fifty seven cents

To be paid on SAFRICAS - CONGO SARL account  
 Account Number : 300 2100 2045 35501 / USD  
 Bank : ACCESS BANK R.D. CONGO

N.B. : This bill cancels and replaces bill no 15/08/04 issued on september 4 2015

**David BLATTNER**

Directeur Général-Statutaire

SAFRICAS - CONGO S.A.  
 SOCIETE AFRICAINE DE CONSTRUCTION AU CONGO S.A.  
 E-mail : safricas@safricas.com

Siège social :  
 1, Route des POIDS LOURDS  
 C. KINGABWA  
 KINSHASA - LIMETE

RCCM : CD/KIN/RCCM/14-B-4132  
 Identification Nat. : 01-420-A04574 X  
 N° Impôts : A 0700407 B

BCDC KINSHASA : 101-094.7639-59 CDF  
 BCDC KINSHASA : 101-01117991-52 USD  
 BCDC KINSHASA : 101-119341-44 EUROS  
 Identification Nat. : 01-420-A04574 X



MINISTRY OF WORKS AND TRANSPORT (MoWT)  
 CONTRACT NO  
 CONTRACT NAME  
 CONTRACTOR  
 CONTRACT PRICE  
 REVISED CONTRACT PRICE  
 CONTRACT SIGNED  
 CONTRACT PERIOD  
 SITE POSSESSION DATE  
 START DATE  
 INTENDED COMPLETION DATE  
 REVISED COMPLETION DATE  
 INTERIM VALUATION NO. 5 (REVISED)

MoFAWRKS/12-13/00090  
 RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING,  
 AVENUE TOMBALBAYE, KINSHASA DRC FOR MoFA  
 SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
 Q. KINGABWA, KINSHASA LIMETE, DRC  
 USD, 1,438,332.73\* (VAT of 16% Inclusive)  
 NIL  
 15 September 2013  
 12 Calendar Months from Start Date  
 30 September 2013  
 14 October 2013  
 14 October 2014  
 (Change Order yet to be issued)  
 DATE: 12 JAN 2016

*ALC*  
*Complete the calculation of balances to date of process*  
*Indicate NOT the balance*  
*2. Add the payment schedule*  
*9 copies of form Certificates*  
*P A*

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED				
					QTY	RATE (USD)	AMOUNT (USD)	QTY	RATE (USD)	AMOUNT (USD)	
			SUMMARY OF CONTRACT								
			Bill No. 1: Preliminaries								
			Bill No.2: Site preparation and demolitions								
			Bill No.3A: Main Building								
			Section No. 1: RC Superstructures								57,435.40
			Section No. 2: Staircases								77,849.10
			Section No. 3: Roof and Rainwater Disposal								7,101.88
			Section No. 4: Walls and Balcony Railing								108,196.82
			Section No. 5: Windows and external doors								60,794.18
			Section No. 6: Internal doors								61,055.74
			Section No. 7: Finishes								61,811.80
			Section No. 8: Finishes								167,693.30
			Bill No.3B: Annex Building								
			Section No. 1: Substructures								
			Section No. 2: RC Superstructures								
			Section No. 3: Staircases								
			Section No. 4: Roof and Rainwater Disposal								
			Section No. 5: Walls and Balcony Railing								
			Section No. 6: Windows and external doors								
			Section No. 7: Internal doors								
			Section No. 8: Finishes								
			Bill No. 4: External Civil Works								210,171.66
			Bill No. 5: Day Works								117,829.72
			Bill No. 6: Electrical Installations								23,618.90
			Bill No. 7: Mechanical Installations								153,330.66
			Bill No. 8: Surveillance, motion detection, access control								22,130.65
			SUB-TOTAL 1								1,127,220.01
			Contingency Sum: Add 10% of Sub-total 1								112,722.00
			SUB-TOTAL 2								1,239,942.01
			ADD Approved Variations/Addendum: Addendum No. 1 Addendum No. 2								
			SUB-TOTAL 3								1,239,942.01
			Add VAT 16%								198,390.72
			CONTRACT PRICE								1,438,332.73

4/3

VAL	BOQ	VAR	DESCRIPTION	UNIT	AS PER BOQ		WORK EXECUTED		
					QTY	RATE (USD)	AMOUNT (USD)	QTY	RATE (USD)
			<b>VALUATION NO. 5 SUMMARY</b>						
			1. Value of work executed to-date						
			a) By Main Contractor						
			Bill No. 1: Preliminaries						
			Bill Nos. 2 - 8 (as submitted in Contractor's claim dated 05.11.2015 and assessed 12.01.2016)						1,066,669.34
			Add Variations under documentation						80,000.00
			b) Materials on site						
			c) Advance payments: USD 1,239,942.01 x 20%						247,988.40
			<b>2. Gross Value</b>						<b>1,394,677.74</b>
			3. Deduct						
			a) Retention : (5% of USD 1,239,942.01)						61,997.10
			b) Recovery of advance payments : USD 247,988.40 x 100%						247,988.40
			c) Damages : 0 Days						0.00
			d) Previous payments						
			Certificate No. 1						247,988.40
			Certificate No. 2						80,809.98
			Certificate No. 3						196,261.70
			Certificate No. 4						291,740.28
									1,126,815.86
			<b>4. Net value payable (excluding VAT)</b>						<b>267,861.88</b>
			<b>5. Add VAT (16% of Item 4)</b>						42,857.90
			<b>6. AMOUNT RECOMMENDED DUE TO CONTRACTOR IN INTERIM CERT NO. 6 (VAT Incl)</b>						<b>310,719.78</b>

VALUATION PREPARED BY:

*Giles O. Odongo*

Name : Giles O. Odongo  
 Designation : Ag. AC/QS  
 Date : 13.01.2016

Notes/Limitations to the above valuation:

1. Measurements were taken on site jointly with undersigned Contractor personnel
2. Variations identified and included have supporting documents in form of instructions, drawings and specs under preparation
3. Test certificates and reports are under preparation as part of completion documents
4. Project Manager has no objection to quality of any of the work included
5. Authorization for extension of the Intended Completion Date, approval of relevant securities are available with Embassy
5. Other completion documents are under preparation by Contractor

The undersigned members of the CMT have no objection to the recommendation of the above valuation:

1. Mr. Ben Kumumanya - US/F&A, MoFA, Chairman CMT

*Ben Kumumanya*

2. Mr. Godfrey Kwoba - Head PMTF, MoFA

*Godfrey Kwoba*

3. Mr. Omar Wamala - Accountant

*Omar Wamala*

4. Ms. Jane Namayanya - SE/MoFPED

*Jane Namayanya*

5. Mr. Geoffrey Muhanguzi - P.Arch/MoWT

*Geoffrey Muhanguzi*

6. Mr. Mugimbya Nimbasa - SE/MoFPED

*Mugimbya Nimbasa*

2/3

Head Item **PAYABLE BY MINISTRY OF FOREIGN AFFAIRS (MoFA)**

M.O.W Form 759  
**ORIGINAL**

THE REPUBLIC OF UGANDA  
MINISTRY OF WORKS AND TRANSPORT  
**INTERIM PAYMENT CERTIFICATE NO. 5 (FIVE)**

Contract No. MoFA/WRKS/2013-1 T.B. Sanction : MoFA CC Meeting of 9.08.2013  
Project RENOVATION/REDEVELOPMENT OF CHANCERY BUILDING, AVENUE TOMBALBAYE, KINSHASA DRC  
Contractor SAFRICAS - CONGO S.a.r.l, 1 Route des POIDS LOURDS,  
Address P.O. BOX , Tel. : Fax : Email : KINSHASA DRC  
Commencement Date 14/10/2013 Completion Date 31/01/2016  
Amount of Tender USD. 1,438,332.73 Maximum Retention USD. 71,916.64

		USD	cts	USD	cts
<b>1. VALUE OF WORK EXECUTED TO DATE</b>					
(i)	By Main Contractor			1,146,689.34	=
(ii)	By Nominated Sub-Contractor				
(iii)	Materials on Site				
(iv)	Direct Labour Works (see reverse)				
(v)	Advance payment : USD 1,239,942.01 X 20%			247,988.40	
GROSS TOTAL			USD	1,394,677.74	=
<b>2. DEDUCT</b>					
(i)	Retention <u>5</u> per cent of USD. <u>1,239,942.01</u>	61,997.10	=		
(ii)	Damages <u>    </u> days @ USD. <u>    </u> per day/week				
(iii)	Value of Stores issued by MOWT Stores				
(iv)	Value of Direct Labour by MOWT				
(v)	Recovery of Advance Payment:	247,988.40	=		
TOTAL DEDUCTION			USD	309,985.50	=
NET TOTAL			USD	1,084,692.24	=
DETAILS OF PREVIOUS PAYMENTS					
Cert No.	USD	cts	Cert No.	USD	cts
1	247,988.40	=	Total by/		
2	80,809.98		11		
3	196,291.07		12		
4	291,740.28		13		
5			14		
6			15		
7			16		
8			17		
9			18		
10			19		
Total c/f	816,830.36	=	20		
			Total		
* Advance Payment					
<b>AMOUNT NOW DUE TO CONTRACTOR</b>				USD	
				310,719.78	=

Certifying Officer [Signature] Approved by       
Title **PRINCIPAL QUANTITY SURVEYOR** Title **AG. ASSIST. COM. (QUANTITY SURVEYING)**  
Date of certificate 13/01/2016 Approved by Engineer-in-Chief       
ORIGINAL-H.Q. Accounts; DUPLICATE-E-in-C; TRIPLICATE-Contractor; QUADRUPPLICATE-Q.S. file; QUINTUPLICATE-Spares PTO

3/  
B

Uganda Embassy Kinshasa

December 15, 2015



Government of Uganda

Payee/Received From: Safricas Congo S.A.R.L  
 Reference No. PV-3539  
 Payment Reference No. N 470749  
 Date 12/15/15

Advance Details:		Amount
Description		
2nd Instalment-Oct'15 Invc-Safricas Congo S.A.R.L		95,000.00
	<b>Total Amount</b>	<b>USD 95,000.00</b>

The sum of: \*\*\* NINETY FIVE THOUSAND USD AND 0 CENTS ONLY \*\*\*\*

Prepared By

*[Signature]*

Received By

Approved By

*[Signature]*

Date

15/12/15

Date

Accounting Officer





**Standard Bank**  
**AMBASSADE D'UGANDA**

STANDARD BANK RDC SA  
 CD/KIN/RCCM/14-B-3334  
 République Démocratique du Congo  
 12, av. de la Monnaie  
 B.P. 16297 Kinshasa I

Membre du Groupe Standard Bank Afrique du Sud

**0240001372301**

N° de compte :

Adressé par :

**Standard Bank RDC**  
**KINSHASA BRANCH**  
**CUSTOMER CONSULTANT**  
**1002**

**ORDRE DE PAIEMENT** N° 470749

Veuillez effectuer le paiement suivant par le débit de notre/mon compte ci-dessus.

Options :	1. Chèque en monnaie locale 2. Chèque en devise 3. Compensation crédit 4. Transfert compte en compte 5. Chèque de voyage 6. Transfert télégraphique 7. Compensation débit 8. Espèces en devise
Monnaie : USD	Montant à payer : (en chiffres et en lettres) <b>105.000 = (ONE HUNDRED AND FIVE THOUSAND ONLY)</b>
Bénéficiaire : SAFFIKI LONGO SARLI	
Banque et N° de compte : ACCESS-BANK RD LONGO WIFT: AONGCDKI	ALC NO: 3002100204535501
Communications ou références : OCTOBER 2011 - SECOND INTIMMENT	

Tous frais à notre charge   
 Tous frais à charge du bénéficiaire

Cacher et signature (s) autorisée (s)  
 (Acceptation des conditions au verso)

Fait à Kinshasa le 10/10/2011

*[Signature]*

PN 3539



**Standard Bank**

**AMB OUGANDA**

**0240001372301**

STANDARD BANK RDC SA  
 CD/KIN/RCCM/14-B-3334  
 République Démocratique du Congo  
 12, av. de la Mongala  
 B.P. 16297 Kinshasa 1

Membre du Groupe Standard Bank Afrique du Sud

Adressé par : **Standard Bank RDC KINSHASA BRANCH**

N° de compte :

**Standard Bank RDC**  
**KINSHASA BRANCH**  
 04 MAR 2016  
 CUSTOMER CONSULTANT  
 1002 111101

**ORDRE DE PAIEMENT N° 487656**

Je soussigné(e) autorise le paiement suivant par le débit de notre/mon compte ci-dessus.

Options : 6		1. Chèque en monnaie locale 2. Chèque en devise 3. Compensation crédit 4. Transfert compte en compte	5. Chèque de voyage 6. Transfert télégraphique 7. Compensation débit 8. Espèces en devise
Monnaie : USD	Montant à payer : (en chiffres et en lettres) 449000 = (US DOLLARS FORTY FOUR THOUSAND ONLY)		
Bénéficiaire : SAFRICAS CONGO S.A.R.L			
Banque et N° de compte : ACCESS BANK RD-CONGO LOGO : ABNGCDKI		A/C NO: 3002100204525501	
Communications ou références : October bill			

Tous frais à notre charge   
 Tous frais à charge du bénéficiaire

Cachet et signature (s) autorisée (s)  
 (Acceptation des conditions au verso)

Fait à Kinshasa le 02/03/16

*W. S. D. M. S.*

PV 3722



**Standard Bank**

**AMB OUGANDA**

STANDARD BANK RDC SA  
 CD/KIN/RCCM/14-B-3334  
 République Démocratique du Congo  
 12, av. de la Mongala  
 B.P. 16297 Kinshasa I

Adressé par :

Standard Bank RDC  
 KINSHASA BRANCH  
 20/04/2015  
 CUSTOMER CONSULTANT  
 1002

0240001372301  
 N° de compte :

Membre du Groupe Standard Bank Afrique du Sud

**ORDRE DE PAIEMENT N° 487667**

Veuillez effectuer le paiement suivant par le débit de notre/mon compte ci-dessus.

Options: <b>6</b>		1. Chèque en monnaie locale	5. Chèque de voyage
		2. Chèque en devise	6. Transfert télégraphique
		3. Compensation crédit	7. Compensation débit
		4. Transfert compte en compte	8. Espèces en devise
Monnaie: <b>USD</b>	Montant à payer: (en chiffres et en lettres) <b>\$ 56,280.88 = (US DOLLAR FIFTY SIX THOUSAND TWO HUNDRED EIGHTY AND EIGHTY EIGHT CENTS ONLY)</b>		
Bénéficiaire: <b>SAFRICOM CONGO SARL</b>			
Banque et N° de compte: <b>CECIBANIC SARL SWIFT: ABNGCDKI</b>		AIC NO: <b>3002100204535501</b>	
Communications ou références: <b>FINAL INSTALMENT</b>			

Tous frais à notre charge

Tous frais à charge du bénéficiaire

Cachet et signature (s) autorisée (s)  
 (Acceptation des conditions au verso)

Fait à **KINSHASA** le **22/04/15**

*Shane Jones*

STANDARD BANK RDC SA  
 CD/KIN/RCCM/14-B-3334  
 République Démocratique du Congo  
 12, av. de la Mongala  
 B.P. 16297 Kinshasa 1  
 Membre du Groupe Standard Bank Afrique du Sud

**Standard Bank**  
**AMBASSADE D'UGANDA**  
**0240001372301**

N° de compte :

**ORDRE DE PAIEMENT N° 470739**

Standard Bank RDC  
 KINSHASA BRANCH  
 30 OCT 2015  
 CUSTOMER CONSULTANT  
 1002  
 Veuillez effectuer le paiement suivant par le débit de notre/mon compte ci-dessus.

Adressé par :

Options :	6	1. Chèque en monnaie locale 2. Chèque en devise 3. Compensation crédit 4. Transfert compte en compte 5. Chèque de voyage 6. Transfert télégraphique 7. Compensation débit 8. Espèces en devise
Monnaie :	USD	Montant à payer : (en chiffres et en lettres) \$76,581 = (SEVENTY SIX THOUSAND FIVE HUNDRED FIFTY ONE ONLY)
Bénéficiaire :	SAFRICAS CONGO SARL	
Banque et N° de compte :	ACCESS BANK RD CONGO SWIFT : ABNGCDK1	AIC NO : 3002100200535901
Communications ou références :	30/10 et octobre 2015 invoice	

Tous frais à notre charge  
 Tous frais à charge du bénéficiaire  
 Cachet et signature (S) autorisée (S)  
 (Acceptation des conditions au verso)  
 Fait à Kinshasa le 27/10/2015  
 [Signature]



SAFRICAS



Kinshasa, le 15 /06 /2016

Affaire 13 /1 /08

INVOICE NO 130108 / 16 /02 / 05

*I AC  
pay this  
down  
contract  
Members  
Supp.  
remained  
as agreed  
to meet  
with  
Chair  
on 22/6/2016  
from the  
21/6/2016  
21/6/2016*

UGANDA AMBASSY  
at Kinshasa

TRAVAUX DE RENOVATION DE LA CHANCELLERIE DE LA REPUBLIQUE  
DE L'OUGANDA A KINSHASA.

Bill no 5 of works executed until fevrier 2016 with respect to details enclosed

Amount of the works during the time interval	141 122,64	Usd
Down payment deduction : 20 %	-28 224,53	Usd
<b>Total</b>	<b>112 898,11</b>	<b>Usd</b>
Garanty retention : 5 %	-7 055,13	Usd
Total garanty retained ( preceding months ) : 54 940,97		Usd
Total garanty retained ( including current month )		
1 239 942,01 x 5 % = 61 997,10		Usd
Over due garanty retained : 61 997,10 - 54 940,97 = 7 056,13		
<b>Total</b>	<b>105 841,98</b>	<b>Usd</b>
Digital Door	8 000,00	Usd

Balance due on this bill : United States of America dollars 113 841,98 Usd

One hundred and thirteen thousand eighth hundred and forty one dollard ninety eight cents

*II Accounts  
Provide a summary of  
payments since commencement of  
project and comment  
amount due as per agreed  
Contract plus as defined above.  
SPD  
21/6/2016*

To be paid on SAFRICAS - CONGO SARL account  
Account Number : 300 2100 2045 35501 / USD  
Bank : ACCESS BANK R.D. CONGO

*III  
Not my  
Comments on  
the attached I/II  
IV. SP*

*[Signature]*  
Daniel SLATTER  
Président du Conseil d'Administration



AMB UGANDA

STANDARD BANK RDC SA  
CD/KIN/RCCM/14-B-3334  
République Démocratique du Congo  
12, av. de la Mongala  
B.P. 16297 Kinshasa I

0240001372301

Standard Bank RDC  
KINSHASA BRANCH

N° de compte :

Membre du Groupe Standard Bank Afrique du Sud

29/JUN 2016  
CUSTOMER SERVICE  
1002

ORDRE DE PAIEMENT

N° 536816

Veuillez traiter le paiement suivant par le débit de notre/mon compte ci-dessus.

Options : 6		1. Chèque en monnaie locale	5. Chèque de voyage
		2. Chèque en devise	6. Transfert télégraphique
		3. Compensation crédit	7. Compensation débit
		4. Transfert compte en compte	8. Espèces en devise
Monnaie : USD	Montant à payer : (en chiffres et en lettres) \$12588.91 = Twelve thousand five hundred eighty eight and ninety one dollar.		
Bénéficiaire : SAFRICA CONGO SARL			
Banque et N° de compte : CESS BANK RD CONGO SWIFT : ABNG CDKI		A/C # 30021002014535501	
Communications ou références : INVOICE # 130108/15/02/01			

Tous frais à notre charge   
Tous frais à charge du bénéficiaire

Cachet et signature (s) autorisée (s)  
(Acceptation des conditions au verso)

*[Signature]*

Fait à Kin le 27/06/16





AMB UGANDA

0240001372301

STANDARD BANK RDC SA  
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B-2

**Annex 16**

Intentionally Omitted





**INTENTIONALLY OMITTED**



### **Annex 17**

U.N. Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session (26 Nov. – 14 Dec. 1990)*, Annex III, *General Comment No. 3 (1990): the nature of States parties' obligations (art. 2, para. 1 of the Covenant)*, U.N. Doc. E/1991/23 (1991)







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**CESCR General Comment No. 3: The Nature of States Parties' Obligations  
(Art. 2, Para. 1, of the Covenant)**

*Adopted at the Fifth Session of the Committee on Economic,  
Social and Cultural Rights, on 14 December 1990  
(Contained in Document E/1991/23)*

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination ...”.

2. The other is the undertaking in article 2 (1) “to take steps”, which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is “to take steps”, in French it is “to act” (“s’engage à agir”) and in Spanish it is “to adopt measures” (“a adoptar medidas”). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be “all appropriate means, including particularly the adoption of legislative measures”. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as

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specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase “by all appropriate means” must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the “appropriateness” of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, “shall have an effective remedy” (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered “appropriate” for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking “to take steps ... by all appropriate means including particularly the adoption of legislative measures” neither requires nor precludes any particular form of government or economic system being used as the



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vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps



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“to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its general comment No. 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled “Adjustment with a human face: protecting the vulnerable and promoting growth,<sup>1</sup> the analysis by UNDP in its *Human Development Report 1990*<sup>2</sup> and the analysis by the World Bank in the *World Development Report 1990*.<sup>3</sup>

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is “to take steps, individually and through international assistance and cooperation, especially economic and technical ...”. The Committee notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in general comment No. 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies “the furnishing of technical assistance” as well as other activities, as being among the means of “international action for the achievement of the rights recognized ...”.

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international

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<sup>1</sup> G.A. Cornia, R. Jolly and F. Steward, Eds., Oxford, Clarendon Press, 1987.

<sup>2</sup> Oxford, Oxford University Press, 1990.

<sup>3</sup> Oxford, Oxford University Press, 1990.



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cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its general comment No. 2 (1990).



## **Annex 18**

“Ban Welcomes Signing of Declaration between DR Congo-M23”, *United Nations News Centre*  
(13 Dec. 2013)





## Ban welcomes signing of declarations between DR Congo-M23



Members of the rebel group known as M23 withdrawing from the North Kivu provincial capital of Goma, Democratic Republic of the Congo (December 2012). UN Photo/Sylvain Liechti

13 December 2013 – [Secretary-General](#) Ban Ki-moon has welcomed the signing of long-awaited accords between the Government of the Democratic Republic of the Congo (DRC) and the M23 rebels it has been fighting until last month, and called on all other armed groups in the country to lay down their weapons and join the political process.

“This constitutes a positive step towards ending cycles of deadly conflicts that have caused immense suffering to the Congolese people,” Mr. Ban said in a [statement](#) from his spokesperson.

Talks between the M23 – mostly composed of soldiers who mutinied from the DRC national army in April last year – and the Government have been held in Kampala, Uganda, under the auspices of the Chairperson of the International Conference for the Great Lakes Region (ICGLR), Ugandan President Yoweri Museveni, the Mediator, as well as Ugandan Defence Minister and Facilitator, Crispus Kiyonga.

The deal, reached after weeks of stalled talks, was finalized last night in the Kenyan capital of Nairobi, signed by President Museveni and President Joyce Banda of Malawi, the chairman of the Southern African Development Community (SADC).

The agreements effectively end the Kampala Dialogue which aimed at reaching a final and principled agreement that ensures the disarmament and demobilization of the M23 and accountability for human rights abuses.

“The DRC Government and M23 have respectively signed declarations reflecting the consensus reached during the Kampala Dialogue on steps necessary to end the armed activities of the M23,” towards long-term stability, reconciliation and development in the country, according to the joint ICGLR-SADC (Southern African Development Community) final communique.

Under the outcome documents, former rebels are entitled to amnesty for rebelling, but are not granted immunity to alleged perpetrators of war crimes, crimes against humanity, genocide, or gross violations of human rights.

Both sides also agreed on the following: the release of prisoners; the end of M23 as a rebel movement and the possibility to establish itself as a political party; and the return of extorted and looted properties during the M23's brief occupation

of Goma in November 2012.

The two declarations also include provisions for the return of refugees and internally displaced persons to their homes. In the past year alone, the fighting has displaced more than 100,000 people, exacerbating an ongoing humanitarian crisis in the region which includes 2.6 million internally displaced persons and 6.4 million in need of food and emergency aid.

In his statement, Mr. Ban “urges the parties to begin implementation without delay and to fully respect their commitments,” the spokesperson said.

Meanwhile, the joint communique calls on international partners, particularly the UN and the African Union (AU) “to work together and provide support and resources to the Government of the DRC for the implementation of the commitments.”

Turning to the wider instability in the country, Mr. Ban called on all other armed groups in the country – which include the Mayi Mayi, the Democratic Liberation Forces of Rwanda (FDLR), the National Army for the Liberation of Uganda (NALU) and the Allied Democratic Forces (ADF) – to “lay down their weapons and pursue their objectives through peaceful political means,” the spokesperson said.

Mr. Ban said that he hoped that the DRC and its neighbours will build on the latest positive developments to address the root causes of instability in the eastern part of the country.

Those plans include the implementation of an 11-nation Peace, Security and Cooperation Framework for the DRC and the region signed earlier this year under UN auspices as a comprehensive approach to sustainable peace in the region.

The Special Envoy of the Secretary-General to the Great Lakes Region, Mary Robinson, has been building support for the framework which she has dubbed 'the framework of hope.'

Mrs. Robinson has led a group of Special Envoys, which includes Martin Kobler, the Secretary-General's Special Representative in the DRC, as well as United States Special Envoy Russ Feingold, African Union Special Representative, Boubacar Diarra and the European Union Senior Coordinator Koen Vervaeke.

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## **Annex 19**

J.C. Witenberg, “La théorie des preuves devant les juridictions internationales”, 56 *Recueil des Cours* 1 (1936-II)



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LA

**THÉORIE DES PREUVES  
DEVANT LES JURIDICTIONS  
INTERNATIONALES**

PAR

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**J.-C. WITENBERG** *1221*

Avocat à la Cour d'appel de Varsovie,  
Jurisconsulte de l'Ambassade de Pologne à Paris



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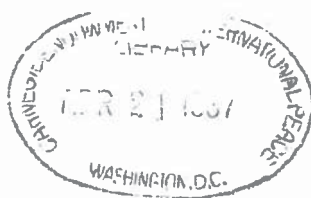
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# RECUEIL DES COURS

1936

II

*Tome 56 de la Collection*



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# LA THÉORIE DES PREUVES

## DEVANT

### LES JURIDICTIONS INTERNATIONALES

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#### INTRODUCTION

**L**E terme de « preuve » comporte plusieurs acceptions. C'est, d'abord, le moyen de déterminer chez le juge la représentation du fait jusque-là ignoré, mais qu'il doit connaître. On dira, par exemple, que le témoignage est une preuve. Cela veut dire que le témoignage détermine dans l'esprit de celui qui le reçoit la représentation d'un fait jusqu'alors inconnu de lui. De même l'aveu est une preuve. C'est-à-dire que la relation, par un sujet de droit, d'un fait de nature à lui nuire, déterminera dans l'esprit de celui qui recevra l'aveu la représentation de ce fait. Tantôt, par contre, la preuve signifiera l'action même de déterminer chez le juge la représentation du fait inconnu. Apporter la preuve, c'est créer dans l'esprit du juge une représentation. En ce sens, on dira que la preuve incombe au demandeur. Cela veut dire que celui qui agit en justice a le devoir de déterminer dans l'esprit du juge la représentation du fait sur lequel il entend fonder sa demande. La preuve est donc, d'une part, le moyen de déterminer chez le juge la représentation d'un fait jusqu'alors ignoré de lui, d'autre part, l'action même de déterminer cette représentation.

La preuve étant à peine définie, on voit immédiatement surgir les problèmes qui s'y rattachent. Ces problèmes, complexes et nombreux, se groupent assez facilement sous quelques idées maîtresses.

Il s'agira de savoir quel est l'objet de la preuve : que

peut-on et doit-on prouver ? Il s'agit ensuite de préciser à qui incombe la charge de déterminer chez le juge la représentation des faits pertinents ou « relevant » : Deux parties litigantes se présentent devant le juge. L'une est demanderesse. L'autre est défenderesse. Quelle est celle des deux qui aura à prouver ? Dans un troisième groupe de problèmes, il faudra rechercher les éléments par la voie desquels la preuve d'un fait peut être administrée. C'est la question des moyens de preuve. En marge de ces problèmes fondamentaux, un autre problème surgit. Il est relatif à la place de la preuve dans le droit en général, dans la procédure en particulier. La preuve fait-elle partie du droit matériel ou du droit formel ? D'autre part, à quel moment de la procédure les problèmes de preuve vont-ils se poser et vont-ils se résoudre ?

\*  
\*\*

En droit international, ces problèmes se présentent dans des conditions tout à fait particulières. Leur domaine, tout d'abord, y est différent de ce qu'il est en droit interne. Ce n'est plus seulement devant un tribunal que la preuve doit être rapportée : elle doit l'être parfois aussi devant des commissions d'enquête. Ces commissions, qui sont prévues aux Conventions de La Haye de 1899 et de 1907, aux Traités Bryan, conclus entre 1913 et 1915 par les Etats-Unis avec les diverses Puissances, ont également place dans le système du Pacte de la Société des Nations, parmi les moyens offerts au Conseil pour l'examen de tout litige non réglé par la voie arbitrale et de nature à entraîner une rupture. On connaît l'objet de ces commissions. Il s'agit de reconstituer des faits litigieux, d'en établir la relation exacte, sans tirer, d'ailleurs, aucune conséquence. Devant ces commissions, le problème des preuves se pose au même titre que devant un tribunal. C'est ainsi que la Commission anglo-russe de 1904 doit rétablir les conditions dans lesquelles la flotte russe a canonné une flottille de pêche anglaise au Dogger Bank<sup>1</sup> ;

1. L'article 3 de la déclaration du 12-25 novembre 1904, soumettant l'incident à l'examen de la commission d'enquête prévoyait un règlement. Celui-ci

que la Commission franco-italienne de 1912 dut enquêter sur les actes d'hostilité accomplis dans les eaux territoriales tunisiennes par des navires italiens<sup>1</sup>; c'est ainsi encore que la Commission germano-hollandaise de 1916 dut reconstituer les circonstances du torpillage du *Tubantia*<sup>2</sup>; c'est ainsi, enfin, qu'après la guerre, en 1925, la Société des Nations envoya une commission d'enquête s'informer sur place dans l'affaire anglo-turque de Mossoul<sup>3</sup>. D'autre part, lorsque le problème des preuves se posera devant les tribunaux internationaux, les termes en seront différents de ceux sous lesquels il se présente devant les juges nationaux. Le juge international ne connaît pas d'autorité supérieure commune aux Etats litigants. Il n'a pas de principe imposé *a priori* aux Etats en conflit. Il n'a pas de loi établissant par voie d'autorité des règles de preuve impératives. Quant aux modes de preuve, l'acte, l'écrit, la preuve préconstituée, sont, en droit international, un élément de preuve relativement assez rare. La complexité des relations entre Etats est telle, la multiplicité de leurs rapports est si grande, qu'ils ne peuvent matériellement faire tous l'objet d'un traité. D'autant que le traité est un acte solennel, dont l'établissement est long et compliqué. Les négociations préalables, la conclusion, puis la ratification, demandent beaucoup de temps. Or, de plus en plus, la vie internationale va vite... Une foule de rapports internationaux échappent donc par la force même des choses à la preuve écrite. Il en va de même pour tous les faits internationaux proprement dits, et en particulier

comprit sept chapitres, dont un, le chapitre E (nos 1 à 9), fut exclusivement consacré à la preuve testimoniale, qu'il régla minutieusement (*Clunet*, 1906, p. 332 et suiv.).

La Convention de La Haye de 1907 posa, pour faciliter le recours aux commissions d'enquête, un certain nombre de règles de procédure applicables en tant que les parties n'auraient pas adopté d'autres règles (art. 17).

1. Cette Commission ne put aboutir. L'affaire fut finalement réglée à l'amiable, en même temps que celles des steamers *Carthage* et *Manouba*, alors pendantes devant la Cour d'Arbitrage de La Haye.

2. La Commission conclut que la torpille ayant coulé le *Tubantia* avait été lancée par un sous-marin allemand.

L'Allemagne accepta d'indemniser le Gouvernement néerlandais.

3. L'affaire fut réglée par le Conseil de la Société des Nations dans sa décision du 16 décembre 1925, attribuant Mossoul à l'Irak.

pour tous les délits internationaux. Là aussi, la nature même des choses va exclure la preuve littérale ou écrite. On va donc recourir au témoignage. Mais, à la différence de ce qui se produit en droit interne, le témoin de l'affaire internationale n'est pas l'égal des parties en litige. Etant le ressortissant de l'une ou de l'autre, il va être impressionné par des préoccupations d'ordre national. Et cela est de nature à fausser le témoignage.

Il y a là toute une série de problèmes qui se sont dressés devant la jurisprudence internationale. Elle a dû les résoudre par ses propres moyens. Le juge international a dû chercher en lui-même, dans les lumières de sa raison, les principes de solution. Les traités d'arbitrage — on le verra — lui ont été d'un maigre appui. Car les traités sont rares qui énoncent une règle de preuve. Les tribunaux internationaux se sont trouvés pour ainsi dire sans guide devant la question des preuves. Cependant, cette question, ils ont fini par la résoudre. Lentement, au cours d'une longue série d'arbitrages, une théorie prétorienne des preuves s'est formée. Les arbitrages internationaux se multiplient. Chacun d'eux laisse quelque chose derrière soi. Chacun dégage une idée que d'autres reprendront. Ces idées, reprises, mises au point, deviennent des principes. Et le corps de ces principes finit par constituer une véritable doctrine. Doctrine très riche, car les précédents où elle a puisé sont très nombreux. Doctrine pratique aussi. Car immédiatement issue des faits, de l'expérience, elle est et demeure en contact étroit avec eux, avec les réalités, avec la vie.

C'est donc en se penchant sur les grands documents jurisprudentiels qu'il faut s'efforcer de résoudre les problèmes essentiels de la preuve devant les juridictions internationales.



**Annex 20**

Marjorie Whiteman, *Damages in International Law* (1943)



**DAMAGES**  
**IN**  
**INTERNATIONAL LAW**

**BY**  
**MARJORIE M. WHITEMAN, LL.B., J.S.D.**  
Assistant to the Legal Adviser  
of the  
Department of State

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## PROSPECTIVE PROFITS

The cases thus far discussed are not, in the main, cases where reimbursement was claimed for the loss of prospective profits. In certain instances claims for the loss of expected profits are disallowed on the ground that they are indirect, uncertain, or speculative. The Commission instituted under article IV of the Treaty of Commerce and Navigation of July 23, 1873 between Great Britain and France, to dispose of certain questions relating to the claims arising out of the payment of certain duties on mineral oils of British origin, collected in France, decided that "Claims for indirect damages, such as commissions lost, failure to earn profits, and so forth", should be rejected.<sup>198</sup>

In the case of the *Saint Gobain, Chauny and Cirey Glass and Chemical Products Manufacturing Company, etc., c. Etat allemand*,<sup>199</sup> decided in 1926 by the Franco-German Mixed Arbitral Tribunal, a claim was presented in part for loss of profits at the rate of 250,000 Belgian francs *per annum* during the period (beginning August 1, 1915) when the property of the Dorsten Glass Works Company (in which the claimant company through the Glass Works Insurance Fund held a large interest) was sequestered by the German authorities. Experts appointed reported that the amount claimed for loss of profits seemed to be "equitable". In allowing an indemnity for the industrial value of the Dorsten glass works and in rejecting the report of the experts in regard to the extent of the loss of profits, the Tribunal stated *inter alia*:

Whereas the experts, in giving their opinion, obviously did not take account of the fact that during the war the operation of glass plants in Germany was limited because of restrictive measures decreed in connection with the distribution of coal, nor of the very special circumstance invoked by the defendant and not contested by the plaintiffs, that the principal object in founding the Dorsten factory had not been to make profits and to distribute dividends, but much rather to fight the competition of the Reisholz factory;

Whereas such a purpose was necessarily bound to exclude the possibility of making large profits as long as the competition of the Reisholz factory should not be overcome;

Whereas the Court, bearing in mind all the above, deems that a sum of 5,500,000 Belgian francs represents a fair indemnity for the prejudice caused by the placing under sequestration and the liquidation of the factory subject of the litigation;<sup>200</sup>

and based the amount awarded on the figure last indicated.

Prospective profits are frequently allowed in international cases, however, on the ground that such losses were within the contemplation of the parties to a contract or, in other cases, that the damage is the direct, or the proximate, or the immediate consequence of the

<sup>198</sup> 65 Br. & For. St. Paps. (1873-74) 426, 429, translation; La Fontaine, *Pasicrisie internationale* (Bern, 1902) 200.

<sup>199</sup> VI *Recueil des décisions des tribunaux arbitraux mixtes* (1927) 297.

<sup>200</sup> *Ibid.* 302, translation.



wrongful act.<sup>201</sup> However, in order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were *reasonably* anticipated; and that the profits anticipated were probable and not merely possible. If the evidence shows that there is doubt that profits would have been realized if the wrongful act had not occurred, damages will be disallowed.

There is apparently no clear-cut demarcation between the allowance of damages for prospective profits in tort as distinguished from contract cases. Prospective profits are allowed or disallowed, not on the basis of whether a particular case is a contract or tort case, except in rare instances, but rather on the basis of whether the expected profits for which damage is claimed were reasonably to be expected from the state of affairs existing at the time of the respondent government's wrongful act. From the nature of things, this may be more often true in contract cases. Frequently, the allowance or disallowance of future profits is held to be controlled by the convention or legislation under the terms of which the tribunal passing upon the claim is organized.<sup>202</sup> In certain classes of cases it has

<sup>201</sup> In connection with the question of allowance of prospective profits, see particularly the sections in the preceding chapters dealing with interference with or destruction of vessels (vol. II, ch. V) and damages for the breach of or interference with contractual rights (ch. VI).

The Supreme Court of the United States has held that "just compensation" must be paid for the taking of private property pursuant to express authorization but that damages for the cancelation of the government's own contract do not include damages for the loss of anticipated gains. (*Russell Motor Car Company et al. v. United States*, 261 U.S. 514, 523 (1923).) In a suit brought by the Ingram-Day Lumber Company against one McLouth for loss of profits sustained on account of the breach of a contract with the company by McLouth, who had refused to accept delivery of lumber which he had agreed to purchase for the building of boats, when the United States Shipping Board Emergency Fleet Corporation canceled its contracts with him for the building of the boats, the Supreme Court held that the contract between Ingram-Day Lumber Company and McLouth was a private contract and allowed recovery for the loss of anticipated profits. (*Ingram-Day Co. v. McLouth*, 275 U.S. 471, 474 (1928).)

<sup>202</sup> Prospective profits were disallowed by the First Court of Commissioners of Alabama Claims established pursuant to the act of Congress of June 23, 1874, which stipulated that "prospective profits . . . gains, or advantages" should be disallowed. (18 Stat. 245, 247-248.)

The act of March 2, 1901, under which a Commission, known as the Spanish Treaty Claims Commission, was established in the United States to settle claims of its nationals against Spain, contained the provision that only the "actual and direct damage" suffered should be allowed and that "remote or prospective damages" should not be allowed. (31 Stat. 877, 879.)

The Joint Resolution of Congress, approved May 25, 1908, conferring jurisdiction upon the Court of Claims of the United States to adjudicate disallowed claims of American nationals against the Boxer-indemnity fund, prior to the remission of a portion of that indemnity to China, excluded the allowance of "merely speculative claims or elements of damage". (35 Stat. 577.)

apparently become customary to allow prospective profits; the allowance of damages in those cases is thought to be reasonable.

Rutherford states in his *Institutes of Natural Law*:

V. In estimating the damages which any one has sustained, where such things as he has a perfect right to, are unjustly taken from him, or withholden, or intercepted; we are to consider not only the value of the thing itself, but the value likewise of the fruits or profits that might have arisen from it. He, who is the owner of the thing, is likewise the owner of such fruits or profits. So that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself. But it is to be considered whether he could have received these profits without any labour or expense: because if he could not, then in settling the damage, for which reparation is to be made, the profits are not to be rated at the full worth of them; but an allowance is to be made for the labour or expense of collecting or receiving them; and when the labour and expense is deducted from their full worth, the remainder is all that he has lost, and consequently, is all that he has any right to demand.

In rating the damage which a man has sustained, we are to estimate something more than the present advantage which he has lost: for the hope or expectation of future advantage is worth something: and if such hope or expectation is cut off by the injury, the value of it is to be allowed him. We must, however, in estimating this hope, be careful not to estimate it as if the advantage had been in actual possession: proper deductions are to be made for the accidents which might have happened to disappoint his expectations. And in proportion as these accidents are greater, or more in number, or more likely to happen, a greater abatement is to be made in consideration of them. In general, the longer time there is to pass before the expected advantage can arise, the more room there is for accidents to prevent its being obtained. And for this reason, other circumstances being equal, the more remote a man's hope is, the less it is worth. Thus, in general, all other circumstances being the same, a field of corn, when it is destroyed in the blade, is worth less than if it had been in the ear.<sup>203</sup>

The Roman and likewise the civil-law systems allow damages described as *damnum emergens* (the actual loss sustained) and as *lucrum cessans* (the cessation of profit). Numerous decisions in international cases, including cases arising in tort as well as those arising in contract, have allowed indemnity for *damnum emergens* and *lucrum cessans*.

The so-called *Chorzów Factory* case, discussed at length *ante*,<sup>204</sup> was a case involving the alleged expropriation of a nitrate factory and business, the property of German nationals, by the Polish Government. The "attitude" of Poland was declared by the Permanent Court of International Justice in Judgment No. 7 (May 25, 1926) not to have been in conformity with provisions of the convention concerning Upper Silesia concluded at Geneva on May 15, 1922, by Germany and Poland.<sup>205</sup> The measurement of the damages sustained was re-

<sup>203</sup> 2d Am. ed. (1832) 203-204.

<sup>204</sup> *Damages in International Law*, vol. II, pp. 1529 *et seq.*

<sup>205</sup> Publications of the Permanent Court of International Justice, Series A-No. 17, Judgment No. 13 (1928); I Hudson, *World Court Reports* (1934) 475, 646.



## **Annex 21**

Jean-Flavien Lalive, “Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice”, *7 Annuaire suisse de droit international* 77 (1950)





QUELQUES REMARQUES SUR LA PREUVE  
DEVANT LA COUR PERMANENTE  
ET LA COUR INTERNATIONALE DE JUSTICE

Par J.-F. LALIVE, docteur en droit,  
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**I. Généralités**

Pour deux raisons principales, la question de la preuve s'est présentée dans des conditions particulières en droit international. D'une part, l'évolution décentralisée de ce droit n'a pas permis aux traditions des systèmes juridiques nationaux d'exercer en cette matière une influence directe. D'autre part, le rythme spasmodique et discontinu des arbitrages internationaux n'a pas pu favoriser la création d'un ensemble de règles précises et cohérentes.

Selon la définition classique, prouver, c'est démontrer la vérité d'un fait contesté de manière à en déduire certaines conclusions de droit<sup>1)</sup>. Fondamentalement, la preuve en droit international a le même objet qu'en droit interne; il s'agit pour le juge ou l'arbitre d'obtenir une représentation du fait inconnu, en d'autres termes de découvrir la vérité<sup>2)</sup>. Mais, si cette fonction est la même, les modalités en seront différentes. A cet égard, il ne sera pas nécessaire de s'arrêter longuement devant un problème souvent débattu en droit interne, à savoir si la preuve appartient au fond (droit matériel) ou à la procédure (droit formel). S'il paraît erroné de soutenir, comme le fait WITENBERG<sup>3)</sup>, que la preuve en droit international appartient

<sup>1)</sup> Cf. GARSONNET & CEZAR-BRU, *Traité théorique et pratique de procédure civile et commerciale*, 3<sup>e</sup> éd. (1912), II, p. 362 s. – BONNIER, *Traité théorique et pratique des preuves*, 5<sup>e</sup> éd. (1888), p. 1 s.

<sup>2)</sup> Non sans doute la vérité absolue, mais la vérité judiciaire dans le cadre que les parties assignent à la divergence qui forme la base du procès.

<sup>3)</sup> La théorie des preuves devant les juridictions internationales, *Recueil des Cours de l'Académie de droit international*, vol. 56 (1936), p. 10 s.

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au seul domaine de la procédure, il est en revanche exact que c'est essentiellement de ce point de vue, celui de l'organisation ou de l'administration de la preuve, que la question présente en droit international certains caractères propres. Quant aux règles de fond, celles qui gouvernent le fonctionnement des tribunaux internationaux et notamment de la Cour internationale<sup>4)</sup>, en matière de preuve, peuvent être considérées comme de véritables principes généraux de droit, source du droit international selon l'article 38 du Statut de la Cour. La disposition de l'article 8 du code civil suisse<sup>5)</sup>, qui a trait à la répartition du fardeau de la preuve, est une règle qu'appliquent tous les tribunaux internationaux<sup>6)</sup>. De même, quant au droit de fond, la justice internationale, dans son développement souple et empirique, a rejeté le système des preuves légales qui imposerait au juge des règles restrictives, notamment l'interdiction de certaines preuves<sup>7)</sup>. C'est de manière générale le système opposé de la conviction intime du juge qui a prévalu. Le juge jouit d'une grande liberté dans l'appréciation des preuves<sup>8)</sup>. Il faut qu'il puisse former sa conviction sans être lié par des règles rigides. Ce principe qui appartient au droit matériel entraîne d'importantes conséquences de procédure, notamment quant à la recevabilité des preuves<sup>9)</sup>.

La Cour permanente a souligné à diverses reprises qu'elle avait toute liberté pour apprécier les preuves et les allégations faites par

4) Aux fins de la présente étude, nous avons admis que la Cour permanente de justice internationale et la Cour internationale de justice constituaient une seule et même entité. Dans le domaine qui nous intéresse, le Statut et le Règlement de deux Cours présentent une similitude complète. Le terme comode de « Cour internationale » englobe donc les deux organismes.

5) « Chaque partie doit, si la loi ne prescrit le contraire, prouver le fait qu'elle allègue pour en déduire son droit. »

6) En ce qui est de la Cour, cf. notamment l'arrêt relatif au Statut juridique du Groënland oriental (1933), C.P.J.I., Série A/B, n° 53, pp. 49, 52; l'affaire franco-hellénique des phares (1934), Série A/B, n° 62, p. 18; cf. aussi l'affaire relative à certains intérêts allemands en Haute-Silésie polonaise (arrêt sur le fond, 1926), Série A, n° 7, p. 30.

7) Par exemple, la preuve testimoniale qui, dans certaines législations (en France), n'est reçue que par exception. Cf. GARSONNET & CEZAR-BRU, op. cit. II, p. 511 s.

8) C'est un principe qui a été affirmé à maintes reprises et qu'on trouve énoncé, sous diverses formes, dans un grand nombre de décisions arbitrales.

9) Cf. infra passim.

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les parties<sup>10</sup>). Ce pouvoir de la Cour ne découle d'aucun texte. Le Statut est muet sur ce point. Mais il est évident que si l'on avait entendu limiter la liberté d'appréciation des juges, l'on aurait introduit une disposition à cet effet dans le Statut.

La règle énoncée par la Cour permanente est dans la ligne d'une jurisprudence abondante des tribunaux arbitraux<sup>11</sup>). Il apparaît bien que la règle de la libre appréciation des preuves constitue un principe général de droit. Elle ne figure en général point dans les traités d'arbitrage ou de règlement judiciaire, lesquels se bornent à énoncer certaines règles de procédure<sup>12</sup>). Il convient d'examiner à cet égard de quelle manière la Cour permanente et la Cour internationale ont essayé de résoudre les difficultés pratiques qui n'ont pas manqué de surgir dans cette recherche de la vérité. Remarquons tout d'abord qu'à côté de ces deux grands tribunaux, les nombreux autres tribunaux internationaux, notamment les tribunaux mixtes et les tribunaux arbitraux, ont apporté une contribution considérable à la question de la preuve<sup>13</sup>). Toutefois, par la force des choses, leur œuvre manque de continuité. Créés en général pour un cas déterminé, ou pour une catégorie de cas, ils manquaient de l'élément de permanence sans lequel il est difficile de concevoir le développement graduel et harmonieux d'une pratique bien définie. Au contraire, la création de la Cour permanente, tribunal préexistant aux litiges internationaux, a modifié cet état de choses. Dès son entrée en fonc-

<sup>10</sup>) Cf. notamment l'affaire relative à certains intérêts allemands en Haute-Silésie polonaise, Série A, n° 7, p. 72-73; affaire relative à l'usine de Chorzow, Série A, n° 9, p. 19.

<sup>11</sup>) Cf. notamment les arbitrages du Président Huber dans l'affaire des biens britanniques au Maroc espagnol (Recueil des Sentences arbitrales [1949], II, passim, not. p. 654) et dans l'affaire de l'Île de Palmas (Ibid. II, p. 841 s.). Le principe avait été posé dès 1875 par l'*Institut de droit international*. Cf. Annuaire, 1877, vol. 1, p. 131. La règle de la Cour permanente est également conforme à la tendance récente de diverses législations internes. Cf. notamment le code allemand de procédure civile (1933), art. 286.

<sup>12</sup>) De là sans doute la déduction erronée de WITENBERG pour qui la preuve appartient au seul droit de procédure: « Les traités posant des règles de fond, ne s'occupant pas de la question des preuves, procèdent donc de cette conception que la matière appartient aux règles de forme, à la procédure, à l'„adjective law“. » (op. cit., p. 14).

<sup>13</sup>) WITENBERG, op. cit., p. 8; SANDIFER, Evidence before International Tribunals (1939), passim.



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tions, la Cour a élaboré un Règlement, véritable-petit code de procédure civile<sup>14</sup>).

Du principe de libre appréciation des preuves découle une conséquence importante dans le domaine de la procédure: à savoir que la Cour permanente et, après elle, la Cour internationale ont adopté une pratique très souple quant à la recevabilité des preuves. Au moment de la rédaction du premier Règlement, la Cour examina s'il fallait adopter le système de certaines législations, selon lequel les parties présentent une offre de preuves, la Cour autorisant l'administration de certaines d'entre elles<sup>15</sup>). On préféra le système anglais des preuves librement présentées par les parties<sup>16</sup>). Ce système fut maintenu, les règles posées ayant résisté à l'épreuve de l'expérience. A cet égard, le Règlement de la Cour n'a pas établi une réglementation détaillée. En 1926, le Président HUBER présenta à la Cour un memorandum relatif à l'amendement projeté de certains articles du Règlement<sup>17</sup>). Lors d'un incident qui avait eu lieu au cours de l'affaire *Mavrommatis* (1924-25), le représentant du Royaume-Uni avait fait remarquer que les parties auraient avantage à savoir exactement dans quelles conditions les preuves peuvent être produites devant la Cour. Cet agent avait donc suggéré que la Cour établît une réglementation plus détaillée que par le passé. Le Président HUBER estima qu'il était difficile de se fonder sur un incident de procédure exceptionnel pour élaborer une réglementation détaillée, qu'au surplus les précédents faisaient défaut, car la jurisprudence des tribunaux sur ce point était très réduite et n'avait, de toute manière, qu'une valeur « très relative », la procédure arbitrale ayant un caractère d'improvisation et ne se fondant en général pas sur un document préconstitué comme le Statut de la Cour.

<sup>14</sup>) Le premier Règlement fut adopté en 1922; des revisions successives eurent lieu en 1925, 1926, 1927 et 1931. Un nouveau Règlement fut adopté en 1936. Enfin, dès après son entrée en fonctions, en 1946, la nouvelle Cour élabora le Règlement du 6 mai 1946.

<sup>15</sup>) Cf. C.P.J.I., Série D (Actes et documents relatifs à l'organisation de la Cour), n° 2, p. 142. Cf. aussi STAUFFENBERG, Statut et Règlement de la C.P.J.I., *Eléments d'interprétation*, (Berlin 1934), p. 365.

<sup>16</sup>) Les règles énoncées par le Statut au sujet de la preuve figurent dans le chap. III, intitulé « Procédure ». Elles sont conçues en termes très généraux et n'ont subi aucune modification lorsque le nouveau Statut fut élaboré, au lendemain de la dernière guerre mondiale.

<sup>17</sup>) Cf. C.P.J.I., Série D, n° 2, Addendum, Revision du Règlement, p. 250.

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Le Président était d'avis que le Statut permettait « d'assurer une bonne administration des preuves et d'éviter des abus »<sup>18)</sup>. Il aurait même été inadmissible que la Cour établît un tel régime, puisque le Statut ne contenait pas trace d'un système formel et rigide des preuves. La Cour se rallia à cette idée, décidant qu'il n'y avait pas lieu d'introduire dans son Règlement des règles sur l'administration des preuves. On en resta donc au système général qui avait été en vigueur depuis le début de la Cour: les parties sont en principe libres<sup>19)</sup> de présenter toutes les preuves qu'elles estiment nécessaires; la Cour, de son côté, jouissant de la plus grande liberté pour apprécier ces preuves.

## II. L'objet et la nature de la preuve

Selon une conception que le droit international a empruntée au droit interne, la preuve doit porter, en règle générale, sur un point de fait. Il faut qu'il s'agisse d'un fait contesté, pertinent (c'est-à-dire relatif à la demande) et concluant (c'est-à-dire de nature à exercer une influence sérieuse sur la demande)<sup>20)</sup>.

L'obligation de prouver incombant à la partie qui allègue un fait s'étend à tous les faits de la demande<sup>21)</sup>. Cette règle de droit (interne) est fondée sur la fiction que, si nul n'est censé ignorer la loi, cela vaut *a fortiori* pour le juge. On excepte cependant la loi étrangère dont l'existence doit être prouvée comme un fait<sup>22)</sup>. En droit international, la situation théorique est la même: la procédure probatoire se rattache au fait. Dans son important ouvrage « La théorie des

<sup>18)</sup> Loc. cit.

<sup>19)</sup> Sous certaines réserves qui seront examinées plus loin, Cf. infra p. 95 s.

<sup>20)</sup> BONNIER fait remarquer que la première de ces conditions rentre évidemment dans la seconde. Op. cit., p. 41.

<sup>21)</sup> On en exceptera cependant les faits notoires, mais il faut que cette notoriété soit appréciée de manière stricte. Dans la sentence de l'Ile de Palmas entre les Pays-Bas et les Etats-Unis, le Président Huber (fonctionnant comme arbitre unique) avait admis que le texte du Traité d'Utrecht de 1714 n'avait pas besoin d'être prouvé, ce traité étant de notoriété publique. Cf. Recueil des Sentences arbitrales (1949), II, p. 842. Demeure également réservée la question de l'*aveu* qui supprimerait l'obligation de la preuve; l'*aveu*, très rare en pratique, n'est pas prévu par le Statut, sinon peut-être, de manière très indirecte, par l'art. 49 in fine.

<sup>22)</sup> Cf. par exemple Répertoire général alphabétique du droit français (1903), vol. 31, p. 548, n° 16.



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preuves devant les juridictions internationales », WITENBERG a soutenu que la connaissance du droit est, en droit international, une « fiction qui serre de très près le réel »<sup>23</sup>). Mais la situation à cet égard n'est pas exempte d'une certaine confusion doctrinale. D'une part, l'importance de la coutume en droit des gens rend la tâche du juge international plus difficile que celle du juge interne. Celui-là doit tout d'abord constater l'existence même de la coutume invoquée, puis seulement il doit l'interpréter, ou il doit l'appliquer au cas d'espèce. Celui-ci se trouve presque toujours en présence d'un texte, ou, dans les pays où le droit coutumier joue encore un rôle, en présence d'une coutume à tel point cristallisée par la jurisprudence que la « constatation » en devient une simple formalité. D'autre part, et sans reprendre ici la discussion bien connue sur le droit et le fait, il sera permis de faire remarquer que cette distinction est souvent artificielle. Ainsi, l'examen de la jurisprudence de la Cour permanente de Justice internationale et de la Cour internationale de Justice révèle que les questions de pur fait sont très rares<sup>24</sup>) et que la presque totalité des affaires porte sur des questions de droit<sup>25</sup>), notamment d'interprétation de traités. C'est là une différence impor-

<sup>23</sup>) En effet, dit-il, « l'Etat peut d'autant mieux être présumé connaître le droit international que, de par sa nature, celui-ci est d'ordre conventionnel, qu'il repose sur son acceptation au moins tacite » (op. cit., p. 33). Le juge international, choisi à raison de sa compétence particulière, n'a pas, en théorie, à recevoir de preuves sur l'existence ou le contenu d'une règle de droit des gens.

<sup>24</sup>) Cela vaut surtout pour les avis consultatifs, mais en matière contentieuse, la situation n'est guère différente. Une exception importante est l'affaire du Détroit de Corfou (1949). Dans l'affaire consultative relative à la Commission européenne du Danube, la Cour prononça que, les faits ayant été soumis à une enquête par un comité spécial de la Société des Nations, et le rapport de ce comité ayant été adopté par l'organisme compétent de la Société, il n'était pas opportun, dans ces conditions, de procéder à de nouvelles études et recherches (Série B, n° 14, p. 46). Dans l'affaire Chinn (Royaume-Uni c. Belgique), la Cour permanente a abordé l'examen de l'affaire par un côté qui permettait de faire abstraction de la « preuve » des faits. C'est une méthode que critique, notamment, le juge Anzilotti, dans son opinion dissidente (C.P.J.I., Série A/B, n° 63, p. 114); il estime que la Cour aurait dû suspendre sa décision sur le fond et ordonner une enquête « pour établir la vérité objective des faits contestés ».

<sup>25</sup>) Ou parfois des questions mixtes où le droit et le fait sont si intimement liés que prouver l'un, c'est prouver l'autre. (Cf. par ex. l'affaire relative au statut du Groenland oriental, Série A/B, n° 53). Il en est le plus souvent de même, en droit interne, des juridictions supérieures (Tribunal fédéral par exemple).

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tante avec nombre d'affaires soumises à des tribunaux arbitraux ou à des commissions mixtes de réclamation, dans lesquelles le fait, et partageant la preuve de ce fait, exercera souvent une influence décisive sur le résultat final.

L'examen de la jurisprudence de la Cour internationale révèle que les parties adoptent sur les points de droit une procédure à caractère nettement probatoire et ne se contentent pas d'une simple argumentation juridique. Tel sera notamment le cas lorsqu'il s'agira d'invoquer une coutume de droit international. Pour en établir l'existence, les parties chercheront à démontrer la succession d'une série de faits, qui, à leurs yeux, constituent cette coutume<sup>27)</sup>. La Cour permanente a eu l'occasion, à diverses reprises, de mettre en lumière le caractère matériel de la coutume<sup>28)</sup>. Dans l'affaire du *Détroit du Corfou*, l'une et l'autre parties ont cherché à démontrer l'existence ou la non-existence, d'après le droit international coutumier, du droit de passage innocent des navires de guerre dans les eaux territoriales et du droit de passage dans les détroits de toute nature. Sur la même base, l'une des parties a cherché à établir que le Déroit de Corfou était une voie maritime internationale, tandis que l'autre des parties contestait ce fait. A cette fin, elles se sont fondées sur une suite de pratiques gouvernementales, sur des faits historiques, des statistiques, des opinions d'auteurs ou de gouvernements. La Cour internationale, dans son arrêt, a tenu compte des données fournies par les parties pour estimer que le Déroit de Corfou entrait dans la catégorie des voies maritimes internationales, où le passage ne saurait être interdit en temps de paix par un Etat côtier<sup>29)</sup>. Dans l'affaire du

<sup>27)</sup> Ainsi que le démontre GUGGENHEIM, *Lehrbuch des Völkerrechts*, I, p. 47 à 48, c'est l'élément de fait qui est décisif, mais la Cour internationale, se fondant sur l'article 38 du Statut, a donné sa sanction à la thèse classique des deux éléments de la coutume, dans son récent arrêt du droit d'asile (Colombie-Pérou), dont les passages pertinents sont cités ci-dessous.

<sup>28)</sup> Cf. notamment *Affaire du Wimbledon*, Série A, n° 1, p. 25 (où la Cour parle de « pratique internationale constante »); *affaire des colons allemands*, Série B, n° 6, p. 36 (« pratique quasi universelle »).

<sup>29)</sup> Il s'agissait en premier lieu de dire s'il existait une coutume autorisant le libre passage, en temps de paix, de navires de guerre par des détroits reliant deux zones de haute mer. Après avoir répondu affirmativement à cette question, la Cour examina si le Déroit de Corfou appartenait à la catégorie juridique des détroits « internationaux », et, pour arriver à une conclusion affirmative, elle s'est notamment prévalu de données historiques et statistiques



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*droit d'asile*, entre la Colombie et le Pérou, il s'agissait de savoir si une coutume régionale, propre aux Etats de l'Amérique latine, autorisait la Colombie à qualifier unilatéralement et définitivement la nature d'un délit commis par un politicien péruvien qui avait reçu « asile diplomatique » dans les locaux de l'ambassade de Colombie à Lima. Rappelant que « la partie qui invoque une coutume de cette nature doit prouver qu'elle s'est constituée de telle manière qu'elle est devenue obligatoire pour l'autre partie », la Cour a estimé que les instruments internationaux non plus que les nombreux cas particuliers cités par la Colombie ne permettaient de dégager « une coutume constante et uniforme acceptée comme étant le droit »<sup>30</sup>). Dans la célèbre affaire du *Lotus*, la Cour permanente a examiné de manière approfondie les arguments (fondés sur une pratique, c'est-à-dire sur un ensemble de faits) qu'avait invoqués le gouvernement français à l'appui de sa thèse d'après laquelle il existait un principe de droit international excluant la compétence de la Turquie pour entreprendre des poursuites contre un ressortissant français, à la suite d'une collision en haute mer. Dans un passage fort intéressant, la Cour affirme que « dans l'accomplissement de sa tâche de connaître elle-même le droit international », elle ne s'est pas bornée à l'examen de l'argumentation française, mais elle a étendu « ses recherches à tous précédents, doctrines et faits qui lui étaient accessibles et qui auraient, le cas échéant, pu révéler l'existence d'un des principes du droit international visés par le compromis »<sup>31</sup>).

On a cru pouvoir tirer argument de ce passage pour soutenir qu'il convient d'abandonner complètement au juge la recherche de l'examen des précédents d'où la règle de droit peut résulter<sup>32</sup>). Une ex-

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fournies par l'une des parties, le Royaume-Uni, dont elle a même cité textuellement dans son arrêt un passage de plaidoirie. Cf. C.I.J. Recueil des arrêts, avis consultatifs et ordonnances (ci-dessous abrégé C.I.J. « Recueil »), 1949, p. 28-29.

<sup>30</sup>) C.I.J. Recueil 1950, p. 276, 277.

<sup>31</sup>) C.P.J.I. Série A, n° 10, p. 31; c'est nous qui soulignons.

<sup>32</sup>) Telle est l'opinion de WITENBERG, op. cit., p. 39, mais il reconnaît que cette conclusion, « juridiquement vraie » est un peu théorique. Dans un autre arrêt (affaire des emprunts brésiliens, 1929), la Cour permanente précisa que, « juridiction de droit international », elle est en cette qualité censée connaître elle-même ce droit (Série A, n° 20-21, p. 124). Toutefois cette indication, figurant dans une phrase subordonnée, a surtout pour objet de marquer le contraste avec les règles de droit interne que « la Cour n'est pas obligée de con-

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plication plus simple peut être proposée: dans la procédure judiciaire internationale, les tribunaux jouissent d'un très large pouvoir d'office; ils peuvent rechercher la vérité non seulement dans les allégations et les preuves des parties, mais de toute autre manière. C'est une collaboration entre les parties, d'une part, et le tribunal, de l'autre, qui permet d'arriver à la vérité. Les Etats n'ont pas le droit mais le devoir de fournir aux tribunaux tous les éléments de preuve dont ils peuvent disposer<sup>33</sup>). Les parties devant la Cour étant presque toujours d'accord sur les faits<sup>34</sup>), cette collaboration portera en général sur des questions de droit ou qui se rattachent de près au droit. C'est pourquoi, à moins de jouer sur le sens des mots, il est difficile d'admettre sans réserve la thèse classique selon laquelle la règle de droit, tant écrite que coutumière, n'a pas à être prouvée devant la justice internationale<sup>35</sup>).

Dans le même ordre d'idées, il est arrivé à plusieurs reprises, que sous une forme ou une autre, une disposition de droit interne ait été invoquée devant la Cour internationale. En droit interne, il est généralement admis que les tribunaux ne sont pas censés connaître le droit étranger et que la preuve d'une disposition particulière doit être rapportée, comme celle de tout autre fait. Mais on retrouve à cet égard aussi la souplesse particulière qui caractérise toute la jurisprudence de la Cour en matière probatoire. Dans l'affaire relative à *certaines intérêts allemands en Haute-Silésie polonaise* (fond) (1926)<sup>36</sup>), la Cour a simplement énoncé ce qui suit:

naître ». Cela n'interdit bien entendu pas aux parties de soumettre tous les moyens et arguments qu'elles estiment propres à influencer le jugement de la Cour.

<sup>33</sup>) Ce que souligne avec raison WITENBERG, *op. cit.*, p. 97.

<sup>34</sup>) Dans l'affaire du Lotus, entre la France et la Turquie, la Cour énonça que les faits se trouvant à l'origine de l'affaire sont « de l'accord des parties » les suivants: ... (Série A, n° 10, p. 10).

<sup>35</sup>) WITENBERG reconnaît d'ailleurs que la règle coutumière, « reposant sur des précédents, donc sur des faits, peut engendrer des controverses de fait, auxquelles la procédure de preuve sera éventuellement étendue » (*op. cit.*, p. 39). Cette constatation a pour effet d'affaiblir sensiblement la thèse par lui soutenue selon laquelle, en droit international plus encore qu'en droit interne, le droit n'aurait jamais à être prouvé. Ainsi qu'on l'a vu, c'est le contraire qui est proche de la réalité, étant donné l'importance beaucoup plus grande des règles coutumières en droit international qu'en droit interne.

<sup>36</sup>) Série A, n° 7, p. 19.



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« Au regard du droit international et de la Cour qui en est l'organe, les lois nationales sont de simples faits, manifestations de la volonté et de l'activité des Etats, au même titre que les décisions judiciaires ou les mesures administratives ».

Mais un arrêt, rendu trois ans plus tard, précise le rapport de ce « fait » avec la procédure probatoire (*Affaire des emprunts brésiliens*). Indiquant que la Cour, qui, juridiction de droit international, est, en cette qualité, censée connaître ce droit et n'est, en revanche, pas obligée de connaître également les lois nationales des différents pays, l'arrêt ajoute :

« Tout ce qu'on peut admettre à cet égard, c'est qu'elle pourrait être éventuellement obligée de se procurer la connaissance du droit interne qu'il y a lieu d'appliquer; et cela, soit à l'aide des preuves que lui fournissent les parties, soit à l'aide de toutes recherches auxquelles la Cour jugerait convenable de procéder ou de faire procéder »<sup>37)</sup>.

Ce passage indique bien que la Cour n'entend pas, à cet égard, se limiter aux éléments de preuves fournis par les parties, mais qu'elle se réserve la faculté de les rechercher elle-même<sup>38)</sup>.

De ce qui précède l'on peut donc conclure que la preuve, dans son sens le plus large, aura pour objet le fait comme le droit. Cela n'enlève rien au pouvoir de la Cour, comme organe du droit international, d'interpréter et de dire ce droit, puisque, de toute manière, elle peut apprécier librement toutes les preuves qui sont produites.

Si cette conception était erronée (il faut reconnaître qu'elle se heurte à la doctrine dominante), il en résulterait que, les affaires devant la Cour ne portant généralement pas sur des points de fait<sup>39)</sup>, aucune procédure probatoire ne devrait d'habitude être nécessaire. Seule suffirait la présentation des deux argumentations. Or la pra-

<sup>37)</sup> Série A, n° 20-21, p. 124.

<sup>38)</sup> Dans un commentaire de cet arrêt, NIBOYET salue cette tendance de la Cour, en faisant observer que les tribunaux nationaux vont trop loin en abandonnant aux seules parties le soin de prouver l'existence du droit étranger (*Revue de droit international privé*, 1929, p. 487-88). Remarquons qu'à la Cour la présence d'un juge de la nationalité des parties facilitera la recherche du droit national (car, dans la mesure où l'on invoquera une disposition de droit interne, il est assez probable qu'il s'agira le plus souvent d'une loi de l'un des Etats en cause). C'est même l'un des arguments qui ont été invoqués à l'appui de l'institution discutable des juges ad hoc.

<sup>39)</sup> Hormis l'affaire du Détroit de Corfou, l'on peut dire qu'il n'y a point d'exemple où le fait se soit présenté en quelque sorte à l'état pur.



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tique démontre que l'inverse est vrai: en un grand nombre d'occasions, les parties ne se sont pas contentées d'énoncer leur thèse, mais elles y ont ajouté divers moyens de preuve.

Quant à la nature de la preuve, l'arrêt rendu par la Cour, en 1949, dans l'affaire du *Détroit de Corfou* (fond) contient plusieurs prononcés importants sur la preuve indirecte ou preuve circonstancielle. Il s'agissait d'établir si l'Albanie était responsable des explosions survenues à bord de deux bâtiments de la marine britannique, qui avaient touché des mines au cours d'un passage dans les eaux territoriales albanaises du Détroit de Corfou. L'Albanie avait-elle, sinon mouillé les mines elle-même, du moins eu connaissance du mouillage? La Cour a estimé que le seul contrôle territorial exercé par un Etat ne permettait pas de conclure qu'il avait eu ou dû avoir connaissance des actes illicites ou de leurs auteurs. Ce contrôle ne justifie « ni responsabilité *prima facie* ni déplacement dans le fardeau de la preuve ». Mais si la Cour n'a pas adopté purement et simplement la théorie de la responsabilité causale, même mitigée de la possibilité d'une preuve libératoire, elle a considéré que ce contrôle territorial exclusif permettait d'atténuer l'exigence de la preuve stricte et exerçait une influence sur le choix des modes de preuve applicables.

« Du fait de ce contrôle exclusif, l'Etat victime d'une violation du droit international se trouve souvent dans l'impossibilité de faire la preuve directe des faits d'où découlerait la responsabilité. Il doit lui être permis de recourir plus largement aux présomptions de fait, aux indices ou preuves circonstanciels (*circumstantial evidence*). Ces moyens de preuve indirecte sont admis dans tous les systèmes de droit et leur usage est sanctionné par la jurisprudence internationale. »<sup>39bis)</sup>

Toutefois, il ne pourra être fait usage de la preuve indirecte que si les présomptions de fait « ne laissent place à aucun doute raisonnable ». Cette règle confirme le système de la conviction intime, appliqué dès le début par la Cour permanente.

### III. La procédure probatoire

La procédure devant la Cour internationale connaît deux phases: l'une écrite, l'autre orale<sup>40)</sup>. L'administration des preuves a lieu au

<sup>39bis)</sup> C.I.J. Recueil, 1949, p. 18.

<sup>40)</sup> Statut, art. 43.

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cours de l'une et de l'autre. La règle principale à cet égard est celle de la communication des preuves (conséquences du principe de l'égalité des parties). Il faut non seulement que l'autre partie puisse examiner la pièce ou la preuve dont il s'agit, mais elle doit pouvoir s'expliquer à ce sujet et, le cas échéant, avoir le temps de se procurer la preuve contraire.

La preuve par documents est beaucoup plus fréquente que la preuve par témoins. Il n'y a d'ailleurs pas de hiérarchie quant à la valeur respective de ces modes de preuve.

Remarquons que, dans la procédure anglo-américaine, la preuve testimoniale a une importance beaucoup plus grande que dans les systèmes continentaux<sup>41</sup>). Même la préparation et le contenu des documents doivent, dans bien des cas, être prouvés par témoins. Il faut que les parties au cours de l'interrogatoire et du contre-interrogatoire (cross-examination) puissent interroger les témoins sur les circonstances de fait qui ont entouré la préparation des documents. Le système des pays de droit civil est opposé. On connaît la méfiance traditionnelle du droit français envers la preuve testimoniale, où le vieil adage « lettres passent témoins » a jusqu'à nos jours trouvé droit de cité<sup>42</sup>). Devant les juridictions supérieures, l'audition de témoins est exceptionnelle. A cet égard, la procédure de la Cour internationale, comme d'ailleurs celle de la plupart des tribunaux arbitraux, a subi l'influence du droit continental plutôt que celle du droit anglo-saxon. Il est cependant clair que la nature même des affaires soumises aux juridictions internationales se prête mal à l'usage de la preuve testimoniale<sup>43</sup>).

D'après l'article 43 du Règlement, les écritures des parties doivent comprendre « toutes pièces et documents à l'appui »<sup>44</sup>). Il en résulte que les preuves écrites devraient autant que possible être produites au cours de la procédure écrite. En fait, elles sont souvent produites

<sup>41</sup>) Cf. à ce sujet WIGMORE, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 1923-1934, vol. V, p. 238 s.

<sup>42</sup>) Cf. à ce sujet, notamment, BONNIER, *op. cit.*, p. 112 s.

<sup>43</sup>) SANDIFER, *op. cit.*, p. 139, tout en constatant ce fait, estime qu'il n'en faut pas pour autant négliger l'influence des juristes continentaux et de leur méfiance envers la preuve testimoniale.

<sup>44</sup>) Dans une affaire (administration du prince de Pless), la Cour fit savoir à l'une des parties (le gouvernement allemand) que le texte de toute pièce, quand il en est fait état dans le mémoire, doit être joint en annexe à ce document (éventuellement en extrait).



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pendant la procédure orale, sur l'initiative d'une partie, à la demande de l'autre partie ou sur la réquisition de la Cour elle-même. A cet égard, l'article 49 du Statut accorde à la Cour un large pouvoir puisqu'il lui permet « même avant tout débat, de demander aux agents de produire tout document et de fournir toutes explications; en cas de refus, elle en prend acte »<sup>45)</sup>.

Les documents produits comme preuves par les parties sont de nature si variée qu'ils défient toute classification<sup>46)</sup>.

Un aspect intéressant de la procédure devant la Cour est l'usage qu'on a fait de l'institution anglo-saxonne de l'« affidavit ». L'affidavit est une preuve qui se trouve à mi-chemin entre la preuve documentaire et la preuve testimoniale. C'est le procès-verbal d'une déclaration, faite sous serment, devant un magistrat et sur l'initiative d'une partie, aux fins de certifier la réalité de certains faits ou l'authenticité de certains documents. Le rôle du magistrat (souvent simple juge de paix ou « notaire public » dans le sens anglo-saxon du terme) est d'ailleurs purement formel. Il consiste à enregistrer le serment et ne comporte aucun examen du fond de la question. On voit que la procédure extrajudiciaire de l'affidavit offre beaucoup moins de garanties que celle de l'enquête par témoins faite devant le tribunal du fond ou que celle de la commission rogatoire<sup>47)</sup>.

L'affidavit a cependant été reçu dans les procédures arbitrales et judiciaires internationales et la Cour en a également sanctionné l'usage. Cela s'explique non seulement par le libéralisme de la Cour en matière de recevabilité des preuves mais aussi par des considérations pratiques. Si l'affidavit ne remplace jamais la comparution du

<sup>45)</sup> Cf. infra p. 99-100.

<sup>46)</sup> WITENBERG a tenté une énumération intéressante encore qu'incomplète (op. cit., p. 60 s.). Citons à titre d'exemple que dans l'affaire du Détroit de Corfou, les documents produits consistaient en correspondances diplomatiques, procès-verbaux, rapports et documents d'organismes internationaux, cartes de géographie, calques et croquis, rapports maritimes, constats d'avarie, photographies, traités et accords internationaux, déclarations sous serment (« affidavits »), télégrammes, coupures de journaux, correspondance privée, livres de bord et journaux de navigation, ouvrages divers, instructions, manuels et règlements maritimes divers, registres de chantiers navals, etc. etc.

<sup>47)</sup> SANDIFER expose que c'est l'affidavit qui a créé les divergences les plus fortes entre les juristes continentaux et les juristes anglo-américains appelés à instruire une affaire devant les tribunaux internationaux (op. cit., p. 167).

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témoin et son interrogation par les parties et la Cour, il n'en demeure pas moins vrai que dans plusieurs cas la convocation de témoins et leur déplacement à La Haye pourraient soulever certaines difficultés, notamment causer des frais disproportionnés. De même, la procédure de la commission rogatoire ordonnée par la Cour pourrait non seulement entraîner de grands retards, mais, selon le cas, soulever de délicates questions d'exécution pratique<sup>48)</sup>.

La Cour internationale de Justice, à plusieurs reprises et notamment dans deux affaires importantes, a admis la production d'affidavits comme preuves: en 1927, dans l'affaire des *Concessions Mavrommatis* (différend entre la Grèce et le Royaume-Uni)<sup>49)</sup>, et en 1948, dans l'affaire du *Détroit de Corfou*<sup>50)</sup>. Dans les deux cas l'une des parties était un Etat dont la procédure reconnaît cette preuve. Remarquons que l'affidavit joue un rôle nettement plus important dans la procédure arbitrale que dans la procédure devant la Cour, ce qui paraît résulter tant de la nature des affaires soumises à la Cour que du fait que la plupart des différends à elle soumis ont opposé des pays européens ignorant cette preuve<sup>51)</sup>. La pratique

<sup>48)</sup> Pour démontrer la nécessité de ce système devant les tribunaux arbitraux, SANDIFER (p. 172 s.) expose nombre de précédents et de cas où l'affidavit constituait l'unique moyen de preuve possible. WITENBERG est d'avis que cette preuve a pris place dans tous les systèmes juridiques modernes. A l'appui de son dire, il cite les législations fiscales lesquelles prévoient la déclaration solennelle de l'intéressé pour asseoir l'impôt (op. cit., p. 81). Mais cette déclaration n'est pas pareille à l'affidavit en ce sens qu'il n'y a pas serment enregistré devant officier ministériel ou juge de paix.

<sup>49)</sup> Cf. C.P.J.I. Série C, vol. 13, III, p. 488-491. La correspondance transmettant ces documents à l'agent britannique est reproduite aux pages 524 à 526. Dans l'affaire Pazmany (1933) on trouve un document intitulé « certificat légal (parère) du ministre royal hongrois de la justice » (cf. Série C, vol. 72, p. 316). Ce document est désigné par le terme « affidavit » dans le bordereau joint en annexe à l'arrêt (Série A/B, n° 61).

<sup>50)</sup> C.I.J. Recueil, 1949, cf. p. 132: liste des documents joints en annexe à l'arrêt de la Cour.

<sup>51)</sup> Les Etats-Unis par exemple qui ont participé à un très grand nombre de procédures arbitrales n'avaient jamais encore été partie à une affaire contentieuse devant la Cour jusqu'à l'affaire relative aux droits des ressortissants américains au Maroc (instance introduite par requête de la France en date du 27 octobre 1950). Dans son remarquable ouvrage déjà cité, SANDIFER indique de quelle manière la procédure des affidavits pourrait être améliorée (p. 184 s.).



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montre que l'affidavit est une preuve reçue par les juridictions internationales<sup>52</sup>).

La production de preuves au cours de la procédure orale soulève un certain nombre de questions intéressantes. Le principe de la liberté des parties dans la présentation des preuves est limité par certaines règles d'ordre, énoncées dans le Règlement de la Cour et précisées par la pratique.

L'article 48 du Règlement dispose qu'aucun « document » nouveau ne peut être présenté après la fin de la procédure écrite, à moins d'un accord entre les parties. S'il n'y a pas accord, c'est à la Cour qu'il appartient d'écartier ou d'autoriser cette production.

Dans l'affaire *Mavrommatis*, l'avocat hellénique avait entendu citer à l'audience certains extraits du compte rendu des débats parlementaires britanniques (Hansard). L'avocat du Royaume-Uni s'opposa à cette citation qui, selon lui, devait être rejetée comme preuve. Le demandeur fit alors valoir que le régime établi par le Statut était celui d'une grande liberté, chaque partie ayant la latitude de produire toute pièce qu'elle jugeait utile à son argumentation, sauf à la Cour à statuer librement sur la valeur probante<sup>53</sup>). Au contraire, l'avocat britannique soutint que les règles relatives à la recevabilité étaient essentielles à la procédure judiciaire de tous les pays et qu'un tribunal international, à plus forte raison, se devait de les observer. La Cour prononça que la lecture du document était recevable, la décision sur l'importance qu'il convenait d'attribuer audit document demeurant réservée.

<sup>52</sup>) WITENBERG est d'avis qu'on peut aujourd'hui considérer la recevabilité de l'affidavit comme étant de coutume en droit international arbitral (L'organisation judiciaire, la procédure et la sentence internationales, *Traité pratique*, 1937, p. 255). Remarquons que dans aucune des affaires précitées les affidavits n'ont exercé une influence probatoire décisive. Dans l'affaire du Détroit de Corfou, le Royaume-Uni a fait très large usage de ce moyen de preuve. Dans un cas seulement et sur un point secondaire, la Cour a accordé pleine valeur probante à un affidavit (cf. C.I.J. Recueil 1949, p. 19). Dans les autres cas elle s'est fondée sur d'autres motifs ou a recherché d'autres preuves permettant de corroborer les faits certifiés par affidavits. Ainsi, dans son arrêt relatif à la fixation des dommages, la Cour a fait examiner par des experts si les demandes britanniques, étayées d'affidavits, étaient fondées en fait (cf. Recueil 1949, p. 247).

<sup>53</sup>) Cf. C.P.J.I. Série C, n° 7, vol. II, p. 31 s., 46, 95; cf. aussi STAUFFENBERG Statut, etc., *Eléments d'interprétation*, p. 365.



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La règle énoncée par le Règlement de la Cour est assurément nécessaire à la bonne administration de la justice. Que les documents soient joints aux écritures, ce mode de faire constitue le meilleur moyen d'assurer l'égalité des parties, puisque, de la sorte, elles auront à temps communication des pièces et arguments dont se prévaut la partie adverse. En revanche, ce serait faire preuve d'un formalisme excessif que d'exciper d'irrecevabilité pour la seule raison qu'un document est produit ou cité au cours de la procédure orale (une telle production a d'ailleurs été de pratique courante). Les incidents de procédure que révèle l'histoire de la Cour comme celle des tribunaux arbitraux ont été provoqués principalement par les représentants anglo-saxons. Cela illustre un phénomène intéressant qu'il convient de relever ici. Les juristes (conseils et avocats) des parties se présentent devant la Cour avec le bagage de leur culture juridique nationale. Ils ont souvent beaucoup de peine à faire abstraction de leurs règles propres de procédure et à tenir compte des conditions et des besoins particuliers de la justice internationale. En droit anglo-américain, la science de la preuve (evidence) constitue une discipline juridique de première importance. Elle fait l'objet de traités volumineux et, dans les universités, d'un enseignement séparé. Ce phénomène qui frappe tous les juristes élevés à l'école du « droit civil » a pour origine, d'une part, l'institution du jury qui a marqué d'une empreinte décisive le développement de la procédure, d'autre part, la liberté très grande du régime des preuves qui sont administrées par les parties elles-mêmes. Le système de l'offre de preuves et de la décision prise à ce sujet par la Cour, ou des questions posées aux témoins par l'intermédiaire du juge, est un système inconnu des pays anglo-américains. Mais le régime de liberté totale, avec la prime qu'il accorde aux avocats et aux procéduriers habiles, capables d'extraire des témoins toute déclaration utile à leurs causes, a été peu à peu amélioré, au gré de la pratique et des besoins judiciaires, par un véritable réseau de règles limitant la recevabilité de certaines questions ou de certains documents<sup>54</sup>). Etant donnée l'influence considérable et

<sup>54</sup>) L'ouvrage classique et monumental de Wigmore sur la preuve en droit anglo-américain comporte cinq gros volumes dont – constatation frappante – plus de quatre sont consacrés à la question de la recevabilité. Dans les procédures continentales, cette question n'apparaît qu'incidemment, à propos de la condition de pertinence et des diverses applications de l'adage « *Frustra admittitur probandum quod probatum non relevat* ». Cf. aussi BONNIER, Traité

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d'ailleurs très bienfaisante que les pays anglo-américains ont exercée sur le développement de la procédure arbitrale et judiciaire internationale, il n'est pas étonnant qu'ils aient, à maintes reprises, essayé, par leurs juristes, d'assurer la réception de leurs « institutions » de procédure par le droit international<sup>55</sup>).

Toutefois, un tribunal comme la Cour internationale, formé de juristes « qui réunissent les conditions requises pour l'exercice, dans leurs pays respectifs, des plus hautes fonctions judiciaires »<sup>56</sup>), est en mesure d'apprécier la valeur de documents ou de témoignages; il n'a pas besoin d'être protégé par un arsenal de règles limitant la recevabilité des preuves. C'est, sans doute, le point de vue auquel s'était placé la Cour permanente lorsqu'elle a prononcé la décision relatée plus haut dans l'affaire *Mavrommatis*.

L'affaire du Détroit de Corfou, jugée en 1949 par la Cour, a été fertile en incidents de procédure du même ordre<sup>57</sup>). Les nombreux témoins cités par les parties ont fait leurs dépositions entre les premières et les secondes plaidoiries (réplique et duplique). Au début de la première audience, le Président indiqua que l'interrogatoire des témoins serait assuré par les parties elles-mêmes (cross-examination), la Cour se réservant le droit de poser ensuite d'autres questions<sup>58</sup>). Le Président précisa que la procédure adoptée par la Cour était « très souple », ajoutant: « ce que la Cour désire, c'est de jeter la plus grande lumière sur l'affaire et, en même temps, de donner aux parties la faculté de défendre leur thèse »<sup>59</sup>).

des preuves, p. 41; GARSONNET & CEZAR-BRU, *op. cit.*, II, p. 365 s., notamment 375.

<sup>55</sup>) Une manifestation intéressante de cette tendance est apparue au cours du différend, cité plus haut relatif à l'Ile de Palmas (cf. note 11). Pour une discussion des problèmes soulevés par cet incident de procédure, cf. SANDIFER, *op. cit.*, p. 44 s.

<sup>56</sup>) Statut, art. 2.

<sup>57</sup>) Au cours de la procédure orale (fond) l'Albanie était représentée par des juristes français peu familiarisés avec certaines techniques de la procédure anglo-saxonne qu'ont tenté de faire prévaloir leurs contradicteurs britanniques. Cela a provoqué, sur le plan de la procédure où s'affrontaient en somme deux systèmes très différents, une suite d'incidents qui ne manqueront pas de retenir l'attention des spécialistes.

<sup>58</sup>) Conformément à l'art. 53 du Règlement (Audience du 22 novembre 1948; C.I.J. Mémoires, plaidoiries, documents, affaire du Détroit de Corfou III, p. 427).

<sup>59</sup>) *Ibid.*, p. 428.



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A diverses reprises, les avocats britanniques firent objection à la production de certains documents. Dans un cas<sup>60)</sup>, il s'agissait d'une photocopie d'un document yougoslave, l'avocat britannique fit remarquer qu'en Angleterre le document doit être produit en original, à moins qu'un témoin ne puisse, de science personnelle, affirmer que l'original du document a été perdu ou détruit. Le Président décida que le document serait provisoirement retenu comme « élément d'information ». Après une suspension d'audience, la Cour prononça sur ce point. Rappelant aux parties le Règlement (art. 48 et 43), la Cour décidait que le document devait être présenté en « original complet », que tous les autres documents dont les parties se proposaient de faire usage devaient être préalablement déposés au Greffe, la Cour se réservant de dire quels étaient ceux de ces documents qui devaient être présentés en original ou en copies certifiées conformes<sup>60bis)</sup>.

A une autre audience, les avocats du Royaume-Uni cherchèrent à faire rejeter par la Cour, pour raison de tardiveté (art. 48 du Règlement), la production de certains documents<sup>61)</sup>. L'incident de procédure donna lieu à un intéressant débat, où se confrontèrent une fois de plus deux systèmes de procédures. Pour les avocats britanniques, c'était à la partie albanaise qu'incombait le fardeau de démontrer les raisons pour lesquelles lesdits documents devaient être reçus à ce moment tardif de la procédure. Après avoir exposé les raisons pour lesquelles lesdits documents n'avaient pas pu être produits plus tôt, l'avocat de l'Albanie donna un résumé desdits documents pour démontrer l'utilité que présentait leur recevabilité à ce stade des débats. Il y eut sur ce point protestation des avocats anglais, selon lesquels la plaidoirie de la partie adverse n'aurait dû porter que sur la recevabilité, non sur la pertinence desdits documents et leur intérêt quant au fond<sup>62)</sup>.

<sup>60)</sup> Audience du 24 novembre 1948, C.I.J. Mémoires, etc., III, p. 539.

<sup>60bis)</sup> Ibid., p. 545.

<sup>61)</sup> Audience du 7 décembre, op. cit., III, p. 305 s. Il s'agissait notamment de documents que le gouvernement albanais avait obtenus du gouvernement yougoslave.

<sup>62)</sup> Op. cit., III, p. 310 s. C'est ici qu'apparaît sous une lumière particulièrement crue la différence des systèmes juridiques. Selon les avocats de l'Albanie, il n'était guère possible de prononcer sur la recevabilité desdits documents sans en connaître le contenu. L'autre partie, habituée aux règles techniques régissant la preuve en droit anglo-saxon, entendait dissocier complète-

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A l'audience du 10 décembre 1948, la Cour prononça sa décision (prise à l'unanimité) sur ce point, déclarant recevables les documents que le Royaume-Uni entendait exclure du débat pour raison de tardiveté<sup>62bis</sup>). La décision précisait que l'agent albanais était invité à expliquer « à l'audience prochaine, la portée de ces documents et les points qu'ils sont destinés à démontrer ». D'autre part, l'agent britannique était autorisé à présenter dans un délai de quatre jours après ladite audience, ses observations sur ces documents, et, le cas échéant, des « documents ou témoignages à l'appui desdites observations ».

Cette décision confirme la nette tendance déjà relevée des juridictions internationales de ne pas se laisser entraver par des règles techniques de procédure dans la recherche de la vérité. Dans le cas d'espèce, la Cour n'a pas sanctionné l'interprétation restrictive qu'on lui proposait de donner à l'article 48 du Règlement. Il est naturellement essentiel d'assurer aux parties l'égalité complète et d'exiger aussi le respect de la règle de la bonne foi. En d'autres termes, l'exception de tardiveté pourrait être reçue là où la manière d'agir d'une partie pourrait donner l'impression d'une manœuvre dilatoire<sup>63</sup>).

En quelques occasions, la Cour permanente décida de rejeter des documents produits comme moyens de preuve<sup>64</sup>). Il a été de pratique fréquente qu'après la clôture de la procédure écrite, les parties produisent de nouvelles preuves, notamment les pièces invoquées par elles dans leurs plaidoiries. La Cour, de manière générale, présume l'assentiment tacite de l'autre partie<sup>65</sup>). Lorsqu'il y avait objection de cette partie, la Cour a estimé que la preuve devait être rejetée si

ment les deux éléments, estimant que le seul point litigieux était celui de savoir si les documents auraient pu ou non être produits à temps.

<sup>62bis</sup>) Op. cit., IV, p. 366.

<sup>63</sup>) A titre d'indication, il convient de citer le rejet par la Cour d'une demande de nouveaux délais, présentée par l'Albanie après la clôture des débats et alors que la Cour était déjà entrée en délibéré (cf. arrêt du 15 décembre 1949 sur la fixation des réparations, Recueil 1949, p. 247-248). Voir aussi la décision prise dans l'affaire consultative du Monastère de Saint-Naoum (1924) où une demande analogue fut rejetée (C.P.J.I. Série C, n° 5-II, p. 381).

<sup>64</sup>) Affaire de l'usine de Chorzow (Série A, n° 9, p. 19), affaire de la Commission du Danube (Série B, n° 14, p. 32) etc. D'autres exemples sont cités par HUDSON, *The Permanent Court of International Justice, 1920-42* (1943), p. 571.

<sup>65</sup>) Cf. sur ce point l'affaire de l'Université Pázmány (Série A/B, n° 61, p. 215).



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ladite partie n'avait plus la possibilité de se prononcer sur la nouvelle preuve, ce qui est conforme à la tendance constatée plus haut.

Dans l'affaire des *Zones franches* (première phase), l'agent du gouvernement suisse se référa, en plaidoirie, à des passages d'un volume des comités suisses en faveur du maintien des Zones franches. Ce document n'avait pas été joint en annexe aux écritures. L'agent français demanda à la Cour d'exclure du débat ladite publication, demande à laquelle la Cour fit droit par ordonnance du 19 août 1929<sup>65bis</sup>). Fait intéressant, la Cour, dans ses considérants, énonça que lesdits extraits n'étaient pas nécessaires pour lui permettre de se former une opinion sur la question à elle soumise. En d'autres termes, l'élément de « pertinence » paraît avoir exercé une certaine influence sur la décision<sup>66</sup>). Dans la troisième phase de la même affaire, l'agent du gouvernement français avait fait valoir, non des documents nouveaux, mais certains moyens nouveaux. L'agent du gouvernement suisse, estimant que ces moyens étaient présentés trop tard, demanda à la Cour de les déclarer irrecevables. La Cour rejeta cette exception<sup>67</sup>).

L'examen de la pratique de la Cour révèle donc beaucoup de souplesse, ainsi qu'un grand désir de limiter aussi peu que possible la liberté d'action des parties<sup>68</sup>).

<sup>65bis</sup>) Série A, n° 22, p. 14 et 21.

<sup>66</sup>) Remarquons que l'agent suisse n'avait pas insisté, s'en rapportant à justice. Par la suite, la Cour a été très prudente à cet égard, estimant peut-être que les parties étaient mieux à même d'apprécier immédiatement l'élément de pertinence. Ainsi, dans l'affaire de Corfou, la pratique de la Cour a été à cet égard très libérale.

<sup>67</sup>) Dans un passage intéressant, l'arrêt met en lumière que « les deux parties ont insisté à plusieurs reprises sur l'importance essentielle qu'elles attachaient à voir autant que possible régler par la Cour tous les points en litige entre elles dans la présente espèce. Pour ce motif et aussi parce que la solution d'un différend international tel que le présent ne saurait principalement dépendre d'un point de procédure, la Cour juge préférable de ne pas admettre l'exception d'irrecevabilité et d'examiner au fond les nouveaux moyens présentés par le gouvernement français... » (Série A/B n° 46, p. 155-56).

<sup>68</sup>) HUDSON estime que la Cour montre en général une certaine hésitation à recevoir, pendant la procédure orale, les documents produits comme moyens de preuve lorsque l'autre partie fait objection (op. cit., p. 567). Il ne semble pas que les exemples qui ont été examinés, non plus d'ailleurs que ceux qui sont cités par l'auteur (loc. cit., note 54), permettent de justifier une telle conclusion.



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La preuve testimoniale est exceptionnelle devant la Cour internationale<sup>69</sup>). Dans deux cas seulement elle a été utilisée. Dans l'affaire des *Intérêts allemands en Haute-Silésie* (1926)<sup>70</sup>) il s'agissait d'ailleurs de témoins-experts et non de simples témoins. Le Président indiqua que les témoins cités devaient limiter leur déposition aux points de fait. Les témoins furent présentés par le gouvernement allemand et par le gouvernement polonais. D'autre part, dans l'affaire du Détroit de Corfou (1948-49), plusieurs témoins comparurent devant la Cour: sept furent présentés par le Royaume-Uni, cinq par l'Albanie. Plusieurs de ces témoins fonctionnèrent en même temps comme experts des parties<sup>71</sup>). Dans la même affaire la plus grande latitude fut laissée aux agents et conseils pour interroger les témoins et la Cour n'intervint pas pour abrégier les interrogatoires parfois longs et fastidieux<sup>72</sup>). La Cour et certains juges posèrent une série

<sup>69</sup>) Comme elle l'est dans l'histoire de l'arbitrage international; cela pour des raisons pratiques évidentes. Cf. SANDIFER, op. cit., p. 206. Pour les détails de la procédure, cf. HUDSON, op. cit., p. 568.

<sup>70</sup>) Série A, n° 7, p. 13.

<sup>71</sup>) La Cour fit même une distinction entre trois catégories de personnes: les *témoins* (à l'état pur, si l'on peut dire), appelés à déposer sur des points de fait, les *experts des parties*, désignés par celles-ci à raison de leurs connaissances techniques, et les *témoins-experts*, cumulant les deux qualités. Il y eut en outre les *experts de la Cour*. Le Royaume-Uni fit appel à quatre témoins et à trois témoins-experts, l'Albanie à trois témoins et à trois experts. Cette distinction tripartite est fondée sur le Statut. Les témoins-experts prononcèrent une double déclaration solennelle (art. 53 du Règlement): l'une, selon la formule consacrée, visant « la vérité, toute la vérité, rien que la vérité », l'autre visant la « conviction sincère ». Malgré ces déclarations le secret professionnel reste réservé: ainsi plusieurs témoins britanniques se réfugièrent derrière le secret professionnel pour refuser de répondre à certaines questions.

<sup>72</sup>) Un régime de procédure où l'interrogatoire des témoins est fait par les parties présente, ainsi qu'on l'a vu, le danger d'avantager indûment un habile avocat. De là, semble-t-il, l'avantage du système en vigueur dans nombre de pays européens où c'est le juge qui interroge et qui peut écarter les questions dépourvues de pertinence. Dans les droits anglo-américains où le système de liberté est tempéré par une série de règles strictes relatives à la recevabilité des preuves, le rôle du juge est alors souvent celui d'un arbitre « sportif » entre les parties, chargé d'éliminer les questions tendancieuses lorsque l'une des parties élève une objection. Dans l'affaire de Corfou, les avocats britanniques opposèrent des objections de cette nature lors des interrogatoires ou contre-interrogatoires menés par les avocats de l'Albanie. Mais la Cour n'eut pas à statuer sur ces points car ces derniers s'inclinèrent, parfois rapidement,

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de questions aux témoins. L'arrêt se fonde, en partie, sur les dépositions de ceux-ci <sup>73</sup>).

Il est difficile de dégager des conclusions précises des expériences faites dans les deux cas précités, notamment le dernier. La procédure de l'enquête par témoins est trop exceptionnelle pour qu'elle puisse servir de précédent. Elle a, une fois de plus, apporté la démonstration de la flexibilité qui caractérise toute la procédure probatoire devant la Cour <sup>74</sup>).

Les articles 48 et 49 du Statut donnent à la Cour, ainsi qu'on l'a vu, un large pouvoir d'office. C'est elle qui « prend toutes les mesures que comporte l'administration de la preuve ». Il a été rappelé en outre que, selon l'article 49, la Cour peut « demander aux agents de produire tout document et de fournir toute explication; en cas de refus, elle en prend acte » <sup>75</sup>). Ce droit d'information et de contrôle est large et la Cour en a fait usage à maintes reprises. La formule figurait déjà dans la Convention de 1899, pour le règlement pacifique des conflits internationaux, et était considérée comme autorisant un tribunal à demander aux parties de justifier leurs dires. Un Etat n'est pas contraint de faire droit à la demande du tribunal, mais s'il s'y refuse, c'est à ses risques et périls. On peut donc admettre que la dernière

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devant les objections de leurs adversaires, alors qu'il leur eût été possible, en droit, de contester une telle application des principes anglo-saxons en invoquant la liberté de la procédure devant la Cour. De son côté, la Cour ne refusa pas d'entendre des dépositions portant sur des faits que les témoins ne connaissaient pas de science personnelle, mais qu'ils avaient entendu relater. Cette preuve par commune renommée ou par oui-dire est en général proscrite ou fortement limitée par les législations internes.

<sup>73</sup>) Dans son arrêt, la Cour écarta la déposition d'un témoin tendante à établir que les mines avaient été mouillées par la Yougoslavie avec la collusion de l'Albanie. La Cour considéra que cette déposition était insuffisante pour démontrer ce fait. En revanche, elle a partiellement appuyé sa conclusion relative à la « connaissance du mouillage » sur la déposition d'un témoin albanais.

<sup>74</sup>) Remarquons que la Cour ne connaît pas le système dit des « reproches » qui permettrait la récusation de témoins. Dans l'affaire de Corfou, certains témoins étaient des fonctionnaires des parties, envoyés à La Haye par leurs gouvernements respectifs. La Cour n'aurait d'ailleurs eu aucun moyen de contraindre ces témoins à comparaître devant elle (sur cette question, cf. SANDIFER, *op. cit.* p. 208, ANDERSON, *Production of Evidence by Subpoena before International Tribunals*, *American Journal of International Law*, 1933, p. 501).

<sup>75</sup>) Cf. l'historique de cette disposition dans STAUFFENBERG, *op. cit.* (1934), p. 370.



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phrase contient une menace voilée et qu'un refus opposé par un gouvernement pourrait entraîner, le cas échéant, des conséquences assez semblables à celles de l'*aveu* des procédures internes. A cet égard, un incident de procédure eut lieu dans l'affaire du Détroit de Corfou au sujet de la production de documents secrets. Dans l'histoire de la Cour permanente, la question des documents secrets s'était présentée de la manière suivante: une partie ayant voulu invoquer de tels documents, l'autre partie protesta et la Cour se trouva devant une question de recevabilité de preuves <sup>76</sup>). Mais le cas des documents secrets a surgi sous une autre forme, plus intéressante, pendant la procédure orale de l'affaire du Détroit de Corfou. Il s'agissait pour la Cour d'apprécier, à propos de la demande reconventionnelle formulée par l'Albanie, si le passage d'une escadre de navires de guerre britanniques, le 22 octobre 1946, par les eaux albanaises du Détroit de Corfou, était innocent ou non <sup>77</sup>). Une des pièces jointes au mémoire britannique révéla l'existence d'un document naval intitulé X.C.U. <sup>78</sup>), lequel contenait des ordres secrets aux commandants des navires de guerre britanniques. Au cours de la procédure, l'Albanie, à diverses reprises, demanda au Royaume-Uni, mais sans succès, de verser au débat ledit document. La Cour prit la décision de demander la production de ce

<sup>76</sup>) Cf. Affaire de la Commission européenne du Danube, Série B, n° 14, p. 32. La Cour décida de ne pas prendre en considération les documents invoqués, vu leur caractère confidentiel. La question avait été discutée l'année précédente (1926) lors de la revision du Règlement. (Cf. Série D 2, add., p. 250.) Dans l'affaire de la *Commission internationale de l'Oder*, le gouvernement polonais avait invoqué, comme moyen de preuve, divers extraits des procès-verbaux relatifs à la préparation du Traité de Versailles. Les autres parties demandèrent à la Cour de rejeter ces moyens, en invoquant le caractère confidentiel desdits documents, le fait qu'ils n'étaient pas concluants et que trois des parties en cause n'avaient point participé aux travaux de la Conférence de la Paix. Dans son ordonnance du 20 août 1929, la Cour « écarta des débats » lesdits extraits des travaux préparatoires dont il s'agissait, en retenant le dernier moyen indiqué ci-dessus. L'un des considérants, qui mérite d'être cité, énonce que, « dans une affaire déterminée, il ne saurait être tenu compte d'éléments de preuve qui ne sont pas admissibles au regard de certaines des parties en cause » (C.P.J.I., Série A, n° 23, p. 42). Il ne semble pas que cette jurisprudence soit révélatrice d'une tendance restrictive de la Cour en matière de preuve car il s'agissait d'un cas exceptionnel.

<sup>77</sup>) Cf. Annuaire suisse de droit international VI (1949), notre article, La jurisprudence de la Cour internationale de Justice, p. 171 s.

<sup>78</sup>) Ces lettres signifiaient: « Exercice Corfou ».

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document<sup>79)</sup>. Dans sa réplique<sup>80)</sup>, l'agent britannique fit connaître que son gouvernement s'opposait à la production de ce document<sup>81)</sup>. L'arrêt rendu par la Cour, à la date du 9 avril 1949, énonce à ce sujet ce qui suit:

« La Cour ne peut toutefois tirer du refus de communication de l'ordre en question des conclusions différentes de celles que l'on peut tirer des faits tels qu'ils se sont effectivement déroulés »<sup>82)</sup>.

En d'autres termes, la Cour, appréciant librement le sens de ce refus, n'en tira pas la conclusion qu'il y avait là aveu implicite<sup>83)</sup>.

La Cour peut recourir à d'autres procédés d'instruction, notamment à l'expertise. L'article 50 du Statut prévoit la possibilité de l'enquête et de l'expertise. Il s'agit là d'une expertise ordonnée par

<sup>79)</sup> Audience du 14 décembre 1948, C.I.J. Mémoires etc., Affaire du Détroit de Corfou IV, p. 428. La Cour demanda en même temps à l'Albanie de produire un document militaire.

<sup>80)</sup> Audience du 18 janvier 1949, C.I.J. Mémoires, etc., IV, p. 563 s.

<sup>81)</sup> Il expliqua ce refus en invoquant le caractère secret du document en cause, soulignant que devant tout tribunal national un gouvernement peut refuser de produire un document lorsqu'il estime qu'un intérêt public est en jeu. Tout en admettant que la Cour pourrait tirer certaines déductions de ce refus, il précisa que celles-ci devraient être en harmonie avec l'ensemble des preuves et qu'au surplus la Cour ne devrait les tirer que si les raisons invoquées à l'appui dudit refus ne lui paraissaient pas fondées.

<sup>82)</sup> Recueil 1949, p. 32.

<sup>83)</sup> Dans son opinion dissidente, le juge ad hoc désigné par l'Albanie arriva à la même conclusion. Pour lui, le refus constituait un indice sérieux contre la thèse britannique, mais ne suffisait pas à renverser la *praesumptio juris*, selon laquelle les Etats sont présumés avoir une attitude conforme aux règles du droit international (Recueil 1949, p. 129). L'incident examiné ici rentre dans le cadre de la question plus vaste des *actes concluants* et de leur force probante. Dans l'avis consultatif du 11 juillet 1950 relatif au Statut international du Sud-Ouest africain, il s'agissait, notamment, de savoir si l'Union sud-africaine était encore soumise aux obligations du Mandat, pour le Territoire du Sud-Ouest africain, nonobstant la dissolution de la Société des Nations. Pour divers motifs déduits des textes pertinents, la Cour arrive à une conclusion affirmative, laquelle est corroborée par les déclarations et par l'attitude du gouvernement sud-africain. L'avis énonce à ce propos que « l'interprétation d'instruments juridiques donnée par les parties elles-mêmes, si elle n'est pas concluante pour en déterminer le sens, jouit néanmoins d'une grande valeur probante quand cette interprétation contient la reconnaissance par l'une des parties de ses obligations en vertu d'un instrument » (C.I.J. Recueil 1950, p. 135). La théorie des actes concluants en matière de preuve trouve ici une application subsidiaire.



## QUELQUES REMARQUES SUR LA PREUVE DEVANT LA COUR PERMANENTE

la Cour et confiée à des personnes (ou à un corps constitué) de son choix. La Cour permanente ordonna une expertise dans l'affaire de l'*Usine de Chorzow* (1928) au sujet du montant à fixer pour l'indemnité due en vertu d'un arrêt de la Cour<sup>84</sup>). Dans l'affaire du *Détroit de Corfou*, la procédure de l'expertise fut largement employée. Trois experts neutres furent commis par la Cour dans la procédure sur le fond. Un premier rapport fut suivi d'une descente sur les lieux, ordonnée par la Cour<sup>85</sup>). Les experts se rendirent en Yougoslavie et en Albanie accompagnés par les experts des parties<sup>86</sup>). D'autres experts furent désignés dans la dernière phase de la même affaire (fixation du montant des réparations). Bien que la Cour, de même qu'un tribunal national, ne soit jamais liée par les conclusions des experts, celles-ci, comme en droit interne, exerceront d'habitude une influence relativement grande sur les décisions à prendre. Ainsi, les deux derniers arrêts dans l'affaire de Corfou sont fondés dans une sensible mesure sur les constatations des experts<sup>87</sup>).

En ce qui concerne un transport sur les lieux de la part de la Cour elle-même, la procédure ne fut utilisée qu'une fois, dans l'affaire des *Eaux de la Meuse* entre la Belgique et les Pays-Bas (1937)<sup>88</sup>).

### Conclusions

L'examen de la pratique de la Cour permanente et de la Cour internationale de Justice en matière probatoire permet de dégager les quelques conclusions suivantes:

<sup>84</sup>) Ordonnance du 13 septembre 1928, Série A, n° 17, p. 99 s. La procédure fut interrompue à la suite d'un arrangement entre les parties.

<sup>85</sup>) Décision du 17 janvier 1949, Recueil 1949, p. 151.

<sup>86</sup>) Cf. le rapport des experts, établi à la suite de ce voyage (Recueil 1949, p. 152).

<sup>87</sup>) Sur ce point, l'arrêt énonce que « la Cour ne peut manquer d'attacher un grand poids à l'avis d'experts qui ont procédé à un examen des lieux entouré de toutes les garanties d'information exacte et d'impartialité. » (C.I.J. Recueil, 1949, p. 21.)

<sup>88</sup>) Le Statut ne prévoit pas expressément cette éventualité, mais les art. 44 et 50 sont conçus en termes suffisamment larges pour la couvrir. Pour cette affaire, cf. C.P.J.I., Série A/B, n° 70, p. 9. D'autre part, dans l'affaire des Zones franches, le compromis prévoyait la possibilité d'une descente sur les lieux d'une délégation de la Cour. Le gouvernement français le proposa, mais sa demande ne fut pas accueillie par la Cour (Série A/B, n° 46, p. 162-63). C'eût été, à vrai dire, plutôt un moyen d'information qu'une véritable preuve.

J.-F. LALIVE

1. Tandis que les autres tribunaux arbitraux ont dû, pour la plupart, improviser leurs règles de procédure, la Cour, tribunal préconstitué, a pu dès son entrée en fonction élaborer – en vertu de son pouvoir normatif et sur la base d'un Statut rédigé à cet égard en termes généraux – un ensemble de règles relatives à l'administration de la preuve.

2. Le système de la Cour qui se caractérise par une grande souplesse paraît avoir emprunté ses meilleurs éléments aux deux principaux systèmes de procédure: celui qu'on appelle « continental » et l'« anglo-américain ». Certains juristes américains estiment que l'influence continentale a été prédominante; d'autres (les auteurs continentaux) soulignent l'apport anglo-américain. Cela démontre le caractère mixte du système institué par la Cour.

3. L'influence anglo-américaine se traduit, notamment, par la libre présentation des preuves. Les parties ne sont soumises à aucune règle restrictive autre que celle de l'observation des délais fixés par la Cour. Et, même à cet égard, les preuves produites tardivement seront rarement rejetées. En outre, l'interrogatoire des témoins sera fait par les parties elles-mêmes (« cross-examination »), sous le contrôle très tolérant de la Cour. D'autre part, l'usage des « affidavits » – institution très peu connue dans les systèmes continentaux – sera autorisé.

4. L'influence continentale se manifeste notamment par l'adoption du principe d'« inquisition ». La Cour dispose d'un très large pouvoir d'office qui lui permet de rechercher par elle-même la vérité et de recourir à d'autres preuves que celles qu'ont proposées les parties. D'autre part, l'absence presque totale de restrictions relatives à la recevabilité des preuves est beaucoup plus proche du système continental que du système anglo-américain. A cet égard, la pratique de la Cour montre que même l'absence de « pertinence » de la preuve ne suffira point, en règle générale, à faire rejeter celle-ci. La seule limitation est celle de la tardiveté. Encore faut-il que l'autre partie élève expressément une exception, sinon son consentement sera présumé et la Cour a montré qu'elle n'entendait pas laisser des obstacles de pure technique procédurale entraver sa recherche de la vérité.

5. La jurisprudence de la Cour montre également que la distinction classique entre le fait et le droit, en matière probatoire, mériterait d'être réexaminée et révisée. Dans la quasi totalité des affaires dont a connu la Cour (affaires contentieuses aussi bien que consultatives),

## QUELQUES REMARQUES SUR LA PREUVE DEVANT LA COUR PERMANENTE

le différend ou la question à résoudre portait sur le droit. A une seule exception (dont le caractère remarquable méritait d'être souligné), la Cour n'a pas été appelée à statuer sur le fait pur. Les parties n'en ont pas moins fait large usage des voies et moyens probatoires que leur offraient les textes et la pratique. Cela démontre le caractère artificiel de la distinction précitée. Les écritures et les plaidoiries des parties révèlent combien il est difficile de faire le départ entre ce qui participe de l'argumentation et du moyen de preuve.

6. La très grande souplesse qui caractérise tout le système probatoire de la Cour trouve sa contrepartie dans l'adoption du principe de la conviction intime. La Cour ne connaît pas de preuve légale. Elle apprécie librement tous les moyens produits. Aucune présomption particulière de véracité ne s'attache à certaines allégations ou affirmations parce qu'elles proviendraient d'un gouvernement ou de tout autre organe ou personne. La Cour jouit d'une discrétion complète. Ce principe, qui est d'ailleurs conforme à la pratique générale des tribunaux ainsi qu'à la tendance des législations nationales modernes, est si bien admis que la Cour repoussa en 1922 la proposition d'introduire dans son Règlement un article d'après lequel elle apprécierait librement la valeur respective des diverses preuves « selon sa conscience et les principes de l'équité ».

7. Le système probatoire de la Cour, qui s'est développé peu à peu, de manière empirique, sur la base des précédents de l'arbitrage et sur celle d'un Statut et d'un Règlement conçus en termes larges et souples, répond entièrement aux besoins propres de la justice internationale. Si certaines améliorations de pur détail peuvent être envisagées, le système lui-même, parfaitement cohérent, permet de concilier avec un rare bonheur les droits et devoirs des parties et ceux des juges dans la recherche de la vérité.





**Annex 22**

William Bishop, "State Responsibility", 2 *Recueil des Cours* 384 (1965)



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## CHAPTER XI

STATE RESPONSIBILITY<sup>1</sup>§ *A. Introductory*

In discussing "State Responsibility", just as in talking about commercial and consular treaties, we deal with a part of international law of direct and immediate practical concern to individuals—to those who are in, or have interests in, a foreign country.

When we speak of "State Responsibility" we mean that area of international law which from the standpoint of the defendant state is thought of as "State responsibility for injury to aliens"; from the plaintiff state regarded as "Diplomatic protection of citizens abroad"; and from the procedural standpoint described as "International claims". There are, of course, other types of state responsibility, as for breach of treaty or direct state-to-state injury; but in present-day usage the term "state responsibility" is reserved primarily for this area of the law.

The rights and duties of aliens are governed by municipal law, and by treaties. Laws concerning the admission of aliens to a state's terri-

1. See, generally, 5 Hackworth, *Digest of International Law*, 471 ff. (1943); E. M. Borchard, *Diplomatic Protection of Citizens Abroad* (1915); Harvard Research in International Law, *Responsibility of States*, 23 *Am. J. Int'l L. spec. supp.* 131 (1929); F. V. Garcia Amador, *Principios de Derecho Internacional que Rigen la Responsabilidad* (1963); D. O. O'Connell, *International Law*, vol. 2, pp. 1019 ff. (1965); Verdross, "Les règles internationales concernant le traitement des étrangers", 37 *Recueil des Cours* 323 (1931); De Visscher, "Déni de Justice en droit international", 52 *id.* 365 (1935); Ago, "Le délit international", 68 *id.* 417 (1939); Garcia Amador, "State Responsibility: Some New Problems", 94 *id.* 365 (1958); Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", 96 *id.* 349 (1959); Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale* (1902); 6 J. B. Moore, *Digest of International Law* 605 ff. (1906); Clyde Eagleton, *State Responsibility* (1928); Hoijer, *Responsabilité internationale des états* (1930); F. S. Dunn, *The Protection of Nationals* (1932); A. V. Freeman, *International Responsibility of States for Denial of Justice* (1938); M. M. Whiteman, *Damages in International Law* (3 vols. 1937, 1943); Garcia Amador, "State Responsibility in the Light of the New Trends of International Law", 49 *Am. J. Int'l L.* 339 (1955).

of property amounting to what is called tortious or confiscatory breach of contract, the state's responsibility will be engaged."<sup>46</sup>

Of course if concession agreements and similar contracts between states and individuals or companies should come to be regarded as governed directly by international law, and to provide in the agreement for at least quasi-international arbitration of disputes arising out of the contract, we may find more and more reason for considering violations by a state of those contracts as a violation of international law.

#### § F. War claims

Another field of state responsibility much discussed in the last twenty years is that of war claims for injuries to persons and property due to conditions of war (both international and civil). Wars and civil strife usually entail extensive destruction of property and widespread violent deaths and personal injuries. Nationals of the belligerent states (or state wherein civil strife occurs), as well as nationals of neutral states, may suffer war-caused losses. Yet it has been seldom that claims of one belligerent against the other, or of neutrals against belligerent, have in recent times been submitted to international adjudication, or settled diplomatically, *according to general rules of international law*. We may thus have some doubts as to just what that law provides, as applied to modern conditions.

So long as wars were not regarded as illegal, there was a general consensus that no illegality was involved in such destruction or injury as was necessarily incident to carrying on the war, provided no violation of the international law of war brought about the injury or loss. These losses for which general rules of international law provided no recovery, on the ground that they were incident to lawful military operations, became known as "war losses".<sup>47</sup> On the other hand, many

46. P. C. Jessup, *A Modern Law of Nations*, p. 104 (1948).

47. See I Oppenheim, *International Law*, 364 (8th ed., by Lauterpacht, 1955): "A State need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection, riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like." On war claims, see also Bishop, *International Law Cases and Materials*, 695-704 (2nd ed., 1962), and works there cited.



rules distinguish between what is lawful in war and what is illegal, and it has been felt proper that compensation be paid for injuries resulting from illegal war-time actions. Thus Hague Convention IV of 1907 says with respect to the annexed Regulations Governing Land Warfare,

"A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

In arranging the peace terms after various wars, the victors have demanded payments from the vanquished, which have often been associated to some extent with losses suffered by the victors or expenses to which the victors have been put. Whether termed "indemnities", "reparations", "compensation", or by other names, these required payments have seldom been based on rules of general international law. Instead, they have more often been determined on considerations of who won and who lost, the "moral climate of opinion", or on what states were best able to pay for what losses. In dealing with war claims covered by such peace settlements, the important thing is to find out what has been provided, whether or not this bears any resemblance to the general situation in the absence of these special arrangements. The settlements after World War I, and so far after World War II, involved elaborate treaty provisions, administrative arrangements, and provisions for adjudication of disputes concerning the liabilities fixed by these treaties. Though the settlements take little account of what international legal rights and duties would be in the absence of treaty, they form the basis of realistic present-day discussion of an important sector of international claims.

Typical of the World War I settlements was the Treaty of Versailles, in whose ill-fated "war guilt clause" the Allies affirmed and Germany accepted,

"the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."<sup>48</sup>

Consequently, provides the treaty, the Allies required and Germany undertook,

48. Article 231.



"that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each . . . against Germany by aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto." <sup>49</sup>

The amount of damage payable was to be assessed by an (inter-Allied) Reparation Commission. Allied nationals were also entitled to compensation for their property rights and interests in Germany which suffered by "exceptional war measures", and Mixed Arbitral Tribunals were established between each Allied state and Germany to pass upon these and certain other claims. Extensive payments were made until the world-wide economic depression of the early 1930s; economists differ as to the consequences of this plan, while the "war guilt clause" was used as a means of encouraging support for the Nazi Party and its aims.

In the post-World-War-II settlements found in the Italian, Bulgarian, Hungarian, Rumanian and Finnish Peace Treaties of 1947 (and to a lesser extent in the Japanese Peace Treaty and the arrangements made concerning Germany), the pattern has been that of reparations, collected chiefly by the Soviet Union, from the Axis Powers on a basis purporting to take into account to some extent the losses suffered by those receiving reparations and the amount of damage done by the Axis Power concerned. In addition, each of the United Nations was authorized to keep various types of publicly and privately owned enemy assets on its territory, and to apply the proceeds thereof to the settlement of its claims against the enemy. Restitution was required of identifiable property taken from Allied territory; while provision was made for restoration to UN nationals of their property, rights and interests in ex-enemy territory, plus payments in local currency of two-thirds of the value of loss or damage to such property "as a result of the war", whether the damage was done by Axis or Allied action. Controversies were to be settled by "conciliation commissions", which actually functioned rather like mixed arbitral tribunals, in the interpretation and application of the treaty provisions. The plan really operated as drafted only in the case of Italy, and to some extent Japan. One may see, particularly in the Italian and Balkan arrangements, the influence of economists more concerned over the balance

49. Article 232.

of payments problems of the then shaky ex-Axis economies immediately after the war, and over what types of payment in available local currency would encourage continuing foreign investment in these countries, than about whether payments would be due under general rules of liability.

The whole war claims situation is further complicated by the modern practice of war-risk and war-damage insurance made available by many states for all properties in the state, and by compensation schemes under which several governments made certain reconstruction payments to their own nationals and anyone else owning property in the country, despite the absence of any international legal obligation to do so. It seems likely that for some years we will still be "winding up" these war claims problems arising out of World War II. Having in mind the whole problem, we may well conclude that the international law of war claims is among the least satisfactory parts of the law of state responsibility. Perhaps the problem with which the law has struggled least successfully is that suggested by the unfortunate "war guilt clause" of the Versailles Treaty: now that a state's resort to war and the use of force has become illegal except in self-defence or as part of enforcement action under the UN (or possibly a regional international organization), should this mean that the state thereby violating international law ought to be responsible for all the loss and injury resulting from this illegal act? And if there is no feasible way of making transfers on such a scale as to carry out such a duty, on what basis should the claims to be satisfied be separated from those which go uncompensated?

#### § *G. Expropriation* <sup>50</sup>

The aspect of State Responsibility which has been most discussed in the last few years has been expropriation—the taking by a state of property of aliens, and the extent of its obligation under international

50. See, generally, Gillian White, *Nationalisation of Foreign Property* (1961); Wortley, *Expropriation in Public International Law* (1959); Foighel, *Nationalization* (1957); Adriaanse, *Confiscation in Private International Law* (1956); E. Re, *Foreign Confiscations* (1951); Seidl-Hohenveldern, "The International Law of Expropriation and Confiscation", 83 *Journal du Droit International*, 340 (1956); Seidl-Hohenveldern, "Communist Theories on Confiscation and Expropriation:

**Annex 23**

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**Annex 24**

Keith Hight, “Evidence, the Court, and the Nicaragua Case”, 81 *American Journal of International Law* 1 (1987)



## EVIDENCE, THE COURT, AND THE NICARAGUA CASE

*By Keith Highet\**

If you get all the facts you can be right; if you don't get all the  
facts, you can't be right.

*Bernard Baruch†*

### INTRODUCTION

#### THE NICARAGUA DECISION

The decision in the *Nicaragua* case<sup>1</sup> is one of the most important judgments ever delivered by the International Court. It is by far the “heaviest” case, in the parlance of the English barrister, ever decided by the Court in the absence of a party. It has broken new ground for the application of Article 53 of the Statute.<sup>2</sup> It deals in detail with the multilateral treaty reservation of the United States (the “Vandenberg amendment”).<sup>3</sup> It contains provocative reasoning about the genesis and maintenance of rules of customary international law, separate from treaties such as the United Nations Charter.<sup>4</sup> It contains seminal findings on the use of force and the exercise of the inherent right of self-defense under Article 51 of the Charter.<sup>5</sup> It presents fresh and doubtless controversial interpretations of the principle of non-intervention.<sup>6</sup> It prescribes limits to “collective counter-measures” in response to conduct not deemed to amount to “armed attacks.”<sup>7</sup>

The length of the *Nicaragua* decision, its scope, and its detail are striking. Moreover, it is accompanied by one of the most closely reasoned and yet

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† St. Louis Post-Dispatch, June 21, 1965. This remark is also recalled in a more pithy formulation: “Get the facts or the facts will get you.”

<sup>1</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27) [hereinafter cited as *Nicaragua Merits*].

<sup>2</sup> *Id.* at 23–25, paras. 26–30.

<sup>3</sup> *Id.* at 29–38, paras. 37–56; and at 92–97, paras. 172–82.

<sup>4</sup> *Id.* at 92–97, paras. 172–82.

<sup>5</sup> *Id.* at 98–106, paras. 187–201; and at 118–23, paras. 227–38.

<sup>6</sup> *Id.* at 106–10, paras. 202–09; and at 123–26, paras. 239–45.

<sup>7</sup> *Id.* at 110–11, paras. 210–11; and at 126–27, paras. 246–49.

impassioned dissenting opinions ever to be appended to a decision of the Court: that of Judge Stephen Schwebel of the United States, who wrote a total of 261 printed pages.<sup>8</sup>

How will the *Nicaragua* case be remembered by international lawyers in future years: for example, as is now true with the *Corfu Channel* case, almost 40 years hence? *Corfu* is now recalled as a somewhat analogous (although far more finite) litigation, also involving complex facts; but in that case the respondent Albania only withdrew in the second (compensation) phase<sup>9</sup> of the proceedings, not in the critical merits phase.<sup>10</sup> The *Nicaragua* case will probably be recalled—in the year 2027—as representing at least the following new developments: a decisive and controversial victory of a small power over a great power; an unprecedented withdrawal from proceedings, to the subsequent regret of the withdrawing party; one of the first considerations by the Court of armed conflict, and surely the first when that conflict, to one degree or another, was continuing; the pronouncement of a controversial precedent on the use of force, intervention and the right of collective self-defense in response to armed attack; and, for the first time, treatment by the Court of such a complex set of facts presented as foundation for a decision, and moreover, their substantially unilateral treatment, in the absence of the defending party, and with the Court itself operating as a “counter-advocate” under the strictures and requirements of Article 53.

It is well known that the *Nicaragua* case is complicated, fraught with controversy and highly sensitive. It is founded upon an intricate, shifting and controversial background of factual assertion unprecedented in the Court’s history. The job of the Court would have been difficult enough, even had the United States remained fully in the proceedings and argued extensively on the merits. With the announcement of its withdrawal,<sup>11</sup> however, the United States made the job of the Court virtually impossible from a factual point of view and, as some have observed, perhaps effectively foreclosed almost all options other than those adopted by the Court in its judgment.

In fact, the Court—perhaps more dramatically than ever before in its

<sup>8</sup> Judge Schwebel’s dissenting opinion is composed of an opinion proper (*id.* at 259–394) and a “Factual Appendix” comprising 227 paragraphs (*id.* at 395–527).

<sup>9</sup> *Corfu Channel (UK v. Alb.) [Assessment of Amount of Compensation]*, 1949 ICJ REP. 244 (Judgment of Dec. 15).

<sup>10</sup> *Corfu Channel (UK v. Alb.), Merits*, 1949 ICJ REP. 4 (Judgment of Apr. 9).

<sup>11</sup> Department Statement, DEP’T ST. BULL., No. 2096, March 1985, at 64, reprinted in 24 ILM 246 (1985). The position adopted by the United States was that it had withdrawn from the case for the variety of reasons set forth in the departmental statement, and that the United States “reserves its rights in respect of any decision by the Court regarding Nicaragua’s claims”—a statement that the Court was quick to rebut in no uncertain terms:

[T]he Court is bound to emphasize that non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to “reserve its rights” in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision.

*Nicaragua Merits*, 1986 ICJ REP. at 23–24, para. 27 (emphasis added).



long history—was placed in a corner.<sup>12</sup> No litigator ever wishes to deny his opponent freedom to negotiate a mutually agreeable solution: the consequences of putting an adversary in a corner can be disastrous. This principle, permitting a *modicum* of adjustment, of freedom of movement, must emphatically be applied—a *fortiori*—to the tribunal before which the case is being heard. To foreclose favorable consideration by the judges can only bring a bitter harvest.

The decision of the United States to boycott the proceedings therefore may well have blown up in its face. As Judge Sir Robert Jennings stated in his dissenting opinion:

[O]ne is bound to observe that here, where questions of fact may be every bit as important as the law, the United States can hardly complain at the *inevitable consequences* of its failure to plead during the substantive phase of the case. It is true that a great volume of material about the facts was provided to the Court by the United States during the earlier phases of the case. Yet a party which fails at the material stage to appear and expound and explain even the material that it has already provided, *inevitably prejudices the appreciation and assessment of the facts of the case.*<sup>13</sup>

Much of the difficulty that resulted from the nonappearance of the United States in the merits phase of the *Nicaragua* case is in fact attributable to the lack of an advocate in court to defend U.S. policy and to attack the evidence presented by Nicaragua. Thus, Judge Jennings later stated in his dissent that the nonappearance of the United States

has been particularly unfortunate—perhaps not least for the United States—in a case which involves complicated questions of fact; where, in the merits phase, witnesses giving evidence as to the facts were called and examined by counsel for the Applicant, but their evidence was not tested by cross-examination by counsel for the Respondent; and where the Respondent itself provided neither oral nor documentary evidence.<sup>14</sup>

<sup>12</sup> Except, perhaps, in the difficult and challenging situation that confronted the Court in 1965 in the merits phase of the *South West Africa Cases* (South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.) (Second Phase), 1966 ICJ REP. 6 (Judgment of July 18)). In that long litigation, however, the Court was not placed in a corner by any actions of the applicants as much as by the unwillingness or inability of half of its judges, *inter alia*, to square the obligations of the sacred trust (of the mandate for South West Africa) with the actual racial practices of South Africa as mandatory power. (The author served as counsel to Ethiopia and Liberia, the applicants, in the second phase of this litigation.)

<sup>13</sup> 1986 ICJ REP. at 544 (Jennings, J., dissenting) (emphasis added); see also comments by the present author after the U.S. decision to withdraw from the *Nicaragua* case had been made, in *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79 AJIL 992 (1985).

<sup>14</sup> 1986 ICJ REP. at 528 (Jennings, J., dissenting) (emphasis added); see also Highet, *supra* note 13, at 1000:

As to each element of proof, it could have been argued that for one reason or another it was inappropriate or impossible for the Court to reach a decision or to base a decision upon it. *Each witness could have been examined from top to bottom, to attempt to disprove the accuracy of the testimony and the bias of the recollection, and to attempt to illustrate at each turning point in the case that this dispute was not ripe for decision—or was not a dispute as to which the Court was capable of functioning in accordance with its Statute [emphasis added].*

The application of Article 53 of the Statute in the *Nicaragua* case effectively served to highlight the importance of the Court's handling of facts. The Court was required to deal with this extraordinarily complex evidence entirely on its own, responding to the arguments and evidence presented by Nicaragua with its own questions (and, in particular, the detailed and painstaking examination from the bench of Judge Schwebel). Moreover—and perhaps just because the respondent United States *was* absent—the Court was obliged to theorize more than it would normally have done to justify the positions it ultimately took on matters of evidence. Rules of evidence were formulated that would clearly not have been necessary had the United States been in the courtroom to defend itself and to assist the Court in evaluating and disposing of the factual assertions made by Nicaragua.

Perhaps because the Court had, in essence, only one side of the case to evaluate, it may also have found itself obliged to render certain rulings and interpretations of law, primarily related to the nature of the right of individual and collective self-defense, that it would not otherwise have been required to reach. By its desire to avoid having the Court deal with the factual and legal issues presented by Nicaragua concerning intervention and the use of force, and to avoid a determination of the justifiability *vel non* of its asserted exercise of self-defense against aggression by Nicaragua, the United States may ironically have made it impossible for the Court to deal with these questions in any way in its favor; for in the absence of the United States, how could El Salvador have seriously considered refreshing its application to intervene, which had been rejected by the Court at the preliminary phases of the case?<sup>15</sup> Would not the vindication of a claim of collective self-defense have required the presence and testimonial of El Salvador?<sup>16</sup>

On this assumption, how could the Court reasonably have been expected to test the facts relating to the alleged aggression by Nicaragua against El Salvador (*inter alia*) and the alleged collective self-defense by El Salvador and the United States in response to that aggression? It surely did not require omniscience in 1985 to surmise that once (and since) the Court had accepted jurisdiction, it was essential to press the full case in defense before the Court, no matter what other misgivings might exist concerning the Court's appropriate resolution of the jurisdictional questions. By its absence from the proceedings, then, the United States probably preempted El Salvador from reapplying to intervene, or at least submitting evidence, and this, in turn, prevented any affirmative defense whatever.

Respondent's absence meant, in the simplest terms, that the Court could not possibly have had fully before it the very facts that could have protected

<sup>15</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Declaration of Intervention, 1984 ICJ REP. 215 (Order of Oct. 4); *see also* Separate Opinion of Judge Lachs to Nicaragua Merits, 1986 ICJ REP. 158, 171.

<sup>16</sup> Yet, in the actual situation, how could El Salvador have proceeded? If its intervention had been allowed, it would have found itself alone in court, without its "champion," the United States (to borrow the felicitous word used by Judge Jennings in his dissent, 1986 ICJ REP. at 545), and would have borne a unique and unacceptably uncomfortable responsibility for the outcome of the case.



the United States, as a matter of evidence, against findings of law such as are contained in the Judgment. The Court was therefore caught in a vicious circle. It was also caught in another: the Court's job under Article 53 was made almost impossible by the complexity of the facts, just as the ability of the Court to deal with those complex facts was rendered almost impossible by the need for the Court to proceed under its Statute. It is a bitter irony.

It is beyond the scope of this article to consider the many other issues of law and tactics presented by the *Nicaragua* case. It is its purpose, however, to consider the overall background and history of the International Court and its predecessor, the Permanent Court, in matters of fact-finding and the gathering, evaluation and disposition of evidentiary material, since the *Nicaragua* case cannot properly be understood in isolation. It must be viewed against the history and practice of the Court.

In particular, that specially important part of the case which concerns the acceptance and disposition of evidence must be seen in perspective, all the more since the Court's handling of the facts received an unprecedentedly strong and detailed dissent by one judge (Judge Schwebel). In addition to appending to his dissent the equivalent of a judicial counter-memorial on the facts,<sup>17</sup> Judge Schwebel dealt *in extenso* with the techniques that the Court had felt obliged to adopt both in dealing with the complex facts presented in the case and in doing so in the absence of the respondent. To understand the Court's decision and the dissent properly, therefore, students of the Court and of international law ought to refresh their recollection of the Court's powers, practices and proclivities in the handling of factual proof and evidentiary questions over its long history.<sup>18</sup>

#### GENERAL CONSIDERATIONS

Article 36 of the Statute establishes the substantive objects of the Court's jurisdiction under the "optional clause."<sup>19</sup> As well as giving the Court power to resolve all legal disputes concerning treaty interpretation and any question of international law, it empowers the Court to determine "(c) *the existence of any fact* which, if established, would constitute a breach of an international obligation."<sup>20</sup> This provision, contemplating the Court's dealing with facts, has been in existence since 1920. How has the Court during those 67 years implemented it? What are the Court's powers over facts and evidence? What

<sup>17</sup> See note 8 *supra*.

<sup>18</sup> To this end, one cannot forget the record of the Permanent Court of International Justice, which in its shorter effective life span of 18 years dealt with many intricate questions of fact, although most were resolved by documentary pleading and proof and without taking actual evidence.

<sup>19</sup> Article 36, paragraph 2 of the Statute; although this provision relates only to the type of matters that may be brought before the Court under the optional clause, it also serves as a useful indication of what kinds of matter can be considered as constituting "legal disputes" under Article 36, paragraph 1 of the Statute, which establishes the Court's jurisdiction.

<sup>20</sup> The last subparagraph also empowers the Court to determine "(d) *the nature or extent of the reparation* to be made for the breach of an international obligation" under subparagraph (c) of Article 36 (emphasis added).

has its experience been in dealing with such questions?<sup>21</sup> What has the attitude of states been to its fact-finding powers?

Judge Manley Hudson wrote years ago that "[i]ssues of fact are seldom tried before the Court, and where a question of fact arises the Court must usually base its finding on statements made on behalf of the parties either in the documents of the written proceedings or in the course of oral proceedings."<sup>22</sup> Yet fully one-half of the matters specified as being the subject of "legal disputes" within the meaning of Article 36, paragraph 2 of the Statute are factual questions.<sup>23</sup> The Court's power to make factual determinations is not merely derivative from its other powers: it is a basic part of the original purpose for an international court.

Moreover, the Court possesses such sweeping powers<sup>24</sup> in the acceptance and evaluation of any and all forms of evidence that it is difficult to prove that it lacks power or ability a priori to cope with any given type of evidence. Determination of which matters are duly justiciable for the Court does not depend on the nature of the evidence that may be laid before it, which may, of course, be insufficient in the context of any given case or may not for substantive reasons be recognized as supporting the burden of proof. The "suitability" of evidence is only relevant to its usefulness in resolving matters before the Court; it does not, in turn, determine the justiciability of a case.<sup>25</sup> Otherwise, the production of inadequate evidence could always serve as an argument to defeat jurisdiction.

It should also be made clear at the outset that questions of evidence are only peripherally affected by the nature of the title of jurisdiction. It makes no substantive difference how the parties have come before the Court; there is no meaningful difference in this respect between the operation of the optional clause or a treaty compromissory clause, on the one hand, and that of a *compromis* or special agreement, on the other, save perhaps that by displaying the will to frame a question jointly for the Court, the parties in the latter instance may have greatly reduced the likelihood of disagreement

<sup>21</sup> What is "evidence"? In Judge Hudson's succinct characterization: "In general it may be said that the term evidence covers real evidence, documentary proofs, and the testimony of witnesses and experts, advanced by a party either on its own motion or at the invitation of the Court." M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, at 565 (1943).

<sup>22</sup> *Id.*

<sup>23</sup> Its subparagraph (a) deals with "the interpretation of a treaty" and subparagraph (b) with "any question of international law" (this latter perhaps including primarily questions of fact). For (c) and (d), see note 20 *supra* and accompanying text.

<sup>24</sup> With one or two logical exceptions, which naturally flow from the overall context and premises of public international law, such as the lack of coercive powers to enforce evidentiary production.

<sup>25</sup> As stated crisply by President Spender "in the course of exchanges with counsel" in the *South West Africa Cases*: "the Court is quite able to evaluate evidence, and if there is no value in the evidence then there will be no value given to it." 1965 ICJ Pleadings (10 *South West Africa*) 163, as quoted in D. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 464 (rev. ed. 1975).



over the scope of the facts to be determined or the nature of the evidence required to prove those facts.<sup>26</sup>

#### WHAT CAN THE COURT DO?

##### POWERS IN GENERAL

The powers of the Court in matters concerning evidence are wide.<sup>27</sup> This was equally true of its predecessor. The Statute, which has remained unchanged in all relevant respects since it came into effect in 1921, is broad and flexible in its vision and scope.<sup>28</sup> Within the context of adjudicating questions between sovereign states (and necessarily subject in large extent, therefore, to the will of the parties), the Statute contains most powers necessary to secure adequate evidence for the Court's determination of factual issues.<sup>29</sup> As Shabtai Rosenne has summarized:

The Court's function in establishing the facts consists in its assessing the weight of the evidence produced in so far as is necessary for the determination of the concrete issue which it finds to be the one which it has to decide. For this reason, there is little to be found in the way of rules of evidence, and a striking feature of the jurisprudence is the ability of the Court frequently to base its decision on undisputed facts,

<sup>26</sup> Still, parties to a special agreement may disagree vehemently and in the course of the proceedings about the appropriate meaning or scope of that agreement. See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, 1982 ICJ REP. 18 (Judgment of Feb. 24) [hereinafter cited as *Tunisia/Libya*], in which there was extensive disagreement between the parties over whether the language of the special agreement (originally written in Arabic) meant that the Court was supposed in effect to indicate the delimitation line or merely to enunciate general principles. (The author served as counsel to Libya in this case.) See also the *Borchgrave* case in the Permanent Court, where one party to a special agreement actually filed preliminary objections to the jurisdiction of the Court. *Borchgrave (Belg./Sp.) (Preliminary Objections)*, 1937 PCIJ, ser. A/B, No. 72 (Judgment of Nov. 6).

<sup>27</sup> See, e.g., Judge Schwebel's dissenting opinion in *Nicaragua Merits*, 1986 ICJ REP. at 321-22, para. 132:

In the instant case, the Court, in its Judgment on jurisdiction and admissibility of 26 November 1984, observed in response to contentions of the United States about the difficulties of finding the facts in a situation of the ongoing use of force in which security considerations are constraining, that the Court "enjoys considerable powers in the obtaining of evidence" (*I.C.J. Reports 1984*, p. 437). Under its Statute, the Court does enjoy such powers, as is illustrated by the terms of Article 49 and Article 50. Given the controversy that surrounded charges by the United States of Nicaragua's support of foreign insurrection and Nicaragua's adamant denial of those charges—despite the evidence in support of those charges that came to light in the oral hearings—it might have been thought that the Court would have chosen to make use of those considerable powers in the obtaining of evidence to which it drew attention at the jurisdictional stage [emphasis added].

<sup>28</sup> See M. HUDSON, *supra* note 21, §119, at 128 (1943). See also Sandifer, who writes that the framers of the Statute of the PCIJ and ICJ "followed the existing practice with respect to provisions concerning evidence in agreements establishing ad hoc tribunals and stated only broad principles in the Statute, leaving the elaboration of specific rules to the Court." D. SANDIFER, *supra* note 25, at 39.

<sup>29</sup> In the absence of specific agreement thereto by the parties (in, e.g., a bilateral arbitration or claims settlement tribunal), these obviously exclude methods of enforcing the writ of the Court that could ostensibly conflict with local sovereignty, such as the power to issue enforceable subpoenas or to require documentary production.

and in reducing voluminous evidence to manageable proportions. Generally, in application of the principle *actori incumbit probatio* the Court will formally require the party putting forward a claim to establish the elements of facts and of law on which the decision in its favour might be given.<sup>30</sup>

Although the substantive expectations of 1920 are not those of 1987, the Court's practice concerning evidentiary material—burden of proof, formal rules, propriety and admissibility—has not changed much over the years. The reason is well recognized by commentators: the Court should be left to determine the facts and law as best it can, with the fullest freedom consistent with the expressed will and consent of the sovereign parties that are the subjects of international law. It is clearly the Court's practice to determine for itself the acceptability *vel non* of evidentiary matters, exercising the greatest freedom to evaluate each case on its merits and on its own particular facts.<sup>31</sup>

The parties also share a similar flexibility in their freedom to introduce, more or less, whatever evidence they may consider appropriate to prove their cases. A leading scholar of evidence before international tribunals has stated:

The International Court of Justice has construed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court. . . . In practice, while the Court has placed few restrictions upon the rights of parties to produce whatever evidence they see fit, it has upon occasion exercised its discretionary authority to refuse to accept evidence offered.<sup>32</sup>

Judge Anzilotti said, during the drafting of the Rules of Court in 1922, that "the Court had accepted the principle that any evidence produced by the parties should be admitted automatically."<sup>33</sup> Another international scholar with a civil law background has commented that

the almost total absence of restrictions relative to the admissibility of evidence more nearly approaches the continental than the Anglo-

<sup>30</sup> 2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 580 (1965).

<sup>31</sup>

In these conditions it is necessary to start from the principle already developed in the jurisprudence of the International Court of Justice that the Court is free to appreciate the evidence and the allegations of the Parties. *The Parties are thus in a large measure free to present any evidence that they consider necessary or opportune.*

D. SANDIFER, *supra* note 25, at 464 (quoting the Swiss Memorial in the *Interhandel* case) (emphasis added).

<sup>32</sup> D. SANDIFER, *supra* note 25, at 184–85. Professor Sandifer has summarized the picture overall in the following words: "Both Courts have in fact been sparing in the attention and time devoted to evidence. Rather than break new trails or generate new precedents, their practice has proceeded largely within the confines of the system already marked out by ad hoc tribunals." *Id.* at 463.

<sup>33</sup> 1922 PCIJ, ser. D, No. 2, at 210, *cited in id.* at 184 n.26. Eventually, several qualifications to this principle evolved, notably in connection with late or improper submission of documentary evidence without the consent of the other party. *See, e.g.*; note 39 *infra*.



American system. In this regard, the practice of the Court shows that even the absence of relevance is not a sufficient reason, as a general rule, for its rejection. The only limitation is that of late submission.<sup>34</sup>

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.

#### THE STATUTE AND RULES

The Statute of the Court quite naturally supports this freedom of action. Unchanged in relevant part since 1920, it presents a broad framework within which the Court may determine the facts necessary for its decisions.<sup>35</sup> Article 48 reserves to the Court plenary powers in connection with the taking of evidence.<sup>36</sup> Not only can it “make all arrangements connected with the taking of evidence”; it can also call upon the parties to produce evidence,<sup>37</sup> commission inquiries or expert opinions<sup>38</sup> and foreclose further production of untimely evidence.<sup>39</sup> The Court even has the power to examine witnesses away from the seat of the Court.<sup>40</sup>

<sup>34</sup> Lalive, *Quelques Remarques sur la Preuve devant la Cour Permanente et la Cour Internationale de Justice*, 7 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 77, 102 (1950), cited in (and translated by) D. SANDIFER, *supra* note 25, at 185 n.26.

<sup>35</sup> The substantive provisions of the Statute relating to evidentiary matters begin with Article 30, paragraph 2, which enables the Court to adopt rules that “may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.” Statute of the International Court of Justice, ICJ ACTS AND DOCUMENTS, No. 4, at 60–89 (1978) (French & English). This is implemented by Article 9, paragraph 1 of the Rules, which provides: “The Court may, either *proprio motu* or upon a request made not later than the closure of the written proceedings, decide, for the purpose of a contentious case or request for advisory opinion, to appoint assessors to sit with it without the right to vote.” For the Rules of Court adopted on Apr. 14, 1978, see *id.* at 92–161 (French & English), reprinted in 73 AJIL 748 (1979). As Rosenne commented in 1983: “During the political and academic discussions on the role of the Court that have taken place since 1970, attention became focused on the problem of assessors, notwithstanding the fact that no use has ever been made of this faculty.” S. ROSENNE, *PROCEDURE IN THE INTERNATIONAL COURT* 31 (1983); see discussion, *id.* at 30–33.

<sup>36</sup> “The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.” See S. ROSENNE, *supra* note 35, at 270–71; M. HUDSON, *supra* note 21, §198, at 202. The breadth and flexibility of this provision has enabled the Court to act with a surprising degree of responsiveness to resolve various questions of fact presented to it.

<sup>37</sup> Article 49 of the Statute provides: “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.”

<sup>38</sup> Statute, Art. 50.

<sup>39</sup> Article 52 of the Statute states: “After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.”

<sup>40</sup> A provision related indirectly to the inspection possibilities of Article 44 of the Statute and Article 66 of the Rules. Rosenne notes that “[t]here is no known instance of this procedure having been followed in the present Court.” S. ROSENNE, *supra* note 35, at 136. This unused flexibility may go unnoticed by most practitioners or commentators.

The most significant impediment to the ability of the Court to function decisively in evidentiary questions is, of course, that it possesses no power to order production. It cannot subpoena witnesses or experts; it cannot punish for contempt; it has no extraterritorial power to compel the production or disclosure of documentary evidence or the taking of live testimony.<sup>41</sup> Yet, in the past few years, the Court has been increasingly exposed to situations involving disputed facts, by a series of cases—represented principally by the maritime delimitation cases of the early 1980s and, most recently, *Nicaragua v. United States*—that have confronted it with the need to deal with wide-ranging factual questions<sup>42</sup> so as to reach a decision.<sup>43</sup>

The Court is authorized to lay down its own rules of procedure, which it has done with a series of overall improving revisions (the most recent of which occurred in 1978).<sup>44</sup> Continuous strong control of the Court over the proceedings is made possible by the Statute and is implemented by the Rules.<sup>45</sup> The Court has great flexibility in determining how to handle questions of fact and evidence.<sup>46</sup> Article 43, paragraph 5 of the Statute specifies

<sup>41</sup> One authority has written:

The Court has no processes to compel the production of evidence. It may request of public international organizations information relative to cases before it, and may call upon the agents to produce any document or supply any explanation. Relevant questions may be put to witnesses and experts. But the Court must depend upon the consent of States to produce witnesses or permit the making of inquiries on the spot.

Alford, *Fact Finding by the World Court*, 4 VILL. L. REV. 37, 53 (1958). His conclusion in this context is that "lacking the necessary power to compel the production of the evidence it may need, the Court tends to rely heavily upon the evidence submitted without positive efforts to police the truth of the facts." *Id.*

<sup>42</sup> As will be seen below, whether or not the Court "resolves" those issues of fact in terms of basing its decision on any factual determination, it must nevertheless deal with them, one way or another.

<sup>43</sup> *Tunisia/Libya*, 1982 ICJ REP. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 ICJ REP. 246 (Judgment of Oct. 12) [hereinafter cited as *Gulf of Maine*]; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 ICJ REP. 13 (Judgment of June 3) [hereinafter cited as *Libya/Malta*]; and *Nicaragua Merits*, 1986 ICJ REP. 14.

<sup>44</sup> Article 30, paragraph 1 of the Statute states: "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure." The 1978 Rules, *supra* note 35, are a continuation of the general improvements made since the first Rules of Court were adopted in 1922. See M. HUDSON, *supra* note 21, §255, at 271.

<sup>45</sup> Consistent with the powers conveyed upon the Court under Article 30, paragraph 1 of the Statute, recapitulated in Article 58 of the Rules, which provides: "1. The Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given." This provision became of critical substantive importance in the second phase of the *South West Africa Cases*, as it was then that the President on behalf of the Court ruled that the parties should present their legal arguments separately from their "factual" arguments, which bifurcated the case in a fundamentally significant manner. See Minutes of Meeting of 12 March 1965, File No. 35765, *Dossier E XXXIII/2/10/1*: "The President: ' . . . A view expressed [by the Court] was that there are in the pleadings substantive and separate questions of law, as distinct from pure questions of fact or mixed questions of fact and law, which might with convenience be argued by counsel separately from the facts.' "

<sup>46</sup> Article 58 of the Rules also provides:

2. The order in which the parties will be heard, the method of handling the evidence and of examining any witnesses and experts, and the number of counsel and advocates to



that witnesses and experts may be heard by the Court.<sup>47</sup> Article 44 of the Statute also contemplates instances where “steps are to be taken to procure evidence on the spot.”<sup>48</sup> Paragraph 2 of that article thus contains the necessary implication that the Court is empowered to engage in a *descente sur les lieux*, which indeed it did do once before the Second World War,<sup>49</sup> and which it considered (but did not do) in one case following the war.<sup>50</sup> Article 50 of the Statute enables the Court to seek its own expert advice.<sup>51</sup> This has come to be most useful in a variety of cases.<sup>52</sup> In addition, the Court and the judges may put questions to the agents, counsel and advocates—as well as to the witnesses and experts—in the oral proceedings.<sup>53</sup>

Moreover, the Rules provide that “[t]he Court may at any time call upon

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be heard on behalf of each party, shall be settled by the Court after the views of the parties have been ascertained . . . .

See S. ROSENNE, *supra* note 35, at 127–28, who, noting that the words “the method of handling the evidence and of examining any witnesses and experts” were added in 1972, states: “In the four contentious cases before the present Court in which witnesses and witness-experts called by a party have been heard, a procedure suited to the circumstances of each case was adopted. The current wording consolidates that practice and flexibility.” *Id.* at 128.

<sup>47</sup> Cf. Rules, *supra* note 35, Art. 62, para. 2 and Art. 68; and see commentary thereon, S. ROSENNE, *supra* note 35, at 135, 141.

<sup>48</sup> Article 44, paragraph 1 states: “For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served.”

<sup>49</sup> *Diversion of Water from the River Meuse*, 1937 PCIJ, ser. A/B, No. 70, 4 M. HUDSON, WORLD COURT REPORTS 178, 182 (1943) [hereinafter cited as HUDSON REPORTS]. See D. SANDIFER, *supra* note 25, at 345; Hudson, *Visits by International Tribunals to Places Concerned in Proceedings*, 31 AJIL 696, 697 (1937); M. HUDSON, *supra* note 21, at 566–67.

<sup>50</sup> In the *South West Africa Cases*; see discussion in D. SANDIFER, *supra* note 25, at 345–48. This implication was confirmed by the Court in a new provision of the revised Rules of 1978, which specifies:

The Court may at any time decide, either *proprio motu* or at the request of a party, to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates, subject to such conditions as the Court may decide upon after ascertaining the views of the parties. The necessary arrangements shall be made in accordance with Article 44 of the Statute.

Rules, *supra* note 35, Art. 66; see S. ROSENNE, *supra* note 35, at 139.

<sup>51</sup> Article 50 provides: “The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.” See also *Nicaragua Merits*, 1986 ICJ REP. at 40, para. 61, and Judge Schwebel’s dissenting opinion, *id.* at 321–22, para. 132.

<sup>52</sup> See *Chorzów Factory case (Ger. v. Pol.) (Claim for Indemnity)*, 1928 PCIJ, ser. A, No. 17 (Judgment No. 13 of Sept. 13); (*Expert Enquiry*), *id.* (Order of Sept. 13); see further *Corfu Channel*, 1949 ICJ REP. 4; and *Gulf of Maine*, 1984 ICJ REP. 246.

<sup>53</sup> Under Article 51 of the Statute, “During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30”; and Article 65 of the 1978 Rules, *supra* note 35, provides: “Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges.” Rosenne comments that “the right to put questions to witnesses and experts is granted to the President and to each judge without restrictions corresponding to those found in Article 61 regarding the putting of questions to the parties.” S. ROSENNE, *supra* note 35, at 138.

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."<sup>54</sup> Article 67 of the Rules reaffirms and specifies the procedures to be followed in relation to the obtaining of "an enquiry or expert opinion" by the Court in accordance with the provisions of Article 50 of the Statute.<sup>55</sup> The Court may also request and receive relevant information from public international organizations.<sup>56</sup> Other provisions of the Rules are concerned with documentary evidentiary production<sup>57</sup> and notification of such evidence, and of witnesses and experts, to the Court and the opposing party.<sup>58</sup>

<sup>54</sup> Rules, *supra* note 35, Art. 62, para. 1. This provides for a relatively high degree of autonomy for the Court's processes, in a manner analogous to the power of the Court under Article 61, paragraph 1 to "indicate [at any time prior to or during the hearing] any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument." See S. ROSENNE, *supra* note 35, at 133. Rosenne's comment on the reworded language of Article 62, paragraph 1, however, suggests that it "seems to open the way to the Court to make its own enquiries on a given matter. There are signs that the Court may take 'judicial notice' of proceedings in competent United Nations organs and perhaps of other statements that are in the public domain." *Id.* at 135. Cf. the treatment accorded to public news reports that remained uncontroverted by respondent government in United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 10, para. 15 (Judgment of May 24); and the more extensive treatment in Nicaragua Merits, 1986 ICJ REP. at 40-41, 53, 65-66 and 80, paras. 63, 92, 117 and 146.

<sup>55</sup> See S. ROSENNE, *supra* note 35, at 140.

<sup>56</sup> The final substantive specification of powers of the Court to obtain information and evidence is contained in Article 69 of the Rules, which implements Article 34, paragraphs 2 and 3 of the 1945 Statute. Paragraph 2 of Article 34 is more relevant to the present discussion: "The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative." See S. ROSENNE, *supra* note 35, at 142-44; see also *id.* at 261-62. This provision therefore goes beyond mere advice or participation in relation to advisory proceedings.

<sup>57</sup> Article 50 requires that "copies of any relevant documents adduced in support of the contentions contained in the pleading" (or extracts, as required) be "annexed to the original of every pleading." See S. ROSENNE, *supra* note 35, at 114 n.1:

The Court has sometimes asked to see the original text of a document. In *Corfu Channel* (merits) the Court asked the applicant to produce certain documents, but on its refusal to do so on grounds of State secrecy refused to draw from that refusal to produce any conclusions differing from those to which the actual events gave rise. ICJ Reports, 1949, 4 at p. 32. See also *Ambatielos* case, Pleadings, p. 547. In *Arbitral Award* a contention was withdrawn after the accuracy of a text of a diplomatic paper was successfully challenged. Pleadings, vol. 2, p. 164.

<sup>58</sup> Rules, Article 56 (paragraph 1) limits the ability of parties to introduce documentary evidence after the close of the written proceedings without the consent of the other party; or (paragraph 2) failing such consent, with the Court's authorization; and contains other related provisions. See S. ROSENNE, *supra* note 35, at 124-25. Article 57 of the Rules requires submission of information "regarding any evidence which [each party] intends to produce or which it intends to request the Court to obtain" (emphasis added). Article 57 also requires "a list of surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indication in general terms of the point or points to which their evidence will be directed." Rosenne, *supra*, at 126, points out that the first application of this rule in its new form was in *Tunisia/Libya*, 1982 ICJ REP. 18.



The general practice of the Court has been to admit contested documents and testimony, subject to the reservation that the Court will itself be the judge of the weight to be accorded to it. In many cases parties have produced evidence—particularly in the form of maps or charts in the course of oral proceedings—that has been objected to as untimely submitted; the party producing the material either withdrew it or abandoned it or, more usually, insisted that it was only an “element of pleading” and should be allowed “for illustrative purposes only” and not in effect as an element of proof upon which the Court was intended to rely.<sup>59</sup>

#### WHAT HAS THE COURT DONE?

##### IN GENERAL

Sir Hersch Lauterpacht wrote almost 30 years ago, in a discussion of the *Customs Union*<sup>60</sup> case:

It may not be easy to answer the question whether the circumstance that in a particular case the reasoning of the Court must consist largely of an assessment of facts or probabilities relevant to the situation affects the obligation to make the decision rest on the broadest possible basis of all requisite detail. A substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevance of facts for the purpose of determining liability and assessing damages. As the *Corfu Channel* case showed, the Court is in the position to perform that task with exacting care.<sup>61</sup>

Although there has been a variety of instances where the fact-finding facilities of the Court have not been as successful,<sup>62</sup> it has also been said that “[a]n occasional court, one to which the cases of secondary importance will be referred for settlement, the World Court has fact-finding facilities as good as it needs.”<sup>63</sup>

How good is “as good as it needs”? This must be answered in the overall context of the relatively low volume of judicial work of the Court, its composition of a large number of judges who tend to be scholars and international lawyers rather than trial lawyers and courtroom practitioners, and the fact that it is both a court of first instance and a court of last resort. In discussions

<sup>59</sup> Cf. the use by the Belgian agent in the *Meuse* case of a map, a bas-relief and models of canal locks as “part of the agent’s pleadings.” M. HUDSON, *supra* note 21, §516, at 566.

<sup>60</sup> Customs Régime between Germany and Austria, 1931 PCIJ, ser. A/B, No. 41.

<sup>61</sup> H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 48 (1958).

<sup>62</sup>

In the *Peter Pazmany University Case* [1933 PCIJ, ser. A/B, No. 61] the Court did not have most of the documents of the written proceedings of the arbitral tribunal which made the decision being reviewed. In the *Lotus Case* [1927 PCIJ, ser. A, No. 10] the Court did not have the Turkish judicial decision that gave rise to the dispute. In the case of *Minority Schools in Albania* [1935 PCIJ, ser. A/B, No. 64] the decision was rendered based upon many assumptions concerning the Albanian education situation. But if the Court *can* be developed into a more vital force as part of the United Nations structure, which is a major assumption, attention to its fact-finding resources should receive a high priority.

Alford, *supra* note 41, at 91.

<sup>63</sup> *Id.*

of this subject, sometimes the assumption is silently made that the Court ought somehow to enjoy coercive and prescriptive powers on the same level, e.g., as those of a U.S. district court. Despite its being a court of first instance, in many ways proceedings before the Court take on the characteristics of an enormous, complex and lengthy appellate argument.

Nevertheless, the Court's appreciation of important questions of proof and testimony is quite lively, although naturally not comparable to the involvement of a single common-law trial judge sitting with a jury. In many aspects—in particular, as regards determining questions of fact—the judges of the Court must necessarily serve as their own “jury” (save to the extent that the Court may appoint assessors or experts).<sup>64</sup> This circumstance, however, is congruent with the nature of the subject matter of international law: not only does the Court deal with states and not individuals—and is thus not normally required to determine subjective and difficult issues such as *scienter* and *mens rea*,<sup>65</sup> it also deals with a sophisticated and relatively narrow series of rules and problems marked by a relatively high level of abstraction.

Without departing from the world of the common law, however, cases of great factual complexity are frequently determined by English courts acting on the equity side on the basis of documentary proof embodied solely in affidavits that are read aloud into the record, together with the legal precedents. An analogy to civil proceedings fought on affidavits is not inapt, and lends appropriate perspective to the nature of practice before the Court. Points of fact are asserted and supported by the parties in their written pleadings and in documentary proofs annexed to the written pleadings. They are then argued and elaborated and sometimes dropped and defeated, without more, by counsel in the course of oral argument. Necessary inferences are drawn about the abandonment of certain arguments when the factual assertions upon which they were based are neglected. Most frequently, there

<sup>64</sup> On the use of assessors, which has never been invoked, see note 35 *supra*. Article 50 of the Statute limits the role of Court-appointed experts to “carrying out an enquiry or giving an expert opinion.” Since the Court is not bound to accept any conclusions offered to it by assessors or experts, the Court itself retains the prime responsibility for factual determinations; it thus appears to be a court and a jury panel in one. The proper analogy is therefore to a panel of trial judges sitting (without a jury) on a case of mixed law and fact, who are required to make findings of fact as well as law to support their decision.

<sup>65</sup> The issue of *mens rea* or intent became a hot one, however, during the debates in the *South West Africa Cases* leading to the problematic amendment of applicants' submissions to eliminate the assertion of “deliberate oppression” of the inhabitants of South West Africa. South Africa took the position that as long as such an allegation remained part of the applicants' case, South Africa must be entitled to prove (by lengthy and detailed evidence of its officials and representatives) that its intent or motives were not to oppress the inhabitants. Applicants, in response, took the position that *mens rea* or intent is presumed in the case of governmental actions in the sense that governments must be presumed to “intend” the natural results of actions they have undertaken. Contrast the disposition of this issue by the Court a few years later, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 ICJ REP. 16, 57, para. 129 (Advisory Opinion of June 21): “the question of intent or governmental discretion is not relevant; nor is it necessary to investigate or determine the effects of [apartheid] . . . upon the welfare of the inhabitants.”



is no need to seek an actual test of proofs—other than weighing assertion and counter-assertion—in the course of the written and oral arguments.

The basic rule of thumb is that the Court is always free to draw its own conclusions: sometimes ignoring factual assertions completely; sometimes finding that a point is made or established by default; sometimes seeking new evidence; sometimes accepting and sometimes excluding evidence from consideration. It is erroneous to view the Court's procedure as requiring that a prima facie case be made out in each instance by the presentation of testimony, as in a municipal criminal or civil proceeding.

#### WHEN EVIDENCE IS PRODUCED

##### *Documentary Evidence*

The great majority of issues of fact presented to the Court since 1922 has been capable of resolution principally by pleading and documentary proof.<sup>66</sup> The specific formulation of the Statute and Rules contemplated that documentary evidence would be the main source.<sup>67</sup> Indeed, the International Court may have naturally inherited much from civil law procedure, which, as Sandifer writes, "is characterized by the priority role it accords to written evidence."<sup>68</sup>

From the beginning, the Court tended to find facts as established or as implied by the documentary evidentiary record and the course of pleadings, without more. An early notable example occurred in *German Interests in Polish Upper Silesia*. One of the issues in the case concerned the purpose for which certain large agricultural estates had been acquired.<sup>69</sup> The Court drew

<sup>66</sup> This means that the parties to disputes before the Court present and state facts in their "Cases" and "Counter-Cases," or "Memorials" and "Counter-Memorials," prepared and submitted in the absence of any stringent formal rules or limitations on form and length. See the original formulation in Rules, Arts. 39 and 40, reprinted in 1 HUDSON REPORTS, *supra* note 49, at 70 (1934).

<sup>67</sup> Thus did Judge Anzilotti refer to witnesses and experts as "living documents." 1 HUDSON REPORTS, *supra* note 49, at 287.

<sup>68</sup> D. SANDIFER, *supra* note 25, at 198. However, rather than arguing for a direct relationship between the prevalence of documentary evidence in international tribunals and the attitudes of civil procedural law, Sandifer suggests that

[t]he emphasis on written evidence in international procedure seems to have been influenced to a great extent by the nature of the problems involved. The distances involved in the transactions forming the subject matter of many international proceedings have also made necessary the use of written evidence. In arbitrations between States in their own right the evidence of the contested questions has frequently been a matter of public record.

*Id.* at 200.

<sup>69</sup> In a nutshell: if they related to industrial or mining operations, they did not fall within the category of being merely large rural estates but fell under different provisions of the applicable Geneva Convention. The question of subsidence of superjacent land over mining operations was therefore considered in great detail, as was the suitability of woodland for producing pit props for mining excavations (as well as fodder for pit ponies).

inferences from the documents about the owners' need to acquire surface (rural) land to avoid liabilities for mining subsidence.<sup>70</sup>

The scope and quantity of documentary evidence has grown dramatically since the first days of the Permanent Court. In the first case before it,<sup>71</sup> the documentary list contained only one letter, two memoranda and one telegram.<sup>72</sup> By 1927, in the Advisory Opinion on the *European Commission of the Danube*, the total documentary and evidentiary production amounted to more than 266 items, some of which were of considerable length.<sup>73</sup> By the time the *Polish Upper Silesia* litigation commenced in 1925, therefore, the Court had become fully accustomed to having substantial amounts of evidentiary facts presented during written and oral pleadings and in annexures thereto; more than 201 documentary annexes were submitted in connection with various phases of those proceedings, consisting of contracts, opinions, notarial records, bylaws, letters, maps, plans, memoranda, notes, decrees,

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Furthermore, a document [a letter] filed by the Agent of the Applicant . . . , which document has not been disputed, decisively establishes the fact that the purpose served by the estate is as the Court understands it. . . . It appears therefore that the object of the purchase of the Mokre estate was to avoid a speculation which would injure the interests of the concern.

Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) (Merits), 1926 PCIJ, ser. A, No. 7, at 61 (Judgment of May 25).

It should moreover be noted that the Applicant has stated that the timbered portion is utilized for the needs of the mine (pit props) and that this statement has not been disputed by the Respondent. The Court therefore regards it as proved, for the purposes of the suit, that the Baranowice estate fulfils the conditions of Article 9 . . . owing to the exploitation of the timber.

*Id.* at 63. The Judgment continued as follows: "The same conclusion is indicated as regards the untimbered portion, because this land, which is devoted to agriculture, supplies foodstuffs for the workers and hay, straw, etc. for the pit ponies." *Id.*

<sup>71</sup> Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labour Conference, 1922 PCIJ, ser. B, No. 1 (Advisory Opinion of July 31).

<sup>72</sup> *Id.* at 11-13 (*see* ser. C, No. 1, at 345-459); 1 HUDSON REPORTS, *supra* note 49, at 116. In the second advisory proceeding brought before the Court, Competence of the International Labour Organisation with Respect to Agricultural Labor, 1922 PCIJ, ser. B, No. 2 (Advisory Opinion of Aug. 12), the documentary dossier included six letters, two notes and one telegram. *Id.* at 11-13; 1 HUDSON REPORTS, *supra*, at 124-25. In the third case, Competence of the International Labour Organisation with Respect to Agricultural Production, the documentary dossier included five letters and one extract from minutes. 1922 PCIJ, ser. B, Nos. 2 and 3, at 51; 1 HUDSON REPORTS, *supra*, at 138-39. By the next year, in Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8, 1921, 1923 PCIJ, ser. B, No. 4 (Advisory Opinion of Feb. 7), the dossier was expressed in terms of being "supplementary documents" and "two series of documents." *Id.* at 10; 1 HUDSON REPORTS, *supra*, at 147.

<sup>73</sup> *European Commission of the Danube*, 1927 PCIJ, ser. B, No. 14 (Advisory Opinion of Dec. 8). The Court appended an annex consisting of (1) more than 34 documents transmitted by the League Secretariat and, "Transmitted in the Name of the Interested Governments or Filed by their Representatives," 11 international agreements, 8 extracts from protocols and minutes of conferences, 54 items of diplomatic correspondence and 9 maps; (2) 37 Protocols of the Commission submitted by the European Commission of the Danube; and (3) documents prepared by the Registry, including 31 "treaties, acts and regulations," 68 protocols and minutes of conferences and international commissions, and 14 items of diplomatic correspondence.



minutes and similar materials.<sup>74</sup> In the *Corfu Channel* case of 1949, the documents submitted to the Court included 116 items introduced by the United Kingdom, 66 by Albania and 6 jointly (for a total of 188).<sup>75</sup> And, by 1950, when the Court handed down its great Advisory Opinion on the *International Status of South-West Africa*, the practice of ever increasing documentary annexures had reached truly epic dimensions. (It took 27 printed pages of the Court's report merely to list the more than three hundred documents contained in 44 folders.)<sup>76</sup>

It became apparent early on that the Court would find it difficult, if not impossible, to assert anything approaching stringent rules relating to the substance of the evidence produced. As was pointed out above, the Court has applied practically no rules of propriety or admissibility to documentary evidence.<sup>77</sup> The absence of rules restricting the length of documents has long been associated with the perceived "freedom" of sovereign states to present their cases before the Court howsoever they see fit, provided they comply with minimum standards of judicial procedure such as adherence to time limits, cutoff of evidence presented following a certain date, and ability to alter or amend submissions at a late stage in the proceedings without adverse consequences, as well as the general principle alluded to as "equality of arms."

The basic approach has been for the Court to make relatively ad hoc determinations as to admissibility, suitability and probative value on the basis of the facts and circumstances of each case and within the context and broad compass of its Statute and Rules. As Rosenne has aptly put it: "the probative value of the evidence depends upon the question at issue, and is determined by the substantive rules of international law through the application of which the Court will reach its decision."<sup>78</sup> This problem is not as circular as it may sound; indeed, Rosenne characterizes it as "a reasonable interpretation of the criterion of relevance."<sup>79</sup>

<sup>74</sup> See Annex III (Documents Submitted by the Parties During Proceedings), 1926 PCIJ, ser. A, No. 7, at 98-107, reproduced in 1 HUDSON REPORTS, *supra* note 49, at 580-87.

<sup>75</sup> *Corfu Channel, Merits*, 1949 ICJ REP. at 132-41 (listed in Annex I).

<sup>76</sup> See *International Status of South-West Africa*, 1950 ICJ REP. 128, 193-219 (Advisory Opinion of July 11).

<sup>77</sup> Judge Hudson observed, in connection with an early and significant decision of the Permanent Court, that "[i]n general, the Court has refrained from requiring specific types of proof for particular matters; thus in the *German Interests in Upper Silesia Case* it rejected a contention that the acquisition of Czechoslovak nationality could be established only by a certificate from the Czechoslovak Government." M. HUDSON, *supra* note 21, at 565 (citing 1926 PCIJ, ser. A, No. 7, at 73).

<sup>78</sup> 2 S. ROSENNE, *supra* note 30, at 582.

<sup>79</sup> *Id.* He continues:

In its attitude towards documentary evidence, the Court is strict. For example the Court found "cogent evidence" of what the parties intended from the actual texts of the instruments of ratification of the relevant treaty in the *Ambatielos case* (jurisdiction). 1952, at p. 42. It found confirmation of the Persian Government's intentions in the text of a law submitted to the Majlis in 1933 . . . . It found in the "invariable" construction of a Norwegian decree of 1812, in later Norwegian decrees, as well as in other legal documents, evidence of the interpretation placed by Norway on the decree of 1812, which itself was admitted to be not clear. 1951, p. 134. . . . In the *Nottebohm case* (second phase) the

As an important aspect of documentary evidence, maps have in general played a key role in litigation before the Court. Many issues framed for its determination have been related to territorial disputes and boundary claims; for example, the *Jaworzina* case, the *Monastery of Saint-Naoum*, the *Eastern Greenland* case, *Frontier Land*, *Minquiers and Ecrehos* and the *Temple of Preah Vihear*.<sup>80</sup> This last case was particularly significant for its handling of cartographic evidence; in addition to much documentary proof of a historical nature, it involved the submission of old maps and surveys as "real" evidence of the contemporaneous intentions of the parties and their predecessor governments concerning such issues as the location of the land boundary and the location (and shifting) of the watershed.<sup>81</sup>

In some instances maps have also been intended to constitute evidence of particular types of facts. Here, more than ever, the technical and scientific maps and charts produced during the maritime delimitation cases of the early 1980s played a peculiar role; they were used primarily at a higher level of abstraction to persuade the Court that certain elements of the "relevant circumstances" should be accorded a particular treatment.<sup>82</sup> In all three of the cases, much attention was given to maps, but principally not as evidence

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"essential facts appear with sufficient clarity from the record", i.e. the documents in support of the written pleadings, and further documents filed subsequently. 1955, at p. 24. This is an interesting example, because from the record the Court established the purpose for which naturalization was asked for, i.e. Mr. Nottebohm's intentions in the year 1939, that gentleman himself not supplying any direct evidence, in writing or orally, to the Court.

*Id.* at 581-82.

<sup>80</sup> Delimitation of the Czechoslovak-Polish Frontier (Question of *Jaworzina*), 1923 PCIJ, ser. B, No. 8 (Advisory Opinion of Dec. 6); *Monastery of Saint-Naoum* (Albanian Frontier), 1924 PCIJ, ser. B, No. 9 (Advisory Opinion of Sept. 4); *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 PCIJ, ser. A/B, No. 53 (Judgment of Apr. 5); *Sovereignty over Certain Frontier Land* (Belg./Neth.), 1959 ICJ REP. 209 (Judgment of June 20) [hereinafter cited as *Frontier Land*]; *Minquiers and Ecrehos* (Fr./UK), 1953 ICJ REP. 47 (Judgment of Nov. 17); and *Temple of Preah Vihear* (Cambodia v. Thailand) (Preliminary Objections), 1961 ICJ REP. 17 (Judgment of May 26); (Merits), 1962 ICJ REP. 6 (Judgment of June 15).

<sup>81</sup> One commentator has observed that "official maps have played a major part in support or as proof of the exercise of sovereignty over a disputed area or as evidence of a litigant's state of mind," adding that "maps may be regarded as strong evidence of what they purport to portray. They may be termed and treated as admissions, considered as binding, and said to possess a force of their own." Weissberg, *Maps as Evidence in International Boundary Disputes: A Reappraisal*, 57 AJIL 781, 803 (1963). For examples taken from the Court's practice, see *id.*

<sup>82</sup> Thus, for example, in *Tunisia/Libya*, Tunisia produced impressionistic maps on a very large scale, including bathymetric contours on a scale of 10 meters (which created the impression that a relatively flat area of the ocean floor was made up of precipices and crevasses), and Libya produced computerized models and block diagrams of the same area to precisely the contrary effect: i.e., to show the relative absence of significant geomorphological features. In *Gulf of Maine*, the myriad of maps and charts included the most detailed and recondite illustrations of the feeding and schooling habits of various species of fish. In *Libya/Malta*, the Court was confronted by sea-surface cartography by the party claiming equidistance (Malta) and by geomorphological charts, diagrams and models intended to demonstrate the existence of a fundamental discontinuity on the sea bottom by the party urging attention to geological and geomorphological natural prolongation (Libya). (The writer served as counsel to Libya in this case.)



of understandings.<sup>83</sup> As everyone knows, much can be accomplished by maps and diagrams to frame an argument. Like statistics, cartography can “lie.” There was thus considerable debate in these cases not so much about the accuracy of the maps introduced, but rather about their correctness (in the context that they were designed to illustrate, e.g., ridges on the seabed or ocean currents). A natural degree of enhancement or exaggeration was necessary even to perceive any difference between one sector and another.

Maps in these later cases, then, came to be indicative of legal conclusions, and demonstrative of their soundness, in quite a new way. They were almost wholly ignored, however, by the Court and the Chamber.<sup>84</sup>

Finally, maps have been offered as “real evidence” where they were intended to demonstrate an act of a state such as agreement to a given boundary or state of affairs. They can also show an omission of a state such as acquiescence in an indicated boundary through failure to register sufficient protest against it.<sup>85</sup>

In other cases, the documentary evidence produced has required a sophisticated perspective and a fine historical touch to review, evaluate, sort and determine: in *Legal Status of Eastern Greenland*,<sup>86</sup> the Court was obliged in 1933 to review materials reaching back to the 12th century. This historical role was later to be repeated in the Anglo-Norwegian *Fisheries* case, recounting 17th-century practices;<sup>87</sup> the *Minquiers and Ecrehos* case,<sup>88</sup> which looked back to the 13th century; and the *Temple* case,<sup>89</sup> where the work of a 1904 boundary commission was carefully studied. Nineteenth- and 20th-century diplomatic and other historical materials of great detail and difficulty were reviewed in the course of the pleadings in *U.S. Nationals in Morocco*.<sup>90</sup> Doc-

<sup>83</sup> Although in the southern sector of the delimitation in *Tunisia/Libya*, this principle was advanced regarding the extent of the early Italian administration of Libya and the history of sponge-fisheries regulation by the Bey of Tunis—but as demonstrative aids.

<sup>84</sup> See Weissberg, *supra* note 81, for a useful review of the use of maps in the International Court prior to these three cases.

<sup>85</sup> Thus, in *Tunisia/Libya* the decisively important fact for the first segment of the delimitation was the carefully conditioned mutual acceptance that the Court found of a status quo along the 26° line where the eastern edge of the Tunisian offshore petroleum concessions abutted the western edge of the Libyan concessions. 1982 ICJ REP. at 83–84, paras. 117–18. Note also that Tunisia subsequently sought unsuccessfully to revise the delimitation by asserting that the de facto line had not correctly represented a joint abutting of concession lines and that no such congruence (and hence no such understanding) had existed. See Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (*Tunisia v. Libya*), 1985 ICJ REP. 192 (Judgment of Dec. 10).

<sup>86</sup> 1933 PCIJ, ser. A/B, No. 53.

<sup>87</sup> Fisheries case (*UK v. Nor.*), 1951 ICJ REP. 116 (Judgment of Dec. 18). The historical facts laid before the Court were treated *id.* at 124–25; geographical facts at 127–28 and 140–43; sociology at 128; fisheries themselves at 127–28; economics at 133; and history in general at 133–38.

<sup>88</sup> 1953 ICJ REP. 47.

<sup>89</sup> 1961 ICJ REP. 17; 1962 ICJ REP. 6.

<sup>90</sup> Rights of Nationals of the United States of America in Morocco (*Fr. v. U.S.*), 1952 ICJ REP. 176 (Judgment of Aug. 27).

uments of substantial complexity were introduced, in addition, in the second phase of the extended *Barcelona Traction* litigation, requiring the Court to appreciate a variety of laws, regulations and corporate resolutions, as well as company law and creditors' rights in general under the laws of at least two municipal jurisdictions.<sup>91</sup>

However, the Court must be careful in handling documentary evidence since such evidence, by its very nature, is somewhat unilateral and passive. In the merits phase of the *Nicaragua* case, the Court observed:

A large number of documents have been supplied in the form of reports in press articles, and some also in the form of extracts from books. Whether these were produced by the applicant State, or by the absent Party before it ceased to appear in the proceedings, the Court has been careful to treat them with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.<sup>92</sup>

This problem was highlighted, of course, by the fact that respondent had withdrawn from active participation in the proceedings.

#### *Witnesses and Experts*

There have only been eight cases in 60 years in which live witnesses and experts of the parties have appeared before the Court. Rosenne characterized the matter (as of 4 years ago) as follows:

The expression "the method of handling the evidence and of examining any witnesses and experts" was added in 1972. In the four contentious cases<sup>93</sup> before the present Court in which witnesses and witness-experts called by a party have been heard, a procedure suited to the circumstances of each case was adopted. The current wording consolidates that practice and flexibility.<sup>94</sup>

Witnesses and experts were heard by the Court for the first time in *German Interests in Upper Silesia*.<sup>95</sup> They gave evidence live in Court on the relationship between large landed estates and the subjacent mines (a question that involved highly technical material relating to, e.g., flooding and subsidence). Germany called four "expert-witnesses" and Poland called one; they testified

<sup>91</sup> *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)* (New Application), 1970 ICJ REP. 3 (Judgment of Feb. 5). "In the course of the proceedings, the Parties have submitted a great amount of documentary and other evidence intended to substantiate their respective submissions. Of this evidence the Court has taken cognizance." *Id.* at 50-51, para. 102. See generally *id.* at 33-50.

<sup>92</sup> *Nicaragua Merits*, 1986 ICJ REP. at 40, para. 62 (emphasis added).

<sup>93</sup> This comment was accurate as of the date of its publication (1983), although (as discussed below) it has now been superseded by evidentiary developments in the *Libya/Malta*, *Gulf of Maine* and *Nicaragua (Merits)* cases.

<sup>94</sup> S. ROSENNE, *supra* note 35, at 127-28.

<sup>95</sup> *Certain German Interests in Polish Upper Silesia* (Ger. v. Pol.) (Jurisdiction), 1925 PCIJ, ser. A, No. 6 (Judgment of Aug. 25); (Merits), 1926 PCIJ, ser. A, No. 7 (Judgment of May 25).



over a period of 3 days and were questioned by the agents and also by some of the judges.<sup>96</sup> The agents were also given opportunities later to comment on the testimony.<sup>97</sup> The Court in its decision on the merits made numerous determinations of a highly technical nature based upon the documentary and expert evidence that had been presented.<sup>98</sup>

In the *Chorzów Factory* case (in the later phase of the *Silesia* litigations), the Court ordered an expert inquiry so as to determine the compensation owing for the damages suffered.<sup>99</sup> This determination involved sophisticated financial analysis of the value of the factory at the date of its expropriation, and what the "financial results" and the present value would have been if it had not been expropriated.<sup>100</sup> Production of the testimony of witnesses or experts was contemplated in one other proceeding before the Permanent Court, but was aborted by the failure to call the witness in question.<sup>101</sup>

<sup>96</sup> One witness was not present in court in order to approve the record and "subsequently the testimony of this witness was set aside." M. HUDSON, *supra* note 21, at 570 (referring to 1926 PCIJ, ser. E, No. 3, at 211).

<sup>97</sup> 1926 PCIJ, ser. C, No. 11, vol. 1 at 25-34; see M. HUDSON, *supra* note 21, §518, at 570. The right to comment on the testimony is preserved under Article 48 of the present Rules; it can be a highly important component of a party's case. (As a prime example of this: applicants' extensive and detailed comments on the massive South African evidence would probably have been highly important in the *South West Africa Cases (Second Phase)*, had the Court ever reached the merits.)

<sup>98</sup> For example, the Court recognized that the testimony of the expert witnesses concerning the relationship of the estates at the surface of the land to the subterranean mine workings supported "the justice of the objections taken by the Applicant" and established the purposes for which surface land had been purchased by the "mining undertaking." 1926 PCIJ, ser. A, No. 7, at 54-55. See further the documentary evidence of a letter, *id.* at 61. In addition, Poland had contended "that ownership of the surface is not now absolutely necessary [to avoid subsidence] . . . because modern technical knowledge has introduced processes which enable any damage to the surface to be avoided." *Id.* at 51. The Court heard technical evidence addressed to this question and made a series of findings, both technical and general. *Id.* at 52-53.

<sup>99</sup> In the earlier stages of these German-Polish litigations of the 1920s, the Court had specifically invited "the Parties to furnish, at a public hearing, by whatever means they may think fit, further information regarding the points reserved by the Court for this purpose." Order of Court of Mar. 22, 1926 PCIJ, ser. A, No. 7, at 96-97.

<sup>100</sup> See *Chorzów Factory*, Order of Sept. 13, 1928 PCIJ, ser. A, No. 17, at 99-103. In support of its unsuccessful application for interim measures of protection in 1927, the German Government had introduced "the expert opinion of the American firm Lybrand, Ross Bros. and Montgomery . . . [which had] carefully examined the books of the Bayerische and arrive[d] at a conclusion of 65 million Reichsmarks." Request for Interim Protection by the German Government, 1927 PCIJ, ser. A, No. 12, at 7. This inquiry was discussed in the body of the Court's main opinion as being intended to "obtain further enlightenment in the matter" of the damage and indemnity. Indemnity, 1928 PCIJ, ser. A, No. 17, at 4, 51-57. The Court appointed chemical engineers (two Norwegian and one Swiss) as its experts for this purpose, 1928 PCIJ, ser. C, No. 16-II, at 12-13 (Order by the President of Oct. 16); and it accepted the nomination of assessors by the parties, *id.* at 13-14 (Order by the President of Nov. 14). However, a month later the case was settled, the German application was withdrawn and the expert inquiry was therefore terminated, 1928 PCIJ, ser. A, Nos. 18/19, at 14-15 (Order by the President of Dec. 15), together with the proceedings, 1929 PCIJ, ser. A, Nos. 18/19, at 11-13 (Order of May 25).

<sup>101</sup> See Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer, 1926 PCIJ, ser. B, No. 13 (Advisory Opinion of July 23); and

In addition, there were two instances before the Permanent Court when the Court rejected (or declined to undertake) an expert inquiry or investigation. In the first,<sup>102</sup> the Court reasoned that an inquiry into factual questions was not called for since its decision was to be limited to legal questions; and in the second, it found no basis for conducting an inquiry into whether a de facto monopoly in Congo River traffic had been established because there would be no cause of action unless measures prohibiting competition were also found to exist.<sup>103</sup>

Whereas the *Silesia* cases were the only real example of testimonial evidence before the Permanent Court, the *Corfu Channel* case in 1949 and the *Nicaragua* case in 1986 are the outstanding examples of the use of witnesses and experts to arrive at a decision in the International Court. In *Preah Vihear* the expert testimony was in essence superfluous to the decision of the Court, which was reached on separate legal grounds; likewise, in *South West Africa*, the 14 "witness-experts" produced by South Africa during more than 2 months might as well never have come to The Hague, since the decision of the Court rendered any inquiry into the facts supererogatory. The massive technical evidence presented in the three latest maritime delimitation cases<sup>104</sup> either neutralized itself because of its complexity<sup>105</sup> or lack of distinctness,<sup>106</sup> or was neutralized or rendered irrelevant for purposes of the decision by the supervening continental shelf provisions of the United Nations Convention on the Law of the Sea.<sup>107</sup>

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ser. E, No. 3, at 213, cited in M. HUDSON, *supra* note 21, §518, at 570 & n.76. Judge Hudson also alludes to the incident in *Monastery of Saint-Naoum* in which a potential witness arrived at The Hague too late to give his evidence and was thus excluded. "[L]ikewise, letters sent by States' representatives were returned to them." *Id.*, §520, at 572.

<sup>102</sup> D. SANDIFER, *supra* note 25, at 334; Free Zones of Upper Savoy and the District of Gex (Fr./Switz.), 1932 PCIJ, ser. A/B, No. 46, at 162 (Judgment of June 7) [hereinafter cited as Free Zones]. Here the Special Agreement actually provided for a request to the Court "by either Party to delegate one or three of its members for the purpose of conducting investigations on the spot and of hearing the evidence of any interested persons." 2 HUDSON REPORTS, *supra* note 49, at 452 (1935).

<sup>103</sup> Oscar Chinn (Belg./Gr. Brit.), 1934 PCIJ, ser. A/B, No. 63, at 84, 88 (Judgment of Dec. 12); 1934 PCIJ, ser. C, No. 75, at 214-20, 239-40; D. SANDIFER, *supra* note 25, at 334.

<sup>104</sup> In *Tunisia/Libya* Libya called one expert, a geomorphologist, who was cross-examined very briefly by Tunisian counsel. However, the parties had brought "experts" (three for Tunisia and two for Libya) into the role of pleading technical portions of the case in argument, who were thus considered part of each delegation and not independent "experts" within the meaning of the Rules (hence not subject to cross-examination). See 1982 ICJ REP. at 25, paras. 10-11. In *Gulf of Maine* Canada called one expert, who was examined and cross-examined. 1984 ICJ REP. at 9. In *Libya/Malta* three geological experts were called by Libya and two by Malta, and three of them were extensively cross-examined. 1985 ICJ REP. at 17-18, para. 9.

<sup>105</sup> See *Tunisia/Libya*, 1982 ICJ REP. at 57, para. 66.

<sup>106</sup> See *Gulf of Maine*, 1984 ICJ REP. at 273-77, paras. 44-55, especially 45 and 55. The United States had called an expert, *id.* at 256, para. 9, but his testimony was, in essence, disregarded.

<sup>107</sup> See *Libya/Malta*, 1985 ICJ REP. at 35-36, paras. 39 and 40; see also para. 41, at 36-37.



The *Corfu Channel* case was therefore the first important case before the present Court in which both witnesses and experts were used,<sup>108</sup> and in which experts were called by the Court to provide detailed findings.<sup>109</sup> The witnesses for the United Kingdom were naval officers who testified about the damage to the British destroyers *Saumarez* and *Volage* and the nature, age and probable source of the mines that would have done the damage.<sup>110</sup> Albania called army and navy officers to testify to the absence of mine-laying activities.<sup>111</sup> The direct and cross-examination of these witnesses and experts was more extensive and detailed than ever before.<sup>112</sup> *Corfu Channel* also produced significant precedent concerning the “best evidence” rule as applied to documentary material,<sup>113</sup> as well as significant rulings concerning the production of new documents,<sup>114</sup> the value of hearsay evidence,<sup>115</sup> and the use of evidence obtained in violation of accepted customary international law rules by “self-help” or direct intervention (in the context of a mine-sweeping operation conducted shortly after the original incidents, by the British Navy, in Albanian territorial waters without Albania’s consent).<sup>116</sup>

In addition, in *Corfu Channel* the Court requested an expert opinion and

<sup>108</sup> Ten witnesses were called and heard: seven by the United Kingdom and three by Albania. Albania also designated two experts. This took 3 weeks. *Corfu Channel*, 1949 ICJ REP. at 7–8.

<sup>109</sup> See generally D. SANDIFER, *supra* note 25, at 290–91; G. WHITE, *THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS* 130–31 (1965).

<sup>110</sup> These were: Cmdr. Sworder, RNVR (witness and expert); former Lt.-Cmdr. Kovacic of the Yugoslav Navy (witness); Capt. Selby, RN (witness); Cmdr. Paul, RN (witness); Lt.-Cmdr. Lankester, RN (witness and expert); Cmdr. Mestre, French Navy (witness); and Cmdr. Whitford, RN (witness and expert). 1949 ICJ REP. at 8. The Court indicated that it had “heard the evidence of the witnesses and experts called by each of the Parties in reply to questions put to them in examination and cross-examination on behalf of the Parties, and by the President on behalf of the Court or by a Member of the Court.” *Id.* at 7.

<sup>111</sup> Albania called Capt. Shtino and First Capt. Polena, Albanian Army, and the former Vice-President of the Executive Committee of Saranda as witnesses, and a Bulgarian Navy Captain and a French Rear Admiral as experts. *Id.* at 8.

<sup>112</sup> One commentator has observed: “As a result of the *Corfu Channel Case* the Court appears to have developed rudimentary but sound techniques for hearing testimony by witnesses. The efficiency of examination of witnesses and the care in recording testimony is in marked contrast to the first efforts in *German Interests in Upper Silesia*.” Alford, *supra* note 41, at 73–74.

<sup>113</sup> 1949 ICJ REP. at 17; see also D. SANDIFER, *supra* note 25, at 206.

<sup>114</sup> 1949 ICJ REP. at 8–9.

<sup>115</sup> Concerning the statements attributed to third parties by Lt. -Cmdr. Kovacic, which “can be regarded only as allegations falling short of conclusive evidence. A charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here.” *Id.* at 17; see also D. SANDIFER, *supra* note 25, at 139–40.

<sup>116</sup>

This justification . . . was presented first as a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task.

The Court cannot accept such a line of defence.

1949 ICJ REP. at 34–35; see also D. SANDIFER, *supra* note 25, at 114–15, 139–40.

appointed a committee of experts to collect and evaluate complex evidence.<sup>117</sup> The Court's questions were answered in painstaking detail.<sup>118</sup> The Court in the subsequent phase of *Corfu Channel* obtained the opinion of two new experts<sup>119</sup> about the accuracy of the British claims for the loss of the *Saumarez* and the damage to the *Volage*; they arrived at a confirmatory figure quite close to that offered by the United Kingdom in its submissions.<sup>120</sup>

In both the *Temple of Preah Vihear* and the *South West Africa Cases*, a wealth of evidence was laid before the Court that it did not have to resolve. In the *Temple* case, both Cambodia and Thailand presented detailed evidence of a technical nature relating to whether the boundary line as drawn in the early years of the century had been intended to follow (and whether it had succeeded in following) the line of the watershed in a mountainous part of the frontier between the countries. The Court had to consider a variety of technical evidence concerning the location of the watershed referred to in the original map drawn by the Mixed Commission of Delimitation between Indo-China and Siam set up under the Treaty of February 13, 1904; it also had to consider other evidence relating to the nature and purport of that map and other cartographic materials.<sup>121</sup> The Court in its decision clearly relied on the diplomatic and historical record as showing a lack of protest to, and acquiescence by Thailand in, the location of the boundary by the map accompanying the Boundary Treaty, which placed the Temple of Preah Vihear in Cambodia. The Court thus held that since the location indicated in the map had been accepted, it was unnecessary to examine the physical location of the boundary as derived from the terms of the Treaty (i.e., the location of the "watershed" line).<sup>122</sup> The intricate and technical questions of geog-

<sup>117</sup> 1949 ICJ REP. at 9. The experts were three naval officers from Norway, Sweden and Holland. They proceeded immediately to the Corfu Strait and filed their response only 3 weeks after their original appointment. For the Court's questions and the experts' answers, see Ann. 2 to the Judgment, *id.* at 142-51 (Experts' Report of Jan. 8, 1949). This report was supplemented by a second report requested at the public sitting of Jan. 17, 1949; two of the three experts returned to the area of Sibenik in Yugoslavia and Saranda in Albania to answer further questions, which they did in their report filed one month later. *Id.* at 152-62.

<sup>118</sup> Commenting on one issue discussed by the experts, the Court stated: "The Court cannot fail to give great weight to the opinion of the Experts which examined the locality in a manner giving every guarantee of correct and impartial information." *Id.* at 21.

<sup>119</sup> A Rear Admiral and the Director of Naval Construction of the Royal Netherlands Navy. Assessment of Amount of Compensation, 1949 ICJ REP. 237, 238 (Order of Nov. 19) and 244, 247-50 (Judgment of Dec. 15).

<sup>120</sup> The Experts' Report of Dec. 1, 1949 was submitted as Annex 2 to the Judgment. 1949 ICJ REP. at 258-60. Upon this report were based questions by Members of the Court, to which the experts replied at a hearing 2 days later. Ann. 3, *id.* at 261-65. (The questions concerned details of valuation, replacement value, value of stores and equipment, scrap value and depreciation.)

<sup>121</sup> The Cambodian Government called a senior civil servant as a witness; the Thai Government called the Dean of the International Training Center for Aerial Survey in Delft and the head of its Geological Section as experts, and an engineer at the same institution as a witness and expert. 1962 ICJ REP. at 9. In addition, the Court viewed in private "a film of the place in dispute filed by Cambodia." *Id.*

<sup>122</sup> *Id.* at 32-34.



raphy and geomorphology intended to support the description in the Treaty were therefore never resolved by the Court since its legal determination in the case made it unnecessary to reach those facts.<sup>123</sup>

In the second phase of the *South West Africa Cases*, respondent South Africa presented an extraordinary and unprecedentedly large number of witnesses, almost all of whom were to testify to the “beneficial” effects of apartheid on the inhabitants of South West Africa, which took more than *two months*. However, essentially because the applicants chose to rest their case on the legal principle that apartheid was per se impermissible and that its application to South West Africa was therefore a fortiori a violation of the mandate, it was necessary for South Africa, if it wished to bring these witnesses before the Court, to have them qualified as other than witnesses as to questions of fact (the applicants had asserted that no issues of “fact,” as distinguished from “conclusions of law” based on facts, remained to be determined as between the parties, and there was consequently no need for any “witnesses” as such).

This led to lengthy, repetitive and vexing confrontations between the applicants’ agent and counsel and the President of the Court, since a controversy arose over the qualification of each witness (indeed, shortly to be qualified in each instance as an “expert”) and the point or points to which his testimony or expertise was to be addressed in accordance with the Court’s Rules. This exchange strongly resembled the battling involved in a municipal *voir dire*.<sup>124</sup> In the event, because of the manner in which the substantive aspects of the case had by then evolved (primarily as a result of a major amendment to the applicants’ submissions), many of South Africa’s witnesses-experts were obliged to manifest their expertise concerning the “existence or non-existence of an international norm or standard of non-discrimination.”<sup>125</sup> In the end, it was clear that the Court did not need to consider

<sup>123</sup> “Given the grounds on which the Court bases its decision,” the Court stated, “it becomes unnecessary to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond in 1904–1908, or, if not, how the watershed line in fact runs.” *Id.* at 35. See further the description in D. SANDIFER, *supra* note 25, at 35–36 and 338–40. Indeed, the major evidentiary significance of the *Temple* case remains its emphatic reliance on maps as evidence in relation to written treaty provisions describing the same features—a proposition with which there was nevertheless strong dissent. See Dissenting Opinions of Judges Sir Percy Spender and Moreno Quintana, 1962 ICJ REP. at 101, 133–34, and 67, 70; and *cf.* the rule of Article 29 of the Treaty of Versailles (text to prevail over maps) and discussion generally in D. SANDIFER, *supra*, at 232–33 and 237–38; see also Frontier Land, 1959 ICJ REP. at 220; see generally Weissberg, *supra* note 81.

<sup>124</sup> See Rules, Art. 57 *et seq.* See also D. SANDIFER, *supra* note 25, at 291–92, 309–12, and especially 340–41; and the foreword by Judge Philip Jessup, stating: “Most of the evidence received by the Court is documentary; the abundance of oral testimony by experts and witnesses for the Respondent in the *South-West Africa Cases* led to some confusion and complications.” *Id.* at x.

<sup>125</sup> This ritual incantation preceded the testimony of each “witness-expert.” The witnesses-experts made up an extraordinarily variegated company: the Commissioner-General for the Northern Sotho; a professor of social philosophy at New York University; a professor of social and cultural anthropology at the University of Port Elizabeth; a professor of geography at the University of California; the editor of *Die Burger* in Cape Town; the Vice-Chairman of the

whether the "facts" sought to be proven by the 14 witnesses-experts were or were not established, since the *ratio decidendi* of the 1966 Judgment left no room or necessity for an inquiry by the Court into the facts. The scope of the testimony-expertise, however, was as broad as it was lengthy, and the Court would have had its work cut out for it if it had not avoided the whole issue on jurisdictional grounds.<sup>126</sup>

After the *South West Africa Cases*, there was an evidentiary lacuna in the Court's activities of some 15 years. Although complex and difficult factual questions were raised in the *Fisheries Jurisdiction* case, the issues were resolved on the basis of documents (the Court relying on the provisions of Article 53 to reach its conclusion, as respondent failed to appear in the proceedings).<sup>127</sup> In the *Nuclear Tests Cases*, the respondent state was also absent, but the proceedings were effectively discontinued on the ground of mootness.<sup>128</sup> This trend was reversed by the three maritime delimitation cases of the first half of the 1980s: the *Tunisia / Libya* case, the *Gulf of Maine* case and the *Libya / Malta* case.

In *Tunisia / Libya* the Court heard a variety of speeches by technical members of each side's delegation, and the testimony of one actual expert, a geomorphologist. Conflicting opinions were advanced about one of the critical issues in the case—whether the continental shelf north of the Tunisia-Libya boundary point at Ras Ajdir was more properly to be considered a natural extension of the Tunisian landmass eastward or of the Libyan landmass northward. Each side argued that, in application of the dictum in the *North Sea Continental Shelf Cases*,<sup>129</sup> the continental shelf under examination was "the [more] natural extension of [its] . . . land territory" into and under the sea.

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Synod of the Dutch Reformed Church of South Africa and the Vice-Chancellor of the University of Stellenbosch; the head of the Department of Economics of the University of South Africa; the Director of Bantu Development in South Africa; the Deputy-Secretary of the Department of "Bantu Education"; the Rector of the University of Pretoria; the editor of the *Allgemeine Zeitung* in Windhoek; an American Brigadier and Chief Historian of the U.S. Army; a former professor of international relations at the University of London; and the Director of International Political Studies at the Hoover Institution of Stanford University.

<sup>126</sup> More properly, the Court would have had to determine whether there did "in fact" exist a "norm or standard of non-discrimination."

<sup>127</sup> *Fisheries Jurisdiction (UK v. Ice.; FRG v. Ice.)*, Jurisdiction of the Court, 1973 ICJ REP. 3, 49 (Judgments of Feb. 2); and Merits, 1974 ICJ REP. 3, 175 (Judgments of July 24).

<sup>128</sup> *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253, 457 (Judgments of Dec. 20). See the comment by Judge Jessup in his foreword to D. SANDIFER, *supra* note 25, at x:

The Court itself, in utilizing its right to find evidence not proffered by the Parties, went to curious lengths in the *Nuclear Test Cases*, which were decided as recently as December 20, 1974. The Court, sua sponte, took cognizance of statements by French officials as reported in the press and elsewhere but not laid before the Court by the Parties. It must be noted that France refused to appear or to participate in the oral proceedings.

<sup>129</sup> *North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.)*, 1969 ICJ REP. 3, 31, para. 43 (Judgment of Feb. 20).



To this end, the parties produced extensive and hotly contested evidence relating to geomorphology, geology and geography. A film was produced by Tunisia and shown to the Court, reminiscent of the film shown in the course of the *Temple* case.<sup>130</sup> Maps of great complexity and, in some cases, of antiquity were reproduced in the documents and laid before the Court. Bathymetric studies converted into computerized “block diagrams” formed part of the parties’ written pleadings and documentary production. The testimony of the one actual expert was also subject to brief and somewhat desultory cross-examination by the other party. For all this effort, which consumed a large part of the pleadings and concerns of each side, the Court essentially found no convincing evidence militating in either direction and decided the case in that particular area of the delimitation on a form of attributed acquiescence by the parties in the line where their concessions met and overlapped.<sup>131</sup>

In the *Gulf of Maine* case, a great deal of documentary evidence was again laid before the Chamber relating to geology, geomorphology and geography. In addition, because the Special Agreement required the Chamber to find a “single maritime boundary” for purposes of both continental shelf exploitation and fishing, an enormous amount of highly technical evidence was offered about fish and shelf species: their ecological zones, habits, spawning grounds and feeding patterns. (There was also considerable discussion of the showing of a film by Canada, although ultimately it was not presented.) However, the Chamber did not find that any of this technical evidence was relevant or determinative; instead, it based its opinion primarily on a geographical solution and essentially ignored the factual controversies concerning aspects other than geography.<sup>132</sup> It should further be noted that in the *Gulf of Maine* case the Chamber listened to an expert of the parties and also appointed its own expert to assist in preparing the line.<sup>133</sup>

By the time the Court came to consider the *Libya/Malta* case, the principles of customary law largely expressed in the UN Convention on the Law of the Sea became in large measure the law of the case. The extensive and weighty evidence advanced by Libya, striving to prove that a fundamental geological/geomorphological discontinuity of such significant proportions existed that it should be considered as a division between two shelves or two areas of shelf, was totally disregarded by the Court; it again favored a wholly geographical solution—albeit this time more openly grounded on the law as reflected in the 1982 Convention.<sup>134</sup> Malta’s case was based more on geography and in fact relied on relatively strict equidistance; nevertheless, it produced a rebuttal expert whose testimony was designed to disprove Libya’s contention that there was a “fundamental discontinuity” in the shelf

<sup>130</sup> See note 121 *supra*.

<sup>131</sup> See *Tunisia/Libya*, 1982 ICJ REP. at 117–18; and note 85 *supra*.

<sup>132</sup> See *Gulf of Maine*, 1984 ICJ REP. at 273–78.

<sup>133</sup> *Id.* at 256 and 265 (referring to the Order of Mar. 30, 1984).

<sup>134</sup> *Libya/Malta*, 1985 ICJ REP. at 29–38, paras. 26–44 (*especially* paras. 35–41, at 34–37).

between them. Libya had produced several experts to substantiate this claim and had also developed a three-dimensional computerized model of the sea floor, which was used as a demonstrative aid.<sup>135</sup>

The *Nicaragua* case comes closest to the *Corfu Channel* case in number of witnesses and scope of testimony.<sup>136</sup> There were five witnesses before the Court, and no experts.<sup>137</sup> Owing to the absence of the United States from this phase of the proceedings, it was not possible to refine the testimony of the witnesses or for the Court to benefit from even the rudimentary form of cross-examination that had taken place in earlier cases. However, the Court and the judges tried to fill the gap:

Questions were put by Members of the Court to the witnesses, as well as to the Agent and counsel of Nicaragua, and replies were given either orally at the hearing or subsequently in writing. On 14 October 1985 the Court requested Nicaragua to make available certain further information and documents, and one Member of the Court put a question to Nicaragua.<sup>138</sup>

The Court was thus obliged to sift through the testimony presented and to do more than its usual share of balancing probabilities and excluding insufficient proofs.<sup>139</sup> The Court also took pains—particularly since it was proceeding in the absence of the respondent—to consider the likelihood of any general a priori tilt or bias in the evidence that it heard.<sup>140</sup>

<sup>135</sup> By the end of the *Libya/Malta* case, the following pattern had developed: an expert would give his testimony in the form of a rehearsed statement that was in "response" to prearranged questions by counsel. This technique managed to convey the feel of "live" testimony on direct examination without many of its accompanying risks; of course, it was still open to cross-examination.

<sup>136</sup> See notes 108–120 *supra* and accompanying text.

<sup>137</sup> "The following witnesses were called by Nicaragua and gave evidence: Commander Luis Carrión, Vice-Minister of the Interior of Nicaragua . . . ; Dr. David MacMichael, a former officer of the United States Central Intelligence Agency . . . ; Professor Michael John Glennon . . . ; Father Jean Loison . . . ; [and] Mr. William Huper, Minister of Finance of Nicaragua. . . ." *Nicaragua Merits*, 1986 ICJ REP. at 18, para. 13.

<sup>138</sup> *Id.*

<sup>139</sup> This was done, for example, with the evidence of Mr. MacMichael relating to support of the Salvadoran insurgency by Nicaragua in 1981:

In short, the Court notes that the evidence of a witness called by Nicaragua in order to negate the allegation of the United States that the Government of Nicaragua had been engaged in the supply of arms to the armed opposition in El Salvador only partly contradicted that allegation.

*Id.* at 74–75, para. 135.

<sup>140</sup>

The Court has had to attach considerable significance to the declarations made by the responsible authorities of the States concerned in view of the difficulties which it has had to face in determining the facts. Nevertheless, the Court was still bound to subject these declarations to the necessary critical scrutiny. A distinctive feature of the present case was that two of the witnesses called to give oral evidence on behalf of Nicaragua were members of the Nicaraguan Government, the Vice-Minister of the Interior (Commander Carrión), and the Minister of Finance (Mr. Huper). The Vice-Minister of the Interior was also the author of one of the two declarations annexed to the Nicaraguan Memorial on the merits, the author of the other being the Minister for Foreign Affairs. On the United States side,



*Expert Inquiry: Inspection*

The Court appointed its own experts in two of the cases under discussion: *Chorzów* and *Corfu*.<sup>141</sup> The matters resolved by the experts in these cases were intricate and demanding of a high degree of technical competence. In a paragraph of the *Nicaragua* decision, the Court detoured briefly to raise the possibility of appointing an individual or body to conduct an inquiry in the way this had been done in the *Corfu Channel* case; the Court also indicated that "such a body could be a group of judges selected from among those sitting in the case." The Court then continued:

In the present case, however, [it] felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.<sup>142</sup>

Supposition appears to be justified that this matter was discussed at some length within the Court, but that it was resolved with appropriate caution in view particularly of the U.S. nonappearance in the merits phase.<sup>143</sup>

In one instance before the Permanent Court, the special agreement between the parties actually provided for a delegation of one or more judges at a party's request "to conduct investigations on the spot,"<sup>144</sup> although such a request was not in fact acceded to by the Court.<sup>145</sup> Of the sole instance where the Court exercised its inspection powers, Judge Hudson commented:

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an affidavit was filed sworn by the Secretary of State. These declarations at ministerial level on each side were irreconcilable as to their statement of certain facts.

*Id.* at 42-43, para. 69. *But see* Judge Schwebel's dissenting opinion, *id.* at 277, para. 27, for an important qualification:

[T]here can be no equation between *governmental statements made in this Court and governmental statements made outside of it*. . . . Deliberate misrepresentations by the representatives of a government Party . . . cannot be accepted because they undermine the essence of the judicial function. This is particularly true where, as here, such misrepresentations are of facts that arguably are essential, and incontestably are material, to the Court's Judgment [emphasis added].

<sup>141</sup> The Chamber's "technical expert" appointed in *Gulf of Maine* had a different and more limited capacity, and is therefore not being discussed under this head. *See* 1984 ICJ REP. at 256, para. 8 (and, for his technical report, *id.* at 347-52).

<sup>142</sup> *Nicaragua Merits*, 1986 ICJ REP. at 40, para. 61.

<sup>143</sup> These difficulties are surely reminiscent of those raised during consideration of the "safari proposal" in *South West Africa (Second Phase)*; *see* D. SANDIFER, *supra* note 25, at 346-48. *See* particularly, however, Judge Schwebel's endorsement of a fact-finding inquiry in "Nicaragua, the United States, El Salvador, Honduras, Costa Rica, Guatemala and Cuba, an enquiry which could have sought access to probative data which certain governments claimed to possess, and which could have examined knowledgeable persons who were unable or unwilling otherwise to appear before the Court." 1986 ICJ REP. at 322, para. 132.

<sup>144</sup> *Free Zones*, 1932 PCIJ, ser. C, No. 17-I, at 493; 2 HUDSON REPORTS, *supra* note 49, at 510. *See* D. SANDIFER, *supra* note 25, at 345 n. 211; and M. HUDSON, *supra* note 21, at 566.

<sup>145</sup> *Free Zones*, 1932 PCIJ, ser. A/B, No. 46, at 162-63; M. HUDSON, *supra* note 21, at 566.

In the *Meuse* Case, after the Netherlands agent had completed his first oral argument, the Belgian agent suggested that the Court should make a *descente sur les lieux* to enable the judges to see the canals, waterways and installations involved in the proceedings; the suggestion was viewed not as an offer to present evidence, but as an invitation to the Court to procure its own information for a better understanding of the case.<sup>146</sup>

In a later instance (the second phase of the *South West Africa Cases*), the South African Government invited the Court (“or a committee thereof”) to undertake a visit (in the form of an “inspection”) to the then Mandated Territory of South West Africa, together with the territories of the applicant states Ethiopia and Liberia and several other independent African states. Following extensive argument during the oral proceedings, this proposal was rejected by the Court.<sup>147</sup> The issue was clouded enough at the time because of the ambiguous terms of reference of this request and the complex litigation issues surrounding it. It has not benefited from subsequent attempts at clarification by commentators.<sup>148</sup> One element stands out clearly, however: the South African proposal did not envisage the actual taking of testimony or gathering of other evidence, and so the “inspection”—had it taken place—would have been somewhat similar to the precedent of the *Meuse* case.<sup>149</sup>

#### WHEN EVIDENCE IS NOT PRODUCED

##### *Nonappearance*

In the *Nicaragua* case, the Court recognized that

the failure of the respondent State to appear in the merits phase of these proceedings has resulted in two particular disadvantages. First, the absence of the United States meant that the evidence of the witnesses presented by the Applicant at the hearings was not tested by cross-examination; however, those witnesses were subjected to extensive questioning from the bench. Secondly, the Respondent did not itself present any witnesses of its own. This latter disadvantage merely represents one aspect, and a relatively secondary one, of the more general disadvantage caused by the non-appearance of the Respondent.<sup>150</sup>

<sup>146</sup> M. HUDSON, *supra* note 21, at 566–67. Sandifer adds: “What use, if any, the Court may have made of the information thus gained is not indicated in its Judgment.” D. SANDIFER, *supra* note 25, at 345.

<sup>147</sup> 1965 ICJ REP. 9 (Order of Nov. 29). “The surprising aspect of [the divided vote of 8 to 6 in the Order of Nov. 29, 1965 on the visit to South West Africa] is the number of Judges who thought the Court should undertake the inspection.” D. SANDIFER, *supra* note 25, at 348.

<sup>148</sup> See, e.g., S. SLONIM, *SOUTH WEST AFRICA AND THE UNITED NATIONS: AN INTERNATIONAL MANDATE IN DISPUTE* 244–49 (1973); and T. D. GILL, *SOUTH WEST AFRICA AND THE SACRED TRUST 1919–1972*, at 61–63 (1984). See also D. SANDIFER, *supra* note 25, at 345–48, and review thereof by the present writer in 71 AJIL 155, especially at 158 (1977).

<sup>149</sup> Nevertheless, in the extensive argument on this question, no doubt was expressed as to the powers of the Court to take testimony should it deem it appropriate in the context of the litigation. See the discussion *supra*, text at notes 108–120, of the extraordinarily detailed work accomplished by the Court’s own experts in the *Corfu Channel* case.

<sup>150</sup> 1986 ICJ REP. at 42, para. 67.



The Court's sensitivity to factual issues and ability to deal with them has in fact been sharpened, and not blunted, by the increasing incidence and popularity of what has been termed the "no-appearance technique" of litigation.<sup>151</sup> In cases of deliberate nonappearance, where the Court is burdened with the statutory duty of satisfying itself "not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law,"<sup>152</sup> considerable care must be exercised in determining any facts presented unilaterally by the appearing party but considered indispensable to the decision. Indeed, this is precisely what occurred in the merits phase of the *Nicaragua* case: more directly than any other decision of the Court, the *Nicaragua* decision treats the relationship between the Court's ability to find evidence satisfactorily and the dilemma presented by Article 53. "One of the Court's chief difficulties in the present case," said the Court, "has been the determination of the facts relevant to the dispute."<sup>153</sup> Possibly just because of this problem, the merits phase of the *Nicaragua* case is easily the most significant judgment rendered by the Court in the matter of evidence since *Corfu Channel*. Paragraphs 57 through 171—or some 55 pages—of the Judgment concern the finding of facts.<sup>154</sup>

Use of circumstantial evidence and inference increases in inverse proportion to the quantity of other evidence available. "The necessity to admit circumstantial evidence derives from the rule of substantive law that a State on whose territory an act contrary to international law has occurred may be called upon to give an explanation."<sup>155</sup> This is only logical. The sovereignty of each state is absolute over its territory; a party to litigation before the Court can therefore exercise unfettered ability to prevent discovery and determination of essential facts. The *Corfu Channel* case exemplified a cogent solution to this problem: in the absence of any forthcoming explanation, Albania was in essence held liable on the basis of the circumstantial evidence

<sup>151</sup> See Fitzmaurice, *The Problem of the 'Non-Appearing' Defendant Government*, 51 BRIT. Y.B. INT'L L. 89 (1980); see also G. GUYOMAR, *LE DÉFAUT DES PARTIES À UN DIFFÉREND DEVANT LES JURIDICTIONS INTERNATIONALES* (1960); Sinclair, *Some Procedural Aspects of Recent International Litigation*, 30 INT'L & COMP. L.Q. 338 (1981); J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1984); and H. THIRLWAY, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* (1985).

<sup>152</sup> ICJ Statute, Art. 53, para. 2. The Court has now stated:

The use of the term "satisfy itself" in the English text of the Statute (and in the French text the term "s'assurer") implies that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, *so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.*

*Nicaragua Merits*, 1986 ICJ REP. at 24, para. 29 (emphasis added).

<sup>153</sup> 1986 ICJ REP. at 38, para. 57. In paragraph 30 of the Judgment, the Court stated that it "cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts." *Id.* at 25.

<sup>154</sup> See, e.g., para. 126, *id.* at 70: "The Court has therefore to ascertain, so far as possible, the facts on which this claim [of collective self-defense against Nicaraguan aggression] is or may be based, in order to determine whether collective self-defence constitutes a justification of the activities of the United States here complained of."

<sup>155</sup> 2 S. ROSENNE, *supra* note 30, at 582.

of the finding of mines in its territorial waters when it must or should have been aware of their actual laying—if not by Albania itself, then by Yugoslavia.<sup>156</sup>

Significantly, if a state pleads the secrecy or unavailability of evidence requested by another state, the Court is quite prepared to exercise its inferential or deductive approach in arriving at a conclusion independent of that plea of secrecy. In the *Nicaragua* case—where, of course, the respondent did not appear on the merits—the question of “intelligence information” did not arise directly, but rather on a collateral matter (regarding which certain other facts had not been disclosed because their production would allegedly have compromised intelligence sources).<sup>157</sup> It is hard to imagine, however, that the Court will generally give so uncharacteristically broad a benefit of the doubt to a nonproducing state that its asserted conclusions about such evidence will be accepted without more. The Court’s practice will in fact continue to be to disregard any assertions unsupported by evidence actually produced; the Court will still have “no means of assessing the reality or cogency of the undivulged evidence which the [nonproducing state] claimed to possess.”<sup>158</sup> Why contrary evidence is not being produced is not determinative; what is critical is that it has not indeed been produced, and thus the evidence of the applicant has not been controverted.

Nonproduction by reason of territorial sovereignty will result in the same response as nonproduction by reason of a form of executive privilege relating to intelligence material. In essence, this response merely extends the sensible principle expressed in the *Corfu Channel* case:

[T]he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.<sup>159</sup>

It is therefore not only because of the Court’s inability to compel evidentiary production that it has relied heavily on the strict application of the doctrine of the burden of proof and the acceptance of circumstantial evi-

<sup>156</sup> 1949 ICJ REP. at 18; see also 2 S. ROSENNE, *supra* note 30, at 582. He notes the cautionary words of the Court: “Here the Court uttered its word of caution, saying: ‘The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt’ (italics in original . . .).” *Id.*

<sup>157</sup> In the controversy surrounding the *Nicaragua* case and the withdrawal of the United States, it has been stressed that much of the evidence that the United States would have been required to produce was of a sensitive “intelligence” nature, and that its production would imperil the intelligence sources involved and thus be adverse to U.S. national security interests. From this, a logically circular conclusion is advanced: i.e., that the existence of this dilemma proves that the Court was never intended to have jurisdiction over “national security” matters of this type, in the first instance.

<sup>158</sup> *Nicaragua Merits*, 1986 ICJ REP. at 84, para. 155 (emphasis added).

<sup>159</sup> 1949 ICJ REP. at 18.



dence; it is also because of the situation generally produced by any form of nonproduction, noncooperation and nonappearance. There is a strong analytic similarity between instances where evidence is not produced because it is claimed to be derived from sensitive intelligence sources, and instances where evidence is not produced because one party is absent from the proceedings and the Court is proceeding under Article 53. It is particularly in the latter cases that a hierarchy of levels of proof can be most clearly visualized; the Court has to be clear at each step as to why it is considering a given conclusion to be "well founded in fact."<sup>160</sup>

#### *Inference*

Traditionally, the Court has operated in important areas of factual conclusions by an informed process of inference. The inferential method may be "negative," in that it seeks to conclude about a state of affairs because of a failure to deny or rebut it. Thus, what is not denied may well be accepted: for example, overflights by U.S. military aircraft in the *Nicaragua* case.<sup>161</sup> What is asserted, but only partially contradicted, may be found to be partially valid: for example, the partial negation of the U.S. allegation that Nicaragua had been supplying arms to the Salvadoran opposition,<sup>162</sup> and the partial rebuttal of allegations concerning border incidents involving Honduras and Costa Rica.<sup>163</sup> A more sophisticated variation on the Court's use of inference is exemplified by the significant conclusion drawn in the *Nicaragua* case that the United States could not have considered Nicaragua to have been engaged in an "armed attack" properly giving rise to the collective right of self-defense because the United States had not complied with the requirements of Article 51 governing the exercise of such a right.<sup>164</sup> A similar inference was applied to El Salvador.<sup>165</sup>

<sup>160</sup> The hierarchy appears to be substantially as follows: (1) uncontrovertible matters of public knowledge (matters that are notorious or universally known) as to which the Court can in effect take "judicial notice"; (2) statements made by high officials of the government(s) concerned "against interest" in the context of the case at hand, from which inferences can be drawn or which, taken at face value, confirm the state's responsibility for subsequent events presumed to be the reasonably likely consequence of the intention imparted by the statement; and (3) press statements of facts against the interest of the state concerned, which are not controverted or denied by responsible officials.

<sup>161</sup> 1986 ICJ REP. at 51-53, paras. 87-91.

<sup>162</sup> *Id.* at 74-75, para. 135. But see on this point Judge Schwebel, *id.* at 329-30, paras. 150-51.

<sup>163</sup> Judgment, *id.* at 87, para. 163.

<sup>164</sup> At no time, up to the present, has the United States Government addressed to the Security Council, in connection with the matters the subject of the present case, *the report which is required by Article 51 of the United Nations Charter in respect of measures which a State believes itself bound to take when it exercises the right of individual or collective self-defence*. . . . [T]his conduct of the United States hardly conforms with the latter's avowed conviction that it was acting in the context of collective self-defence as consecrated by Article 51 of the Charter.

*Id.* at 121, para. 235 (emphasis added).

<sup>165</sup> *The States concerned did not behave as though there were an armed attack at the time when the activities attributed by the United States to Nicaragua, without actually constituting an*

The inferential process may also be "affirmative"; it may engage the responsibility of a state on the presumption that the state must have intended the likely or reasonably foreseeable consequences of an earlier statement or action. Thus, in the *Nicaragua* case the responsibility of the United States was determined (via the Central Intelligence Agency) in respect of the publication and dissemination of a manual on psychological operations: "The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties."<sup>166</sup> A broader example of this process relates to the question whether U.S. support of the "contras" constituted a violation of the principle of nonintervention:

Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the *contras* was solely to interdict the supply of arms to the armed opposition in El Salvador, *it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the "Nicaraguan Democratic Force", intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua.*<sup>167</sup>

The Court further adopted the inferential approach in the *Nicaragua* case in dealing with the question of the supply of weapons from Nicaragua to El Salvador, which involved the alleged failure of the United States in 1981 "to provide the Nicaraguan authorities, as it had on previous occasions, with the specific information and details that would have enabled them to call a halt to it."<sup>168</sup> The Court said that "if this evidence really existed, the United States could be expected to have taken advantage of it in order to forestall or disrupt the traffic observed";<sup>169</sup> and continued:

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attack, were nevertheless the most accentuated; they did so behave only at a time when these facts fell furthest short of what would be required for the Court to take the view that an armed attack existed on the part of Nicaragua against El Salvador.

*Id.* at 122, para. 236 (emphasis added).

<sup>166</sup> *Id.* at 130, para. 256. The key fact upon which the inference was grounded was the finding by the Court

that at the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to "moderate" such behaviour.

*Id.* (The ninth paragraph of the *dispositif* related to this claim; it is notable that Judge Schwebel of the United States voted in favor of it.)

<sup>167</sup> *Id.* at 124, para. 241 (emphasis added).

<sup>168</sup> *Id.* at 84, para. 155. "Since the Government of the United States has justified its refusal by claiming that any disclosure would jeopardize its sources of information, the Court has no means of assessing the reality or cogency of the undivulged evidence which the United States claimed to possess." *Id.*

<sup>169</sup> *Id.* at 84, para. 156 (emphasis added). "[I]t could presumably for example arrange for the deployment of a strong patrol force in El Salvador and Honduras, along the frontiers of these States with Nicaragua." *Id.*



*If, on the other hand, this evidence does not exist, that . . . implies that the arms traffic is so insignificant and casual that it escapes detection even by the sophisticated techniques employed for the purpose, and that, a fortiori, it could also have been carried on unbeknown to the Government of Nicaragua, as that Government claims. These two conclusions mutually support each other.*<sup>170</sup>

In general, the Court tried to take considerable care in balancing the evidence that had come before it, necessarily mostly from one side, and in utilizing its traditional process of inference and deduction to find the facts upon which the legal findings would be based. It used such a “balancing process” in *Nicaragua*, for example, in connection with the flow of arms to El Salvador between 1979 and 1981.<sup>171</sup> Since Nicaragua was the applicant and the United States had failed to appear on the merits (and had therefore filed no counterclaim), there was naturally more evidence “balanced up” adverse to the United States than there was adverse to Nicaragua.<sup>172</sup> Another example is found in the progression of conclusions leading up to the significant holding in the case that “it is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States.”<sup>173</sup>

<sup>170</sup> *Id.* at 84–85, para. 156 (emphasis added).

<sup>171</sup>

On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. *On the other hand*, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.

*Id.* at 86, para. 160 (emphasis added).

<sup>172</sup> *But see* the Dissenting Opinion of Judge Schwebel:

The facts are in fundamental controversy. I find the Court's statement of the facts to be inadequate, in that it sufficiently sets out the facts which have led it to reach conclusions of law adverse to the United States, while it insufficiently sets out the facts which should have led it to reach conclusions of law adverse to Nicaragua.

*Id.* at 266–67, para. 2. And: “the Court, partially because of its misapplication of the rules of evidence which it has articulated for this case, has even failed adequately to recognize and appraise the facts which do appear in the record of the proceedings and in this dissenting opinion.” *Id.* at 296, para. 75. See also, in the context of official statements: “It is the fact that these rules of evidence when applied will cut in favour of a government of the nature of that of the Government of Nicaragua and against a government of the nature of that of the Government of the United States.” *Id.* at 324, para. 139. (See also Dissenting Opinion of Judge Oda, *id.* at 212, 243–44, paras. 64, 65.)

<sup>173</sup> *Id.* at 63, para. 111. The Court held that it “is not satisfied that all the operations launched by the *contra* force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. However, . . . support of the United States authorities for the activities of the *contras* took various forms over the years . . .” (*id.* at 61, para. 106). Thus, “the Court has not been able to satisfy itself that the respondent State ‘created’ the *contra* force in Nicaragua” (*id.* at 61, para. 108), but “[o]n the other hand, the Court holds it established that the United States authorities largely financed, trained, equipped, armed and organized the FDN” (*id.* at

One observation about the *Nicaragua* case is necessary at this stage. There will doubtless be substantial critical comment about the Court's method: about what will be termed the use of bold inferences and heroic assumptions in Nicaragua's favor, where (it will be alleged) such assumptions and inferences were not justified by the "actual" situation.<sup>174</sup> Yet this article cannot purport to be a considered evaluation of the accuracy or correctness of the Court's findings in *Nicaragua*; it can only report the Court's method, as chronicled somewhat laboriously by the Court itself.

Three points, however, should be specifically emphasized. *First*: not all the favorable inferences were made in favor of Nicaragua; some were favorable to the United States and contrary to Nicaragua. *Second*: it would be a bad mistake to evaluate the decision in the *Nicaragua* case without recognizing that it also represents the most dramatic and serious instance of nonappearance (or disappearance) of a party ever to confront the Court, and to forget the overall implications of the Court's duty to proceed under Article 53 in such a complex factual case.

The *third* point flows directly from the second: *what other result could really have been anticipated, once the United States had deliberately chosen to dissociate itself from the merits of the case?* Even if the Court's decision on the merits may be open to criticism, was the Court not—in essence—forced into an impossible corner by the respondent's absence from the proceedings?<sup>175</sup>

#### *Admissions*

In the *Nicaragua* case, the Court, forced as it was to evaluate matters without the respondent's advancing opposing evidence or cross-examining the applicant's witnesses, arrived at a process of taking at face value the public statements of high officials when those statements were arguably made against the legal interest of the state in whose government the officials served. This was mainly applied, but was not limited to, the respondent United States; it was also applied to Nicaraguan officials. In the early part of the decision, the Court stated:

The material before the Court also includes statements by representatives of States, sometimes at the highest political level. Some of these statements were made before official organs of the State or of an international or regional organization, and appear in the official records

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62, para. 108) even though "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf" (*id.* at 62, para. 109). The Court said it had insufficient evidence to reach a finding on whether the U.S. Government ever "devised the strategy and directed the tactics of the *contras* . . . . It is *a fortiori* unable to determine that the *contra* force may be equated for legal purposes with the forces of the United States" (*id.* at 62–63, para. 110).

<sup>174</sup> See, e.g., quotations from Dissenting Opinion of Judge Schwebel, *supra* note 172, and further at 1986 ICJ REP. at 331, para. 153; and Dissenting Opinion of Judge Oda, *id.* at 243–44, para. 64.

<sup>175</sup> See, e.g., quotations from Dissenting Opinion of Judge Sir Robert Jennings, text at notes 13 and 14 *supra*, and discussion, text at notes 13–16 *supra*.



of those bodies. Others, made during press conferences or interviews, were reported by the local or international press. The Court takes the view that statements of this kind, emanating from high-ranking official political figures, sometimes indeed of the highest rank, are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them. *They may then be construed as a form of admission.*<sup>176</sup>

This method was applied to statements made by President Reagan<sup>177</sup> and by Secretary of State Shultz,<sup>178</sup> for the United States; and by President Ortega,<sup>179</sup> for Nicaragua. In addition, the quotation (by the press) of "United States administration sources" assisted in establishing the Court's conclusions that the United States was responsible for mining the Nicaraguan harbors<sup>180</sup> and, among other similar facts, that the CIA was responsible for production of a psychological warfare manual.<sup>181</sup> The Court, however, was at evident pains to point out the limitations when the public statements of high officials were not "against the interest" of the state concerned but, rather, in its favor.<sup>182</sup> The Court commented on these "declarations at ministerial level" as follows:

<sup>176</sup> 1986 ICJ REP. at 41, para. 64 (emphasis added).

<sup>177</sup> A refusal to comment was treated as an admission, *id.* at 49, para. 83. Presidential statements were also used in a corroborative sense, *id.* at 47, para. 78 (citing a televised interview stating: "Those were homemade mines . . . planted in those harbors . . . by the Nicaraguan rebels"), leading to the conclusion, *id.* at 48, para. 80 ("the Court finds it established that . . . the President of the United States authorized a United States government agency to lay mines in Nicaraguan ports").

<sup>178</sup> *Id.* at 71-73, paras. 128 and 131. In considering Nicaragua's conduct in relation to Honduras and Costa Rica, the Court examined "only the allegations of direct cross-border attacks, since the affidavit of Mr. Shultz claims only that there was support by the provision of arms and supplies for military and paramilitary activities 'on a smaller scale' in those countries than in El Salvador." *Id.* at 73, para. 131.

<sup>179</sup> *Id.* at 79-82, paras. 144-151, citing an interview of President Ortega published in the *New York Times Magazine*, *id.* at 79, para. 144; and a *New York Times* report that he had stated that measures were being taken to prevent further use of an airstrip in Nicaragua for certain purposes, *id.* at 82, para. 151 ("This, in the Court's opinion, is an admission of certain facts, such as the existence of an airstrip designed to handle small aircraft, probably for the transport of weapons, the likely destination being El Salvador, even if the Court has not received concrete proof of such transport").

<sup>180</sup> *Id.* at 50, para. 86. *See also id.* at 47, para. 78 ("According to press reports quoting sources in the United States administration, the laying of mines was effected from speed boats, not by members of the ARDE or FDN, but by the 'UCLAs'").

<sup>181</sup> "According to the press, CIA officials presented to the Intelligence Committee in 1984 evidence of [terrorist behavior or atrocities] . . . and stated that this was the reason why the manual was prepared, it being intended to 'moderate the rebels' behaviour'." The Court found confirmation of this report in "the finding of the Intelligence Committee that 'The original purpose of the manual was to provide training to moderate FDN behaviour in the field.'" *Id.* at 68, para. 121.

<sup>182</sup>

However, it is natural also that the Court should treat such statements [made by high officials of the states concerned] with caution, whether the official statement was made by an authority of the Respondent or of the Applicant. Neither Article 53 of the Statute, nor any other ground, could justify a selective approach, which would have undermined the consistency of the Court's methods and its elementary duty to ensure equality between

[T]his evidence is of such a nature as to be placed in a special category. In the general practice of courts, two forms of testimony which are regarded as *prima facie* of superior credibility are, first the evidence of a disinterested witness—one who is not a party to the proceedings and stands to gain or lose nothing from its outcome—and secondly so much of the evidence of a party as is against its own interest.<sup>183</sup>

From this, the Court proceeded to take the *unfavorable* evidence as probative, but in general to reject the *favorable* evidence as not being disinterested or veracious:

The Court . . . can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve.<sup>184</sup>

There must, however, be limits on the Court's freedom to find facts by way of admission. For example, the Court was not prepared to accept that the assertion by the United States of the right of collective self-defense was tantamount to " 'a major admission of direct and substantial United States involvement in the military and paramilitary operations' directed against Nicaragua."<sup>185</sup> Acknowledging that "[t]his reasoning would do away with any difficulty in establishing the facts, which would have been the subject of an implicit overall admission by the United States, simply through its attempt to justify them by the right of self-defence," the Court continued by stating that "in the present case the United States has not listed the facts or described the measures which it claims to have taken in self-defence; nor has it taken the stand that it is responsible for all the activities of which Nicaragua accuses it but such activities were justified by the right of self-defence."<sup>186</sup> The Court

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the Parties. The Court must take account of the manner in which the statements were made public; evidently, it cannot treat them as having the same value irrespective of whether the text is to be found in an official national or international publication, or in a book or newspaper. It must also take note whether the text of the official statement in question appeared in the language used by the author or on the basis of a translation (cf. *I.C.J. Reports 1980*, p. 10, para. 13). It may also be relevant whether or not such a statement was brought to the Court's knowledge by official communications filed in conformity with the relevant requirements of the Statute and Rules of Court. Furthermore, the Court has inevitably had sometimes to interpret the statements, to ascertain precisely to what degree they constituted acknowledgments of a fact.

*Id.* at 41, para. 65.

<sup>183</sup> *Nicaragua Merits*, 1986 ICJ REP. at 43, para. 69.

<sup>184</sup> *Id.* at 43, para. 70. This principle was applied, inter alia, to the affidavit of Secretary of State Shultz that had been annexed to the Counter-Memorial of the United States. *Id.* at 71-72, para. 128 ("the Court would recall the observations it has already made . . . as to the evidential value of declarations by ministers of the government of a State engaged in litigation concerning an armed conflict"). *But see* Dissenting Opinion of Judge Schwebel, *id.* at 271-72, para. 14; and part G of the "Factual Appendix" thereto, *id.* at 410-11, para. 27.

<sup>185</sup> 1986 ICJ REP. at 45, para. 74.

<sup>186</sup> *Id.*



concluded that it “thus cannot consider reliance on self-defence to be an implicit general admission on the part of the United States; but it is certainly a recognition as to the imputability of some of the activities complained of.”<sup>187</sup>

*Public Knowledge and Press Reports*

It would be inappropriate to leave this analysis of evidence without also commenting on the use of judicial notice and public knowledge in the two cases in which the United States has been prominently involved: the first, the *Hostages* case, with the United States present and Iran absent; and the second, the *Nicaragua* case (Merits), with the United States absent and Nicaragua present. In each case the Court was naturally required to proceed under Article 53 of the Statute. In the former, the Court specifically stated as follows:

The essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries. . . .

. . . The result is that the Court has available to it a massive body of information from various sources concerning the facts and circumstances of the present case, including numerous official statements of both Iranian and United States authorities.<sup>188</sup>

This comment is useful in analyzing the role played by judicial notice and the observation of “current events” by the judges. In the position of the International Court, this is a necessary, if not an inevitable, step in accumulating the factual evidence upon which determinations as to international responsibility can proceed to be founded.<sup>189</sup>

In the *Nicaragua* case, the Court referred to the *Hostages* case in discussing the use of judicial notice of facts that are public knowledge, largely conveyed in the form of press information.<sup>190</sup> Particularly because the respondent failed to appear during the merits phase of the *Nicaragua* case, as well as because of the widely publicized nature of the respondent’s alleged acts in relation to Nicaragua, the Court was naturally confronted with a wide range of information and assertion, no small part of which was culled from reports and stories in the public press. A classic example of public knowledge in the case concerned the determination of the existence of joint military maneuvers

<sup>187</sup> *Id.*

<sup>188</sup> 1980 ICJ REP. at 9–10, paras. 12 and 13.

<sup>189</sup> See also comments by Judge Jessup quoted in note 128 *supra*.

<sup>190</sup> The Court referred to its statement in paragraph 9 of the *Hostages* case quoted in text at note 188 *supra*, and continued as follows:

The Court has however to show particular caution in this area. Widespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source. It is with this important reservation that the newspaper reports supplied to the Court should be examined in order to assess the facts of the case, and in particular to ascertain whether such facts were matters of public knowledge.

1986 ICJ REP. at 41, para. 63.

between the United States and Honduras near the Honduras-Nicaragua frontier: "As evidence of these manoeuvres having taken place, Nicaragua has offered newspaper reports; since there was no secrecy about the holding of the manoeuvres, the Court considers that it may treat the matter as one of public knowledge, and as such, sufficiently established."<sup>191</sup> Sometimes, when otherwise unsupported, the Court disregarded mere allegations reported in the newspapers, such as that of CIA responsibility for a publication<sup>192</sup> and "statements attributed . . . to unidentified diplomats stationed in Managua" about arms supply and training of Salvadoran rebels.<sup>193</sup> Press reports, when significant and not denied by the responsible state, or when recounting events such as official statements by responsible officials and agencies of that state, are accepted;<sup>194</sup> but when uncorroborated or not otherwise containing material with an independent title of credibility and persuasiveness, are generally discounted almost entirely.

Quite naturally, a failure to deny facts reported in the press tends to permit the Court to take those facts as accurate and well founded. This inferential approach can be a two-edged sword; it was applied to Nicaragua<sup>195</sup> as well as to the United States.<sup>196</sup> In addition, the Court demonstrated considerable caution in portions of the *Nicaragua* case regarding reliance on press reports (for example, concerning allegations by the United States that Nicaragua was supporting insurrection in El Salvador).<sup>197</sup>

#### *Insufficient Evidence*

In several instances the Court in the *Nicaragua* case determined generally that there was insufficient evidence to prove a point.<sup>198</sup> There was no "direct

<sup>191</sup> *Id.* at 53, para. 92.

<sup>192</sup> *Id.* at 65-66, para. 117.

<sup>193</sup> *Id.* at 80, para. 146 ("While the Court is not prepared totally to discount this material, it cannot find that it is of any great weight in itself").

<sup>194</sup> *But see* Dissenting Opinion of Judge Schwebel, *id.* at 317, para. 120, and 324, paras. 138-39.

<sup>195</sup>

[T]he declaration of the Nicaraguan Foreign Minister . . . while repudiating the accusation of support for the armed opposition in El Salvador, did not refer at all to the allegation of border incidents involving Honduras and Costa Rica.

. . . The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-border military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua.

1986 ICJ REP. at 87, paras. 163-64 (emphasis added).

<sup>196</sup> Regarding press attribution of responsibility for attacks on Nicaraguan ports to the CIA's "UCLAs": "So far as the Court is aware, no denial of the report was made by the United States administration." *Id.* at 50, para. 84 (emphasis added). (The denial would, of course, be expected to follow the press report within a reasonable time, and would not be made in court, since the party that would be in the position of offering the denial was no longer participating in the case and the Court was proceeding under Article 53.) Concerning lack of denial of press reports, see also *id.* at 52, para. 89. See further note 180 *supra* and accompanying text.

<sup>197</sup> See note 193 *supra* and accompanying text, and especially para. 146 of the Judgment cited therein. See, in contrast, Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 317, para. 120, and 326-31, paras. 145-53.

<sup>198</sup> See Dissenting Opinion of Judge Oda, 1986 ICJ REP. at 240-41, para. 61, and examples given.



evidence of the size and nature of the mines" laid in the Nicaraguan ports.<sup>199</sup> There was no evidence of U.S. involvement in the planning or execution of certain attacks on Nicaraguan installations.<sup>200</sup> There was no evidence relating to "the military effectiveness of" the contra bands.<sup>201</sup> Most importantly, "despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf."<sup>202</sup> "In sum, the evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid."<sup>203</sup> Acts committed by the *contras* were not imputable to the United States, because the Court was "not satisfied that the evidence available demonstrates that the *contras* were 'controlled' by the United States when committing [unlawful] acts,"<sup>204</sup> any more than publication of a document entitled *Freedom Fighter's Manual* was found to be attributable to the United States.<sup>205</sup>

Where the Court is proceeding by a relatively painstaking examination of what has, and what has not, been denied or proved, it can readily be seen that the lack of specificity common to many political and diplomatic statements will result in an inadequacy of proof or persuasion. Thus, in the *Nicaragua* case the Court rejected the assertion by the United States in its Counter-Memorial on jurisdiction and admissibility that "'El Salvador, Honduras, and Costa Rica have each sought outside assistance, principally from the United States, in their self-defense against Nicaragua's aggression,'" <sup>206</sup> to which the Court replied that "[n]o indication has however been given of the dates on which such requests for assistance were made."<sup>207</sup> The Court further said that Secretary of State Shultz's affidavit—asserting the exercise of the "inherent right of self-defense"—"makes no express mention of any request for assistance by the three States named";<sup>208</sup> this was held to be significant in view of the Court's later statement that "[i]t is also evident that if the victim State wishes another State to come to its help in the exercise of the right of collective self-defence, it will normally make an express request to that effect."<sup>209</sup>

<sup>199</sup> Judgment, 1986 ICJ REP. at 46, para. 76.

<sup>200</sup> *Id.* at 50, para. 85.

<sup>201</sup> *Id.* at 54, para. 93.

<sup>202</sup> *Id.* at 62, para. 109.

<sup>203</sup> *Id.* at 62, para. 110.

<sup>204</sup> *Id.* at 139, para. 277.

<sup>205</sup> "Since the evidence linking the 'Freedom Fighter's Manual' to the CIA is no more than newspaper reports the Court will not treat its publication as an act imputable to the United States Government for the purposes of the present case." *Id.* at 65–66, para. 117 (emphasis added).

<sup>206</sup> *Id.* at 87, para. 165 (emphasis added).

<sup>207</sup> *Id.* (emphasis added).

<sup>208</sup> *Id.* at 88, para. 165 (emphasis added). *But see* Dissenting Opinion of Judge Schwebel, *id.* at 323, para. 134 ("[the Court] failed to invite El Salvador to transmit evidence in support of its official claim to the Court that it had made such requests years earlier" (emphasis added)).

<sup>209</sup> *Id.* at 120, para. 232. The Court then stated:

Thus in the present instance, the Court is entitled to take account . . . of the actual conduct . . . at the relevant time, as indicative of a belief by the State in question that it was the victim of an armed attack by Nicaragua, and of the making of a request by the victim State to the United States for help in the exercise of collective self-defence.

Finally, the Court went so far as to observe that President Reagan's executive order of May 1, 1985 ("which contained a finding that 'the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States' ")<sup>210</sup> did not exculpate the United States from responsibility under the 1956 Treaty of Friendship, Commerce and Navigation because it was wholly unsupported by evidence:

Since no evidence at all is available to show how Nicaraguan policies had in fact become a threat to "essential security interests" in May 1985, when those policies had been consistent, and consistently criticized by the United States, for four years previously, the Court is unable to find that the embargo was "necessary" to protect those interests.<sup>211</sup>

In view of the difficulties confronting it in the *Nicaragua* case, the Court also made explicit that caution must be exercised in the use of evidence that has not been fully tested by the adversary method or that, for one or another reason, is hearsay, conclusory or closer to the expression of opinion than to being a manifestation of a fact:

The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence. An opinion expressed by a witness is a mere personal and subjective evaluation of a possibility, which has yet to be shown to correspond to a fact; *it may, in conjunction with other material, assist the Court in determining a question of fact, but is not proof in itself.* Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight . . . .<sup>212</sup>

Thus, the Court characterized the testimony (in affidavit) of Mr. Chamorro as "probably strictly hearsay";<sup>213</sup> and, as to that portion of the oral testimony of Mr. MacMichael relating to the period "after he left the CIA and ceased to have access to intelligence material," the Court stated that "it can attach little weight to statements of opinion of this kind."<sup>214</sup>

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*Id.* (emphasis added). And:

The Court has seen no evidence that the conduct of those States was consistent with such a situation . . . . [T]he representative of El Salvador before the United Nations Security Council . . . *refrained from stating* that El Salvador had been subjected to armed attack, and *made no mention of the right of collective self-defence* which it had supposedly asked the United States to exercise.

*Id.* at 120–21, para. 233 (emphasis added). *See also id.* at 119–20, para. 231.

<sup>210</sup> *Id.* at 70, para. 125.

<sup>211</sup> *Id.* at 141, para. 282.

<sup>212</sup> *Id.* at 42, para. 68 (emphasis added).

<sup>213</sup> *Id.* at 50, para. 84: "It is not however clear what the source of [his] information was; since there is no suggestion that he participated in the operation . . . his evidence is *probably strictly hearsay*, and at the date of his affidavit, the same allegations had been published in the press" (emphasis added).

<sup>214</sup> *Id.* at 82, para. 149.



*Special Problems*

"Ongoing" or "Fluid" Situations. Finally, there has been much discussion of late about what has been termed "ongoing" or "fluid" factual situations, also involving "armed conflict." The assertion is made that these are inherently "unsuitable for judicial determination," and that the evidence produced in connection with them is intrinsically unmanageable or inappropriate for the Court's consideration.<sup>215</sup> The question seems to boil down to the proposition that fluid or ongoing situations are unsuitable for adjudication since their factual matrix is fluid and constantly changing.<sup>216</sup> The Court in its Judgment on jurisdiction and admissibility in the *Nicaragua* case responded to this point in part, in terms of the preponderance of the actual evidence and the burden of proof.<sup>217</sup> The Court stated:

[A]ny judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law. A situation of armed conflict is not the only one in which evidence of fact may be difficult to come by, and the Court has in the past recognized and made allowance for this (*Corfu Channel, I.C.J. Reports 1949*, p. 18; *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 10, para. 13).<sup>218</sup>

Ultimately, however, it is the litigant seeking to establish a fact that bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but is not

<sup>215</sup> The Department Statement and supporting Observations on the Judgment on Jurisdiction and Admissibility in the *Nicaragua* case in substance repeated this argument, and it has ever since occupied a key position in the views of those who disagree with that Judgment. See Department Statement, *supra* note 11, and "Observations," reprinted in 24 ILM 246, 246-48 and 262-63 (1985).

<sup>216</sup> Stripping away the argument concerning armed conflict, the United States Counter-Memorial framed the argument precisely in the first phase of the *Nicaragua* case:

The pattern of facts necessary to the achievement of a legal conclusion . . . is incapable of judicial ascertainment through the technical and formal procedures and evidentiary standards applicable to proofs at law.

. . . In addition, for the legal significance of such "facts" to be determined—in other words, for them to serve as the basis for a judicial determination of the respective rights and duties of the parties to an alleged armed conflict—a sufficiently coherent and legally static pattern of facts must be found to exist. The validity and applicability of any legal conclusion extends only as far as its factual predicate; rights and duties can be determined only with reference to facts proven to exist at a point in time that is either contemporaneous with or anterior to the judgment. Such a determination can therefore have no necessary application with respect to facts that may develop subsequently; the principle of *res judicata* is inherently retrospective. Hence the judicial process is unsuited to dealing with situations that are by their nature exceptionally fluid.

Counter-Memorial Submitted by the United States of America (The Questions of the Jurisdiction of the Court to Entertain the Dispute and of the Admissibility of Nicaragua's Application) 223-24, paras. 523-24 (Aug. 17, 1984) (emphasis added).

<sup>217</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392, 436-38, paras. 99-101 (Judgment of Nov. 26).

<sup>218</sup> *Id.* at 437, para. 101.

to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof.<sup>219</sup>

Ever since the arguments on admissibility in the jurisdictional phase of the *Nicaragua* case, the United States has also laid great stress on the proposition that the Court was never intended to handle matters involving "ongoing armed conflict." In view particularly of the requirement of Article 53 that the applicant's case be well founded in law, the Court in the *Nicaragua* case went out of its way to reassure itself that the case as presented to it by the end of the oral proceedings was not nonjusticiable on the ground that it related to an "ongoing armed conflict"; the Court held that the factual issues and legal conclusions to be drawn did not "necessarily involve [the Court] in any evaluation of military considerations."<sup>220</sup>

The Court also reverted to the question of the "ongoing" nature of the conflict—a characteristic, it had been urged by the United States, that would work to defeat any judicial attempt at resolving it. At the outset of the 115 paragraphs of the opinion devoted to factual questions, the Court stated quite bluntly that "[o]ne of the Court's chief difficulties in the present case has been the determination of the facts relevant to the dispute."<sup>221</sup> The Court added that "[a] further aspect of this case is that the conflict to which it relates has continued and is continuing," and concluded relatively simply that "the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case."<sup>222</sup> The Court did not engage in any analytic study of the dispute as one that was continuing (and must continue to continue), as opposed to past; rather, it based its resolution of this question on a rule of reason that, in effect, fixed the facts as at a given time and thus converted a continuing or fluid factual situation into one crystallized *ratione temporis* as at the end of the oral proceedings.<sup>223</sup>

It should also be noted that the basic premise underlying the institution of interim measures of protection (upon which the United States relied without hesitation in the *Hostages* case)<sup>224</sup> is that it was surely intended to forestall current conflicts of interests by protecting against actions that might prejudice "the respective rights of either party" within the meaning of Article 41.<sup>225</sup> As Judge Schwebel stated in his dissenting opinion: "The Statute of

<sup>219</sup> *Id.*

<sup>220</sup> *Nicaragua Merits*, 1986 ICJ REP. at 28, para. 35.

<sup>221</sup> *Id.* at 38, para. 57.

<sup>222</sup> *Id.* at 39, para. 58.

<sup>223</sup> See Dissenting Opinion of Judge Schwebel, *id.* at 318 and 324, paras. 124 and 140 (citing *Nuclear Tests*, 1974 ICJ REP. at 263–65, for the proposition that the Court should have dealt with fact developments subsequent to the closure of the oral proceedings); is there not a distinction, however, between subsequent indications of mootness of the dispute, as in *Nuclear Tests*, as opposed to other developments in the dispute, as in *Nicaragua*?

<sup>224</sup> See Art. 41 of the Statute and Art. 73 of the Rules, *supra* note 35. See also the U.S. request for the indication of provisional measures at the outset of the *Hostages* case on Nov. 29, 1979, and the Order of the Court granting such provisional measures only a fortnight later, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Provisional Measures, 1979 ICJ REP. 7 (Order of Dec. 15).

<sup>225</sup> See generally J. ELKIND, INTERIM PROTECTION—A FUNCTIONAL APPROACH (1981), who writes: "The *Hostages Case* also underlines the nexus between desperation and urgency. It may



the Court rightly contemplates that the Court may deal with cases of an 'ongoing' nature; if it did not, the provisions of the Statute for [provisional measures] . . . would not make sense."<sup>226</sup> Of course, where two states are in present conflict, there is always a greater possibility of a fundamental change in the situation; the Court's position is that it would deal with such a circumstance in the appropriate manner, but without ruling it out as non-justiciable *in limine* on the basis that it might shortly change or be altered.<sup>227</sup>

*Irregular and Illegal Evidence.* One of the key problems presented by non-appearance (or nonparticipation, which is for these purposes functionally the same) is the paradox that evidence or near-evidence is taken into account by the Court that it might have ignored in a normal case, on the ground that the Court is obliged under Article 53 to satisfy itself that the claim of the applicant state is "well founded in fact as well as in law." In the course of attempting to determine the "well-foundedness" of factual assertions, the Court must necessarily make particular and deliberate efforts to consider any factual elements accessible to it even if, in a normal setting, such evidence would have been unacceptable (if not out of order) as being inconsistent with the Court's own rules.<sup>228</sup>

The perfect example of this paradox<sup>229</sup> is where the nonappearing or disappearing party causes evidentiary material to be laid before the judges in an irregular manner, such as by using the mails, or delivering a document or white paper to the Registry, as indeed happened in the *Nicaragua* case

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be necessary to act urgently to prevent an irreparable injury. It is necessary to act urgently to suppress an unendurable situation." *Id.* at 258. What could be more indicative of a "current" or "ongoing" or "fluid" situation than one in which interim measures of protection are sought and justifiably indicated?

<sup>226</sup> 1986 ICJ REP. at 294, para. 71 (Schwebel, J., dissenting).

<sup>227</sup> To paraphrase paragraph 101 of the Court's Judgment on Jurisdiction and Admissibility in the *Nicaragua* case, 1984 ICJ REP. at 437.

<sup>228</sup> Thus, Judges Oda and Schwebel both felt that the Court had gone unnecessarily far in finding facts in the *Nicaragua* case and that Article 53 did not require it to go to such lengths. See Dissenting Opinion of Judge Oda, 1986 ICJ REP. at 244-45, paras. 67-69, especially at 245, para. 69: "The Court should therefore have been wary of over-facile 'satisfaction' as to the facts, and perhaps should not have ventured to deliver a Judgment on the basis of such unreliable sources of evidence." See also Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 316-20, paras. 116-27.

<sup>229</sup> The Court stated the paradox as follows:

While these are the guiding principles, the experience of previous cases in which one party has decided not to appear shows that something more is involved. Though formally absent from the proceedings, the party in question frequently submits to the Court letters and documents, in ways and by means not contemplated by the Rules. The Court has thus to strike a balance. On the one hand, it is valuable for the Court to know the views of both parties in whatever form those views may have been expressed. . . . On the other hand, the Court has to emphasize that the equality of the parties to the dispute must remain the basic principle for the Court. The intention of Article 53 was that in a case of non-appearance neither party should be placed at a disadvantage; therefore the party which declines to appear cannot be permitted to profit from its absence, since this would amount to placing the party appearing at a disadvantage.

1986 ICJ REP. at 25-26, para. 31.

with a State Department publication entitled *Revolution Beyond our Borders, Sandinista Intervention in Central America*.<sup>230</sup> Such documents are nevertheless taken into account, one way or another, by the Court: "The Court however considers that, in view of the special circumstances of this case, it may, within limits, make use of information in such a publication."<sup>231</sup>

The effect of the "illegal" provenance of evidence is also of interest. The Court in the *Corfu Channel* case was confronted with what it determined to be a violation of international law by the United Kingdom: "Operation Retail," a minesweeping operation undertaken in Albanian territorial waters without Albania's consent.<sup>232</sup> Yet evidence resulting from that operation was taken into account by the Court. While finding that the United Kingdom had not acted in accordance with international law as far as its incursive minesweep was concerned, the Court avoided considering specifically that such evidence would be "inadmissible" under some theory akin to the exclusion of evidence on constitutional grounds in U.S. municipal law, and permitted its use.<sup>233</sup>

The likely result in the future, therefore, is that—without specifically ruling on the matter—the Court will consider any such evidence on its own footing and weigh it accordingly, but will not exclude it from consideration on the ground of alleged "illegality" alone.<sup>234</sup>

#### CONCLUSIONS

##### IN GENERAL

This general review of the practice of the Court in matters of evidence and proof suggests some general conclusions about its powers and experience.

<sup>230</sup> *Id.* at 44, para. 73. The oral proceedings had only commenced on the preceding day, Sept. 12; the publication was circulated later, on Nov. 6, 1985, as an official document of the United Nations. *Id.*

<sup>231</sup> *Id.* Judge Schwebel, in his dissenting opinion, stated that "the practice of the Court demonstrates repeated reliance on irregular communications from States parties to a case and reliance even on documents and statements of a non-appearing State which are not addressed to the Court and which are published after the closure of oral hearings." *Id.* at 318, para. 123. Judge Schwebel believed, however, that inadequate account had been taken of this particular document. *Id.* at 318–20, paras. 122–27 (especially para. 122 at 318); see the Dissenting Opinion of Judge Oda, *id.* at 240–45, paras. 61–69, especially para. 62 at 241–43. (For a sophisticated discussion of this problem, written before the judgment in *Nicaragua Merits*, see H. THIRLWAY, *supra* note 151, at 143–51.)

<sup>232</sup> Indeed, the Court answered the second question of the special agreement in the case *unanimously*: Great Britain had violated Albanian sovereignty in connection with the evidence-gathering incursion represented by "Operation Retail," but *not* in connection with the initial voyage of the destroyers that had hit the mines. 1949 ICJ REP. at 32–36.

<sup>233</sup> *Id.* at 13–15. The illegality issue was not raised specifically, in an exclusionary sense, but only in relation to the second question presented by the special agreement. For interesting recent discussion concerning the use or nonuse of "tainted" evidence that has been collected or obtained by processes that constitute violations of international law, and whether the Court is under any duty to exclude such evidence from its deliberations, see Thirlway, *Dilemma or Chimera?—Admissibility of Illegally Obtained Evidence in International Adjudication*, 73 AJIL 622, 632–33 (1984) (on *Corfu Channel*); and Reisman & Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Inadmissibility in International Adjudication*, 76 AJIL 737, 747 (1982).

<sup>234</sup> See generally Thirlway, *supra* note 233.



In only a few instances since 1922 has the Court heard live testimony; yet the quantity—and also the variety—of evidence that states are now accustomed to laying before it during the written and oral proceedings could do a Federal Rules discovery procedure proud. Evidence has taken the form of inspection on the spot, whether by the judges themselves or by Court-appointed experts. It has been adduced in court by the live testimony of witnesses and the live expertise of experts; cross-examination has accompanied direct testimony. Documents of all shapes, sizes, antiquity and provenance have been introduced. Maps ranging from antique charts to modern computerized block-diagrams have accompanied three-dimensional models as “illustrative” material or “tools of pleading.” Films have been shown.<sup>235</sup>

A brief *tour d’horizon* can illustrate quite readily the wide range of material that has been embraced and disposed of by the Court in the exercise of its duty to determine facts that “would constitute the breach of an international obligation.”<sup>236</sup> Among other things, the Court’s appreciation of facts giving rise to the responsibility of the parties before it has ranged from its appreciation of details of mining operations in Upper Silesia to accounting techniques for valuing going concerns and the potential effect of cartel operations in the phosphates industry.<sup>237</sup> It has been concerned with diplomatic history and the administrative details of colonial regimes,<sup>238</sup> the administration of phosphates concessions<sup>239</sup> and the details of river transportation on the Congo.<sup>240</sup> It has occupied itself in considerable detail with determining the validity of local and municipal laws and regulations regarding rights of minorities (and related rights) guaranteed under the Peace Treaties.<sup>241</sup>

It has considered claims of great antiquity, necessitating historical review

<sup>235</sup> See *Temple of Preah Vihear*, 1962 ICJ REP. at 9; and *Tunisia/Libya*, 1982 ICJ REP. at 25. On the *Gulf of Maine* case, see text at note 132 *supra*.

<sup>236</sup> To quote Article 36, paragraph 2(c) of the Statute of the Court.

<sup>237</sup> *Certain German Interests in Polish Upper Silesia and the Factory at Chorzów* (Ger. v. Pol.) (Jurisdiction), 1927 PCIJ, ser. A, No. 9 (Judgment of July 26); (Interim Protection), 1927 PCIJ, ser. A, No. 12 (Order of Nov. 21); (Interpretation), 1927 PCIJ, ser. A, No. 13 (Judgment of Dec. 16); (Indemnity), 1928 PCIJ, ser. A, No. 17 (Judgment of Sept. 13); (Expert Enquiry), 1928 PCIJ, ser. A, No. 17 (Order of Sept. 13).

<sup>238</sup> *Nationality Decrees*, *supra* note 72; *U.S. Nationals in Morocco*, *supra* note 90; the *Temple* case, *supra* note 80; *Tunisia/Libya*, *supra* note 26.

<sup>239</sup> *Phosphates in Morocco* (Italy v. Fr.) (Preliminary Objections), 1938 PCIJ, ser. A/B, No. 74 (Judgment of June 14).

<sup>240</sup> *Oscar Chinn*, *supra* note 103.

<sup>241</sup> *German Settlers in Poland*, 1923 PCIJ, ser. B, No. 6 (Advisory Opinion of Sept. 10); *Acquisition of Polish Nationality*, 1923 PCIJ, ser. B, No. 7 (Advisory Opinion of Sept. 15); *Polish Postal Service in Danzig*, 1925 PCIJ, ser. B, No. 11 (Advisory Opinion of May 16); *Rights of Minorities in Upper Silesia (Minority Schools)* (Ger. v. Pol.), 1928 PCIJ, ser. A, No. 15 (Judgment of Apr. 26); *Access to, or Anchorage in, the Port of Danzig, of Polish War Vessels*, 1931 PCIJ, ser. A/B, No. 43 (Advisory Opinion of Dec. 11); *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, 1932 PCIJ, ser. A/B, No. 44 (Advisory Opinion of Feb. 4); *Polish Agrarian Reform and German Minority* (Ger. v. Pol.) (Interim Protection), 1933 PCIJ, ser. A/B, No. 58 (Order of July 29); *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 1935 PCIJ, ser. A/B, No. 65 (Advisory Opinion of Dec. 4).

of many centuries of conduct and state claims.<sup>242</sup> It has dealt with territorial claims of considerable cartographic detail.<sup>243</sup> It has been occupied with complex questions of concessionary rights and public contracts in mandated and other territories.<sup>244</sup> It has been concerned with complex questions of geology, fishing practices, ecology, petroleum resources and even plate tectonics, and has summarized abstruse geomorphological material with accuracy and care.<sup>245</sup> The Court has also dealt in detail with the intricacies of canal engineering.<sup>246</sup>

The Court has resolved complexities of corporate finance and public indebtedness, exchange controls and companies law.<sup>247</sup> It would doubtless have been prepared to deal with facts relating to hostile aerial incidents resulting in loss of life, and to discriminatory racial policies applied in mandated territories, had jurisdictional concerns not intervened.<sup>248</sup> It has ruled in situations involving asylum of a political refugee,<sup>249</sup> the expropriation and naturalization of a former German national<sup>250</sup> and the lengthy imprisonment

<sup>242</sup> *Eastern Greenland*, *supra* note 80; Peter Pázmány University Case [Appeal from a Judgment of the Czechoslovak-Hungarian Mixed Arbitral Tribunal (Peter Pázmány Univ. v. Czechoslovakia)] (Czech. v. Hung.), 1933 PCIJ, ser. A/B, No. 61 (Judgment of Dec. 15); *Minquiers and Ecrehos*, *supra* note 80; the *Temple* case, *supra* note 80.

<sup>243</sup> *Jaworzina, Saint-Naoum, Frontier Land and the Temple* case, all *supra* note 80.

<sup>244</sup> *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.) (Jurisdiction), 1924 PCIJ, ser. A, No. 2 (Judgment of Aug. 30); *Mavrommatis Jerusalem Concessions* (Greece v. Gr. Brit.) (Merits), 1925 PCIJ, ser. A, No. 5 (Judgment of Mar. 26); *Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction), 1927 PCIJ, ser. A, No. 11 (Judgment of Oct. 10); *Oscar Chinn*, *supra* note 103; *Lighthouses Case between France and Greece* (Fr./Greece), 1934 PCIJ, ser. A/B, No. 62 (Judgment of Mar. 17); *Lighthouses in Crete and Samos* (Fr./Greece), 1937 PCIJ, ser. A/B, No. 71 (Judgment of Oct. 8); *Phosphates in Morocco*, *supra* note 239; *Panevezys-Saldutiskis Railway Case* (Estonia v. Lithuania) (Merits), 1939 PCIJ, ser. A/B, No. 76 (Judgment of Feb. 28); *Anglo-Iranian Oil Co.* (UK v. Iran), Interim Protection, 1951 ICJ REP. 89 (Order of July 5); and *Preliminary Objections*, 1952 ICJ REP. 93 (Judgment of July 22).

<sup>245</sup> *Fisheries*, *supra* note 87; *Fisheries Jurisdiction*, *supra* note 127; *North Sea Continental Shelf*, *supra* note 129; *Aegean Sea Continental Shelf* (Greece v. Turk.), Interim Protection, 1976 ICJ REP. 3 (Order of Sept. 11); and 1978 ICJ REP. 3 (Judgment of Dec. 19); *Tunisia/Libya*, *supra* note 26; *Gulf of Maine*, *supra* note 43; *Libya/Malta*, *supra* note 43.

<sup>246</sup> *Meuse*, *supra* note 49.

<sup>247</sup> *Brazilian Loans* (Braz./Fr.), 1929 PCIJ, ser. A, No. 21 (Judgment of July 12); *Serbian Loans* (Fr./Serb-Croat-Slov. State), 1929 PCIJ, ser. A, No. 20 (Judgment of July 12); *Monetary Gold Removed from Rome in 1943* (Italy v. Fr., UK, U.S.), Preliminary Question, 1954 ICJ REP. 19 (Judgment of June 15); *Certain Norwegian Loans* (Fr. v. Nor.), 1957 ICJ REP. 9 (Judgment of July 6); *Interhandel* (Switz. v. U.S.) (Preliminary Objections), 1959 ICJ REP. 6 (Judgment of Mar. 21); *Barcelona Traction (New Application)*, *supra* note 91.

<sup>248</sup> See the various *Aerial Incident* cases of the 1950s: *Aerial Incident of 7 October 1952* (U.S. v. USSR), 1956 ICJ REP. 9 (Order of Mar. 14); *Aerial Incident of 10 March 1953* (U.S. v. Czech.), 1956 ICJ REP. 6 (Order of Mar. 14); *Aerial Incident of 4 September 1954* (U.S. v. USSR), 1958 ICJ REP. 158 (Order of Dec. 9); *Aerial Incident of 27 July 1955* (Isr. v. Bulg.), 1959 ICJ REP. 127 (Judgment of May 26); *Aerial Incident of 7 November 1954* (U.S. v. USSR), 1959 ICJ REP. 276 (Order of Oct. 7); *Aerial Incident of 27 July 1955* (UK v. Bulg.), 1960 ICJ REP. 264 (Order of Aug. 3); *Aerial Incident of 27 July 1955* (U.S. v. Bulg.), 1960 ICJ REP. 146 (Order of May 30); *South West Africa Cases (Second Phase)*, *supra* note 12.

<sup>249</sup> *Asylum* (Colom./Peru), 1950 ICJ REP. 266 (Judgment of Nov. 20); Request for interpretation of the Judgment of November 20th, 1950, in the asylum case, 1950 ICJ REP. 395 (Judgment of Nov. 27).

<sup>250</sup> *Nottebohm* (Lichtenstein v. Guat.), Preliminary Objections, 1953 ICJ REP. 111 (Judgment of Nov. 18).



of hostages by a revolutionary government.<sup>251</sup> It has determined a state's responsibility for mining damage to war vessels in the absence of direct evidence and has resolved detailed factual questions concerning the nature of the mines, the incident itself and the manner of conducting naval operations.<sup>252</sup> Most recently, of course, it has dealt with facts relating to civil insurrection and belligerency, including the mining of harbors, the conduct of overflights, attacks on ports and shore installations, the preparation of field manuals encouraging selective assassinations, economic warfare and—in general—the logistical, political and financial support by one state of elements of armed insurrection within the territory of another. In this latter context, it has considered facts relating to trans-border arms supplies and personnel movements, the existence of “armed attacks,” and the necessity and proportionality of actions taken in response to them.<sup>253</sup>

However, the natural subject matter of the types of cases that have been presented before the Court—and the proof of the type of facts that constitute violations or breaches of international obligations—does not normally require detailed investigation into, or resolution of, difficult evidentiary questions. Evidence has generally been presented in documentary form or in the course of assertions with documentary support during oral and written proceedings. Neither Court has dealt very extensively with witnesses or experts, although some cases have indeed involved testimony and expertise or the use of Court-appointed experts. Moreover, its Statute and Rules confer broad, flexible and far-reaching powers on the Court, which in several instances have been exercised.<sup>254</sup> There also is no a priori limitation on the ability of the Court to make difficult factual determinations; in some instances, its precise and delicate appreciation of complex facts is quite striking.<sup>255</sup>

The size of the Court, the nature of its international law subject matter and the high degree of formality with which proceedings are conducted and arguments advanced before it, all explain why detailed evidentiary questions are most frequently resolved by documentary methods of proof involving a strict discipline of factual admission and retraction. In addition, the Court has resorted with increasing frequency and unusual force to a form of “international judicial notice,” and has resolved matters in favor of complainant states in instances where only unfavorable inferences could be drawn because of nonappearance, refusal to permit discovery or failure to submit to documentary production.

#### SPECIFICALLY CONCERNING NICARAGUA

When one considers overall the various affirmative determinations of fact in the *Nicaragua* case, it is noticeable how few of them were decided by direct

<sup>251</sup> The *Iranian Hostages* case, *supra* note 54.

<sup>252</sup> *Corfu Channel, Merits*, *supra* note 10; *Compensation*, *supra* note 9.

<sup>253</sup> *Nicaragua Merits*, *supra* note 1.

<sup>254</sup> The *Meuse* case even involved a “view” by the Court itself. See text at note 49 *supra*.

<sup>255</sup> See *Tunisia/Libya*, 1982 ICJ REP. at 54–58, paras. 62–68.

evidence of any kind.<sup>256</sup> The first issue,<sup>257</sup> relating to the mining of Nicaraguan ports and attacks on shore installations, was largely determined by recognizing uncontroverted news reports, and by making inferences about statements by U.S. public authorities constituting either admissions against the U.S. interest or failure to deny news stories on the subject.<sup>258</sup> The second issue,<sup>259</sup> that of the infringement of Nicaraguan airspace, was again determined by a combination of attribution and failure to deny.<sup>260</sup> Joint military maneuvers with Honduras were confirmed as a "matter . . . of public knowledge."<sup>261</sup>

Regarding the contra forces,<sup>262</sup> the Court found that they were supported by and dependent upon the United States, but were not so closely controlled by the United States as to become in effect agents of the U.S. Government, with fully imputable responsibility for their actions.<sup>263</sup> Affirmative findings concerning this subject were largely supported by reports of official government acknowledgments and discussions of the contra forces.<sup>264</sup> Publication of a manual was not attributable to the United States because its authorship was only indicated by press reports;<sup>265</sup> but that of another was so attributable because of its public mention by a U.S. governmental body.<sup>266</sup> The finding of the existence of the economic measures against Nicaragua was supported by official U.S. government statements.<sup>267</sup>

As to what would have been an affirmative defense of the United States (had the United States been present), governmental declarations and similar conclusory remarks were insufficient to establish facts,<sup>268</sup> but direct testimony and indirect inferences drawn from that testimony, as well as close readings and negative inferences from statements by Nicaraguan officials, were used to find some trans-border supply of arms at certain periods, though not at other periods.<sup>269</sup> Cross-border military incursions into Honduras and Costa Rica were found to have been attributable to Nicaragua by its failure specifically to deny accusations.<sup>270</sup> No express request for aid was found to have been made.<sup>271</sup> The views of the United States concerning the failure of the Nicaraguan regime to live up to its stated intentions of 1979 were determined by public announcement and publication by officials.<sup>272</sup>

This quick overview of the factual findings made in the *Nicaragua* case suffices to show how substantially the Court relied upon indirect or inferential methods of proof, as well as on public knowledge supported by either gov-

<sup>256</sup> Following the schema of the *Nicaragua* decision, 1986 ICJ REP. at 38-92, paras. 57-171.

<sup>257</sup> *Id.* at 146-48, para. 292(4), (6), (7) and (8) [*dispositif*].

<sup>258</sup> *Id.* at 45-51, paras. 75-86.

<sup>259</sup> *Id.* at 147, para. 292(5) [*dispositif*].

<sup>260</sup> *Id.* at 51-53, paras. 87-91.

<sup>261</sup> *Id.* at 53, para. 92.

<sup>262</sup> *Id.* at 146, para. 292(3) [*dispositif*].

<sup>263</sup> *Id.* at 53-65, paras. 92-116.

<sup>264</sup> *Id.* at 61, para. 107 ("The legislative and executive bodies of the respondent State have moreover, subsequent to the controversy which has been sparked off in the United States, openly admitted the nature, volume and frequency of this support").

<sup>265</sup> *Id.* at 65-66, para. 117.

<sup>266</sup> *Id.* at 66-69, paras. 118-22.

<sup>267</sup> *Id.* at 69-70, paras. 123-25.

<sup>268</sup> *Id.* at 71-72, para. 128.

<sup>269</sup> *Id.* at 70-86, paras. 126-60.

<sup>270</sup> *Id.* at 86-87, paras. 161-64.

<sup>271</sup> *Id.* at 87-88, paras. 165-66.

<sup>272</sup> *Id.* at 87-92, paras. 165-71.



ernmental publications or notoriety or press reports that had not been corrected by officials. It must be acknowledged, however, that Judge Schwebel in his dissent stressed his opinion that the Court's findings of fact—even if largely employing these indirect techniques—were skewed in favor of Nicaragua against the United States,<sup>273</sup> particularly in relation to the alleged armed attacks and intervention by Nicaragua against its neighbors.<sup>274</sup> Judge Schwebel attributed this shortcoming to the way the Court had selected and evaluated news stories and other reports, and to what he viewed as the failure of the Court to take into account in an appropriate manner all of the available material (including particularly material filed with the Court on behalf of the United States)<sup>275</sup> and to use its authority to find facts on its own (including possible use of a commission).<sup>276</sup>

Nevertheless, the Court's use in *Nicaragua* of indirect and inferential techniques clearly owed much to the one-sided nature of the proceedings being conducted under Article 53. Had the United States been present in court, this use would have been far less prominent. Yet since these techniques have also long been employed by the Court to winnow through the vast quantities of documentary assertion and evidentiary pleading to which it is normally subjected in bilateral litigations, they are therefore not wholly new in the *Nicaragua* situation. In the *Hostages* case, the most dramatic previous example of nonappearance and judicial response under Article 53, the Court made liberal and uncontroverted use of public knowledge and evidence taken as fact by the exercise of a form of judicial notice.<sup>277</sup> What is so striking and novel about the *Nicaragua* case is the cumulation of their multiple use and the overall breadth and volume of the Court's findings on the basis of these methods in an unprecedentedly strong decision under Article 53.

#### THE FUTURE

What is likely to be the overall effect of the *Nicaragua* case on the future activity of the Court, and specifically upon its ability to deal with matters of evidence? Although the Court has broad flexibility and wide powers in matters relating to evidence, it has not yet used them to their full potential, any more than the Court itself has been used to its full potential. It did not fully use those powers in *Nicaragua*. The difficult Judgment just rendered in that case will in every likelihood engender a broad assault from legal circles sympathetic to the position of the United States, to the effect that the Court has seriously injured itself, and that its future caseload and activity—certainly in respect of cases from the developed countries of the West—will suffer as a result.

<sup>273</sup> See note 172 *supra*.

<sup>274</sup> See, e.g., Dissenting Opinion of Judge Schwebel, 1986 ICJ REP. at 271–73, paras. 14–16; 279–80, paras. 31–32; and 295–96, para. 75.

<sup>275</sup> *Id.* at 318–20, paras. 122–27; and 325–27, paras. 141–45.

<sup>276</sup> *Id.* at 321–23, paras. 132–34; see also note 143 *supra* and accompanying text.

<sup>277</sup> See *supra* note 188 and accompanying text.

Is this likely to be true? Some brief observations and conclusions come to mind:

(1) The Court—at this writing—has seldom been busier. The Chamber in the *Mali/Burkina Faso* boundary dispute has just rendered its Judgment.<sup>278</sup> The United States and Italy have agreed to submit the *Raytheon* case to a Chamber of the Court, although the terms of reference to the Court have not yet been made public.<sup>279</sup> The damages or “reparations” phase of the *Nicaragua* case is still to take place.<sup>280</sup> A request for an advisory opinion is pending.<sup>281</sup>

Two fresh contentious cases have been filed in the Court since the decision in *Nicaragua*.<sup>282</sup> Both were filed by Nicaragua as applicant; each related to fundamentally the same issues as had already been determined in the Judgment in *Nicaragua v. United States*.<sup>283</sup> To the extent either proceeding reaches the merits, there will be ample opportunity for the Court again to handle matters of factual inquiry (save this time with the benefit of the participation of the respondent).

A third case, concerning the territorial and maritime boundary dispute between El Salvador and Honduras is also, at this writing, about to be filed (before a Chamber of the Court).<sup>284</sup> In that case, substantial evidence may be expected, perhaps of a more traditional nature (geographic, cartographic,

<sup>278</sup> Frontier Dispute (Burkina Faso/Mali) [Special Agreement of Sept. 16, 1983], 1984-1985 ICJ Y.B. 171; ICJ Communiqué No. 86/18, December 22, 1986 (Judgment of Dec. 22).

<sup>279</sup> Statement of Oct. 7, 1985, reproduced in 24 ILM 1745 (1985).

<sup>280</sup> See *Nicaragua Merits*, 1986 ICJ REP. at 142-43, paras. 283-85, especially para. 284; and 149, para. 292(15) [*dispositif*].

<sup>281</sup> Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal (*Yakimetz v. Secretary-General of the United Nations*). On Sept. 20, 1984, the Court received a request for an advisory opinion submitted by the Committee on Application for Review of Judgments of the Administrative Tribunal of the United Nations in respect of UNAT Judgment No. 333 of June 8, 1984. The committee had taken this step on Aug. 23, at the request of the interested parties, under Article 11 of the UNAT Statute. Written comments were submitted by the United States Government and by the Secretary-General, who also transmitted the comments of the individual who was the subject of the UNAT judgment. See Report of the International Court of Justice, 1 August 1985-31 July 1986, 41 UN GAOR Supp. (No. 4) at 18, UN Doc. A/41/4 (1986).

<sup>282</sup> See ICJ Communiqué No. 86/10, July 29, 1986, announcing the filing of two applications by Nicaragua on July 28, 1986, one against Costa Rica and one against Honduras, each entitled “Border and Transborder Armed Actions.” Both respondents have appointed agents; Honduras is expected to contest its case on jurisdictional grounds, and Costa Rica has reserved the right to present a counterclaim on the merits. See, respectively, ICJ Communiqué Nos. 86/11 and 86/12, Sept. 3, 1986.

<sup>283</sup> It will be interesting—and most important—to note the extent to which (if at all) the Court’s application of the principles and rules of evidence developed in *Nicaragua v. United States* in 1986 will be applied, adapted or modified, or will in effect remain unused in these two subsequent cases, and also the extent to which (if at all) the Court will modify or alter its interpretation of the critical legal principles set forth in the original *Nicaragua* case.

<sup>284</sup> El Salvador/Honduras Boundary Dispute, *Compromis* of May 24, 1986, registered with the UN Secretary-General on Oct. 7, 1986. The parties have agreed to notify the Court jointly before Dec. 31, 1986, following which an official announcement concerning the case will be made.



historical and documentary). Since the dispute is intended to be brought by special agreement, the Chamber is bound to reach the merits. Finally, observers expect several more continental shelf disputes to come before the Court (or Chambers of the Court) in the next several years; in matters of this sort, complex questions of evidentiary proof can still be anticipated.<sup>285</sup>

(2) Any lack of confidence by states in the Court's ability to handle evidence and facts would be serious indeed. This is particularly so because of the litigator's commonplace: that, in the long run, the factual matrix is always the most important part of any lawsuit. The present administration in Washington, and international lawyers sympathetic to its current problem of being at the receiving end of one of the strongest and most important cases ever decided by the Court,<sup>286</sup> will doubtless soon be predicting, as a result of the *Nicaragua* case, that the same type of desuetude that the Court suffered following its 1965 decision in the *South West Africa Cases*<sup>287</sup> will be repeated (at least as to the developed world). They will say that whereas a good part of the reaction 20 years ago was predicated on assertions that the Court was not sufficiently responsive to the "Third World"<sup>288</sup> and had shown a bias to Western or "neocolonialist" values, the Court has now gone over—excessively—to the other side. Such criticism will probably take the form of assertions (to this writer wholly unfounded) that the Court was too responsive to the Third World, insensitive to the problems and tensions of the "real" world, and definitely biased in favor of "anti-Western" or Third World values. Such accusations would be unfortunate as well as unfair; they impugn the independence of the Court and are difficult to counter in purely analytic terms.

(3) It is still too early to tell what the overall reaction to the *Nicaragua* case of developed states (other than the United States) will be; but even if that reaction is supportive of the Court in general—as in the author's judgment it should be—the Court and its "clientele" will still inevitably develop in the direction of the Third World. This development will occur for affirmative rather than negative reasons: by a general increase in Court traffic by Third World states,<sup>289</sup> reinforced perhaps by a largely valid perception that

<sup>285</sup> See notes 129–135 *supra* and accompanying text.

<sup>286</sup> Which could probably have been prevented had the United States taken the Court more seriously in 1984: "Before embarking on a Reagan doctrine," Thomas Franck has observed, "the United States should have taken care that its legality could not be tested in the World Court. . . . Failing to bring its legal strategy into line with its political strategy, the United States found itself inevitably on the losing end of a major law suit." T. FRANCK, *JUDGING THE WORLD COURT* 60 (1986); see also *id.* at 64.

<sup>287</sup> See L. HENKIN, *HOW NATIONS BEHAVE* 187 (2d ed. 1979); M. KATZ, *THE RELEVANCE OF INTERNATIONAL ADJUDICATION* 103–44 (1968).

<sup>288</sup> If, indeed, it is still constructive to characterize the majority of United Nations members by that term.

<sup>289</sup> Which have played a surprisingly active role even in the past two decades, in spite of the slump following the *South West Africa* Judgment in 1966. See, for example, these cases (in addition to the *Nicaragua* series) involving Third World interests: Trial of Pakistani Prisoners of War (*Pak. v. India*), Interim Protection, 1973 ICJ REP. 328 (Order of July 13); and removal from list, *id.* at 347 (Order of Dec. 15); Western Sahara, 1975 ICJ REP. 12 (Advisory Opinion

the Court in *Nicaragua* attempted to break out of the mold of sterile positivism into which it had been cast 20 years ago in the *South West Africa Cases*, and made a strenuous effort to be objectively responsive to the perceived aspirations of the majority of member states in 1986.<sup>290</sup> In the long run, demographic trends will probably also cause the overall business and preoccupations of the Court to shift substantially toward the Third World; the *Nicaragua* case and its likely aftermath may then have had a significant part in accelerating this trend. It may even prove to be a happy irony that many of the positive suggestions for reform of the Court that have been made over the years, and that are particularly surfacing again now in the aftermath of *Nicaragua*, will have been accomplished by indirection when they could not have been brought about directly: the Court is becoming increasingly busy with certain traditional and relatively limited disputes, brought in large part by special agreement, relating to smaller states of the Third World and involving the use of Chambers. It is hoped that fresh cases will continue to come to the Court, no matter what they involve, and no matter what their provenance. In spite of the unpopularity in some quarters of the *Nicaragua* decision, perhaps the Court's willpower and institutional courage and independence—which are certainly highlighted by that decision—will ultimately prove to be a more important attraction. The irony is that it may eventually become crystal clear that the Court has *not* been biased (as will have been urged by the United States) but has, in fact, been precisely the opposite.

(4) The Court will definitely have a variety of cases before it in the next several years that will deal further with questions of evidence and proof. Not the least of these will be the reparations phase of the *Nicaragua* case. Since much attention, and much of the inevitable criticism by the United States, will undoubtedly be addressed to the Court's handling of the complex evidence in the absence of the respondent,<sup>291</sup> the Court can be expected to deal with the reparations phase of *Nicaragua*, and the factual issues in the other cases recently brought before it, with the same "exacting care" that Judge Lauterpacht thought it had demonstrated in *Corfu Channel*.<sup>292</sup> It can be hoped, if not anticipated, that the Court will exercise an even higher

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of Oct. 16); *Aegean Sea*, *supra* note 245; Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 ICJ REP. 73 (Advisory Opinion of Dec. 20); the *Iranian Hostages case*, *supra* note 54; Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application [Malta] for Permission to Intervene, 1981 ICJ REP. 3 (Judgment of Apr. 14); *Tunisia/Libya*, *supra* note 26; Continental Shelf (Libyan Arab Jamahiriya/Malta), Application [Italy] for Permission to Intervene, 1984 ICJ REP. 3 (Judgment of Mar. 21); *Libya/Malta*, *supra* note 43; *Application for Revision and Interpretation*, *supra* note 85; *Frontier Dispute*, *supra* note 278.

<sup>290</sup> "In different respects and for different reasons, the Court was not [politically] responsive enough in the *South West Africa Cases* and in its *Certain Expenses* Advisory Opinion and probably was overly responsive in the *Namibia* Advisory Opinion." R. FALK, REVIVING THE WORLD COURT 23 (1986).

<sup>291</sup> Even states that may be highly sympathetic to the vigorous substantive holding in the case may not be prepared to face a similarly vigorous ruling of the Court on a matter closer to their own national interest.

<sup>292</sup> See text at note 61 *supra*.



degree of care in attacking factual issues than it has ever done before, if only as a result of the adverse criticism it will doubtless receive from those sympathetic to the U.S. position in the *Nicaragua* case.

(5) It also remains to be seen how well the Court can weather the institutional storm that is now about to break over implementation of the *Nicaragua* decision, including most importantly the conduct and results of the "subsequent phase of the proceedings" on reparations.<sup>293</sup> Even if the Judgment in *Nicaragua* is perceived as being absolutely correct, and the position of the United States as absolutely wrong, the problem nevertheless remains. The attitude of the United States toward the subsequent phase of the proceedings will be critical: in particular, how it responds to its obligation to comply with any part of the Court's decision.<sup>294</sup> The fear is that the case may effectively become transformed from *Nicaragua v. United States* into *United States v. International Court of Justice*.<sup>295</sup>

(6) Long-term stonewalling of the Court by the United States concerning the *Nicaragua* decision may well backfire. The vast majority of member states may become increasingly sympathetic to the Court, whether or not they actually agree with the substance of the *Nicaragua* decision, simply because by defying the Court over *Nicaragua*, the United States will be defying the Court in general; by necessary inference, it will then also be defying the

<sup>293</sup> *Nicaragua Merits*, 1986 ICJ REP. at 142-43, paras. 283-85; and 149, para. 292(15) [*dispositif*]. Can it not be cogently argued that the United States, bound as it is by Article 94, paragraph 1 of the Charter, ought now to reenter the proceedings so as to mitigate damages? (The Court even suggested this eventuality: "while the United States has chosen not to appear or participate in the present phase of the proceedings, Article 53 of the Statute does not debar it from appearing to present its arguments on the question of reparation if it so wishes." 1986 ICJ REP. at 143, para. 284.) Does the Executive not have a duty to avoid, wherever possible, a heedless accumulation of liabilities under treaties and other international agreements? Is not a decision *not* to reenter the proceedings for the purpose of mitigating damages tantamount to a gamble, in effect, that the Judgment will be unenforceable at all costs, as well as an anticipatory repudiation of our solemn obligations under Article 94, paragraph 1 of the Charter (as distinguished from any subsequent enforcement action under Article 94, paragraph 2)? See Highet, *supra* note 13, at 1003.

<sup>294</sup> See *Nicaragua Merits*, 1986 ICJ REP. at 23-24, para. 27; see also Rowles, "Secret Wars," *Self-Defense and the Charter—A Reply to Professor Moore*, 80 AJIL 568, 580-82 (1986); and Highet, *supra* note 13, at 1003. The problem is also raised collaterally by the possibility of Nicaragua's being successful in enforcement or *exequatur* actions in third-party state courts in efforts to obtain judgments to confirm and order execution of the Court's decision.

<sup>295</sup> As a matter of historical contrast to the positions currently being adopted by the United States (see the Department Statement, *supra* note 11): in 1923 Secretary of State Charles Evans Hughes (later to become both a judge of the PCIJ from 1928 to 1930 and also Chief Justice of the Supreme Court of the United States) wrote a letter to Norway enclosing a U.S. Government check for the full amount of a more than \$12 million arbitral award of 1922 in favor of Norway, on behalf of Norwegian shipowners whose vessels had been appropriated by the United States during World War I. Actually, Secretary Hughes was highly critical of the award and refused to accept that its bases of decision were declaratory of international law or capable of creating precedents binding on the United States. The check was nevertheless delivered, as a "tangible proof of [the] desire [of the U.S. Government] to respect arbitral awards" and of its "devotion to the principle of arbitral settlements even in the face of a decision proclaiming certain theories of law which it cannot accept." 1 R. Int'l Arb. Awards 344 (emphasis added). This precept should not go unnoted at the present time.

entire organization of which the Court is the principal judicial organ.<sup>296</sup> The United States is not likely to suffer too many immediately adverse consequences—although the possibility of third-party or collateral enforcement of the decision should not be dismissed lightly—but positive effects on the general attitude toward the Court held by a large majority of UN member states could well be accelerated.

(7) The “no-appearance technique” of litigation<sup>297</sup> will be placed in a new, sharp and critical light. The *Nicaragua* case dramatizes the profound consequences and implications of the nonappearance (more properly, disappearance) of the United States, and any subsequent refusal by it to comply with the Judgment. This can become a life-threatening event for a fragile institution such as the Court. Yet this strategy may also backfire: the “no-appearance technique” of litigation may suffer a setback, once its absurdity and overall uselessness are correctly perceived. Likewise, overt defiance of the Court by a great power over a case won by a small one may prove to be an unattractive example—a disincentive—for other states. It is hard to complain with Goliath after he has been trounced by David.

(8) The destruction or weakening of the Court does not appear to be as sure a thing as its opponents are bound to announce. This writer hopes that precisely the opposite effect will be experienced. As was pointed out above, many of the classic anodynes for improving the Court’s functioning are now beginning to materialize one way or another, perhaps in reaction to *Nicaragua* and perhaps merely by coincidence.

In any event, the negative forces undermining the progressive development of international law—nonproduction, noncooperation and nonappearance—which, like Antaeus, might at first appear to be gaining renewed strength from both the 1985 withdrawal of the United States and the likely long-term response by the United States and others to the Court’s *Nicaragua* decision in 1986, will now be seen for what they are.

It is therefore not entirely vain naiveté to hope that some institutional good may come out of the extraordinarily difficult situation from which the Court is just now emerging. That hope may be expressed as a variant of Pascal’s wager: it is better to believe in the Court than not to believe in the Court, since, if the Court does emerge as an effective institution, one’s belief and conviction will have been vindicated; whereas, if the Court falls upon increasingly difficult times, then it will not matter much *what* one believed. The Court may well continue to have more to do—not less—as a result of *Nicaragua*. At least, it will certainly have more facts to determine and it will have to continue to “perform that task with exacting care.”<sup>298</sup> It is hoped that its use and determination of facts and evidence will grow in strength and depth as a result of, and not in spite of, the *Nicaragua* decision of 1986, where much of the Court’s careful and painstaking work was rendered difficult beyond description by the absence of the respondent.

<sup>296</sup> UN CHARTER art. 92.

<sup>297</sup> See Fitzmaurice, *supra* note 151, at 105.

<sup>298</sup> See text at note 61 *supra*.

## **Annex 25**

Eduardo Valencia-Ospina, "Evidence before the International Court of Justice", 1 *International Law Forum* 202 (1999)





## Evidence before the International Court of Justice

EDUARDO VALENCIA-OSPINA\*

### Introduction

The Statute of the International Court of Justice deals with evidence in only cursory terms. Article 48 provides that the Court shall “make all arrangements connected with the taking of evidence”. This provision was carried over verbatim from the Statute of the Permanent Court of International Justice (PCIJ), and appears to be derived from similar provisions in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. As the cases before the PCIJ primarily concerned the application of treaties, that Court was in a position to establish and rely on facts that were not in dispute between the parties, obviating, in most cases, the need for detailed rules of evidence.

The Statute of the present Court has remained virtually unaltered in terms of evidence, and the current Rules of Court, adopted in 1978, continue this liberal regime: the parties enjoy great freedom in relation to the production of evidence, as does the Court in evaluating it. Article 48 of the ICJ Statute is supplemented by a handful of general provisions, both in the Statute and the Rules of Court, which give the Court a great deal of autonomy and flexibility in dealing with evidentiary matters.

### Nature of the ICJ Evidentiary System

Although the Court has been said to have taken the best from the accusatorial/adversarial and the inquisitorial systems of evidence, the drafters of the earliest sets of Rules of the PCIJ expressed the view that the broad and liberal system of evidence created by the Statute was closer to the English system, based on the freedom of the parties to present their own evidence. When the litigants are sovereign States, it is perhaps only logical for them to have the main initiative and responsibility in regard to the production of evidence. While the Court is authorized to seek particular evidence, either at the request of a party or of its own motion, and to question witnesses and experts, its primary function is to supervise the taking of, and to decide as to the admissibility, relevance and weight of evidence.

Like its predecessor, the PCIJ, the Court is often in a position to base its decision on undisputed facts. While a domestic trial court is deemed to know the law and can therefore confine itself almost entirely to making findings of fact (leaving it in many cases to one or more appellate instances to rule on the

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\* The author is Registrar of the International Court of Justice.

ultimate legal repercussions of those predetermined facts) the International Court of Justice must find both law and fact in a single instance, and is often called upon to establish the existence of the rules of international law on which its decisions are based.

### **Burden and Standard of Proof**

In allocating the burden of proof, the Court follows the basic rule of *actori incumbit probatio*: that the party putting forth a claim is required to establish the requisite elements of law and fact. This may be rendered more difficult, in those cases brought before the Court by Special Agreement, by the absence of an identifiable plaintiff/defendant relationship, but the basic approach remains that each party bears the burden of proving the facts on which it relies in making its case. In the *Minquiers and Ecrehos* case,<sup>1</sup> for example, the Special Agreement between France and the United Kingdom asked the Court to determine which country had sovereignty over certain rocks and islets. The Special Agreement further provided that the written proceedings be “without prejudice to any question of the burden of proof”.<sup>2</sup> In its judgment the Court held that as both parties claimed sovereignty, each was required to “prove its alleged title and the facts upon which it relies.”<sup>3</sup> Judge Levi Carneiro elaborated on this basic rule in his separate opinion, stating that “it is for the Party interested in restricting the application of an established rule or of a recognized fact to prove that such a restriction is valid.”<sup>4</sup>

The concept of an identifiable or quantifiable standard of proof emanates from the common law system, with its “beyond a reasonable doubt” in criminal proceedings and the more lenient “by a preponderance of the evidence” in civil proceedings. The international regime appears to reflect the civil law system, in which all that is needed is that the court be persuaded, without reference to a specific standard. Certain aspects of the Court’s practice require a *prima facie* showing of particular matters, such as the existence of a jurisdictional basis for the indication of provisional measures.<sup>5</sup> Interestingly, the only guidance offered

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<sup>1</sup> *Minquiers and Ecrehos* (France/United Kingdom), 1953 ICJ Rep. 47 (Judgment of 17 November).

<sup>2</sup> *Id.* at 49.

<sup>3</sup> *Id.* at 52.

<sup>4</sup> *Id.* at 99.

<sup>5</sup> See, e.g., the cases concerning Legality of Use of Force ((Yugoslavia v. Belgium), (Yugoslavia v. Canada), (Yugoslavia v. France), (Yugoslavia v. Germany), (Yugoslavia v. Italy), (Yugoslavia v. Netherlands), (Yugoslavia v. Portugal), (Yugoslavia v. Spain), (Yugoslavia v. United Kingdom), (Yugoslavia v. United States of America)), Orders of 2 June 1999.

by the Statute with respect to the standards of proof is Article 53, which provides that in the case of a party's failure to appear or defend its case, the Court may rule in favour of the other party, but only after it has satisfied itself that it has jurisdiction, and "that the claim is *well founded in fact and law*" [emphasis added].

### **Admissibility of Evidence**

In keeping with its liberal evidentiary regime, there is no true hierarchy of different forms of evidence before the Court. In this respect, the Court appears to have been influenced primarily by continental legal systems, with written evidence more common than oral evidence. Most of the evidence produced in ICJ proceedings forms part of the often voluminous written pleadings. The Statute and Rules of Court do, however, provide for the oral testimony of witnesses and experts, and both have been employed before the Court. Furthermore, the Court has on several occasions agreed to the production of "sworn statements" (affidavits), a hybrid form of evidence common in Anglo-Saxon law, which consists of the evidence being taken by a public official and recorded by him in a formal instrument drawn up in accordance with the provisions of his national law.

With respect to written evidence, Article 50(1) of the Rules of Court requires the annexation to the original of every pleading of "certified copies of any relevant documents adduced in support of the contentions contained in the pleading." In terms of formal admissibility, after the closure of the written proceedings, Article 56 of the Rules requires either the consent of the other party, or the permission of the Court, in order to submit further documents. The substantive admissibility of documentary evidence is left to the appreciation of the Court, and evidence tends to be regarded as admitted, unless challenged by the other party.

Another aspect of the Court's liberal evidentiary practice is that the parties have traditionally been allowed recourse to available technical resources. Thus the PCIJ accepted the production of photographs<sup>6</sup> and the use of models,<sup>7</sup> while the present Court has agreed to view films.<sup>8</sup> In more recent cases, a party has

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<sup>6</sup> See, e.g., *Phosphates in Morocco (Italy v. France)*, 1936 P.C.I.J. (series C) No. 85, at 875.

<sup>7</sup> See, e.g., *Diversion of Water from the Meuse (Netherlands v. Belgium)* 1936 P.C.I.J.(series C) No. 81, at 215.

<sup>8</sup> See, e.g., *Oral Arguments, Documents, 1959 I.C.J. Pleadings (II Temple of Preah Vihear, Cambodia v. Thailand)* 130. If there is an objection from one of the parties, the Court generally requires that that party be allowed to preview the film, *Oral Arguments, Documents 1978 I.C.J. Pleadings (V Continental Shelf, Tunisia/Libyan Arab Jamahiriya)* 487, 492.8

produced a video cassette as an annex to a written pleading, or each of the parties has been permitted to show a video cassette in the course of the hearings.<sup>9</sup>

The Court has even relied, in certain circumstances, on what it termed “matters of public knowledge”. In the *Hostages* case, for example, 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”<sup>10</sup> 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”.<sup>11</sup>

One explanation for this flexible approach to the admissibility of evidence is the Court’s broad power, and perceived ability, to ascertain the weight and relevance of particular evidence. Unlike a common-law lay jury, this highly-qualified and experienced international bench is not considered to need “protection” from potentially unreliable evidence. It is, therefore, perhaps surprising that the Court has nevertheless, on a few occasions, rejected hearsay evidence as “allegations falling short of conclusive evidence.”<sup>12</sup>

## Recent Developments and New Challenges

### *Site Visit*

In 1997, for the first time in its fifty-year history, the Court gave effect to the provisions of Article 66 of the Rules of Court, by making a much-publicized visit to the areas to which the case related. In the case concerning *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* the Court visited, between the first and second rounds of oral pleadings, the Gabčíkovo-Nagymaros hydroelectric dam project on the Danube river. The visit was undertaken at the request of both governments, which made joint arrangements for the site visit by concluding a Protocol of Agreement and subsequent Agreed Minutes.

Accompanied by the Agents and technical advisers of the two States, the Court visited areas between Bratislava and Budapest in both countries, at which technical explanations were given and Judges were able to put questions of fact to the two delegations.

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<sup>9</sup> Provided that the cassettes in question were exchanged in advance by the parties through the intermediary of the Registry (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 27 September 1997, para. 8).

<sup>10</sup> *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* 1980 I.C.J. Rep. 9.

<sup>11</sup> *Id.* at 10.

<sup>12</sup> E.g., *Corfu Channel (United Kingdom v. Albania) Merits*, 1949 ICJ Rep. 4 (Judgment of 9 April).



*Authenticity of Documents*

In September 1997, following the filing of the parties' memorials in the case concerning *Maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain)*, Bahrain informed the Court that it challenged the authenticity of eighty-one documents produced by Qatar as annexes to its memorial. Bahrain indicated its intention to disregard the content of these documents for the purposes of preparing its counter-memorial, which was due to be filed by 31 December 1997, simultaneously with that of Qatar.

Qatar responded that the objections raised by Bahrain came too late and that it could not answer them in its counter-memorial, while Bahrain asserted that reliance by Qatar on the challenged documents could give rise to procedural difficulties affecting the orderly development of the case. It observed that the question of the authenticity of the said documents was "logically preliminary to . . . the determination of its substantive effect".

After the filing of the counter-memorials in December 1997, Bahrain, noting that Qatar continued to rely on the challenged documents, again emphasized the need for the Court to decide the question of their authenticity as a preliminary issue. On 30 March 1998 the Court ordered a further round of written pleadings in the case, directing the submission, by each of the Parties, of a Reply on the merits by 30 March 1999. The Court further ordered that, by 30 September 1998, Qatar should file an interim report, to be as comprehensive and specific as possible, on the question of the authenticity of the challenged documents. The Order specified that Qatar's Reply should contain its detailed and definitive position on the question and that Bahrain's Reply should contain its observations on Qatar's interim report.

Qatar's then announced, in its interim report, that it would not rely on the disputed documents. The report, to which four experts' reports were appended, stated that while there were differing views not only between the respective experts of the Parties, but also between its own experts, on the question of the material authenticity of the documents, as far as the historical consistency of the content of those documents was concerned, Qatar's experts took the view that Bahrain's assertions showed exaggerations and distortions. Qatar pointed out that its decision to disregard the documents was intended "to enable the Court to address the merits of the case without further procedural complications". In an Order dated 17 February 1999, the Court placed on record Qatar's decision to disregard the challenged documents, and granted the parties a two-month extension of the time-limit for the submission of their replies, which were not to rely on those documents.

*Hearing of Witnesses*

Currently pending before the Court are two cases brought against the Federal Republic of Yugoslavia under the 1948 Convention on the Prevention and

Punishment of the Crime of Genocide. Bosnia and Herzegovina initiated proceedings in 1993, and Croatia in July 1999. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Yugoslavia has filed counter-claims (which the Court has declared admissible), asserting inter alia that Bosnia and Herzegovina is responsible for acts of genocide committed against the Serbs in Bosnia and Herzegovina.

The experience of the two International Criminal Tribunals (former Yugoslavia and Rwanda) reveals that establishing an international crime can be extremely fact-intensive. In particular, both tribunals have heard large numbers of live witnesses; up to 150 in one recent ICTY case. Of course, as a criminal tribunal, the ICTY is required by its rules to hear all witnesses presented by a party. There is no similar requirement in the Statute or Rules of the International Court of Justice, both of which contemplate,<sup>13</sup> but do not prescribe, witness (and expert) testimony.

The PCIJ heard witnesses on only one occasion, in 1926, in the case concerning *Certain German Interests in Polish Upper Silesia*. Witnesses, and witness-experts, have appeared before the present Court at the parties' instance<sup>14</sup> in several cases, including: *Corfu Channel*; *Temple of Preah Vihear*; *Military and Paramilitary Activities in and against Nicaragua*; *Land, Island and Maritime Frontier Dispute*; *Elettronica Sicula S.p.A. (ELSI)*, but never in such numbers as is customary before criminal tribunals. In the merits phase of the *Southwest Africa* cases, the Respondent called fifteen witnesses, who were heard from 18 June to 14 July 1965 and 20 September to 21 October 1965, at a total of forty sessions of the Court. It is therefore not inconceivable that the Court will be called upon, in these cases arising under the Genocide Convention, to make difficult and delicate evidentiary rulings on the subject of witness testimony, balancing equitable and fact-finding considerations against the exigencies of the Court's limited resources of time and funds.

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<sup>13</sup> See, e.g., Articles 43(5) ("The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.") and 51 of the Statute; Articles 57, 58, 62, 63, 64, 65, 68, 70 and 71 of the Rules of Court.

<sup>14</sup> Although contemplated by the Rules, there has never been a case in which witnesses appeared before the Court at its own instance.

**Annex 26**

Chittharanjan Amerasinghe, *Evidence in International Litigation* (2005)





**EVIDENCE  
IN  
INTERNATIONAL LITIGATION**

by

**CHITTHARANJAN F. AMERASINGHE**

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### **Annex 27**

Maurice Kamto, “Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle”, 49 *German Yearbook of International Law* 259 (2006)



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GENERAL ARTICLES

**Les moyens de preuve devant la Cour internationale  
de Justice à la lumière de quelques affaires  
récentes portées devant elle**

Par Maurice Kamto

**A. Introduction**

La preuve est un élément essentiel dans tout procès. S'il est de coutume de dire que les faits sont sacrés, c'est parce qu'ils conditionnent une bonne application de la règle de droit dans le cadre d'un contentieux. Pour cette raison, ils doivent être avérés, attestés, vérifiables et vérifiés, et ceci ne peut se faire qu'au moyen des preuves. Les éléments de fait et de preuve peuvent conditionner, du reste, la compétence de la CIJ appelée à exercer sa fonction consultative et, en tout cas, la qualité du matériau probatoire détermine

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<sup>\*</sup> Professeur des Facultés de Droit, Membre de la Commission de droit international des Nations Unies, Membre associé de l'Institut de droit international. Cet article est la version développée d'une communication présentée par l'auteur au « Colloque du 60<sup>e</sup> anniversaire de la CIJ » organisée par celle-ci à son siège à La Haye, du 10 au 12 mars 2006.

<sup>1</sup> Dans la procédure concernant les *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé* (avis du 9 juillet 2004, CIJ Recueil 2004, 136 (*Conséquences juridiques de l'édification d'un mur*)), plusieurs participants à la procédure ont soutenu que la Cour devrait refuser d'exercer sa compétence, motif pris de ce qu'elle ne dispose pas des faits et des éléments de preuve nécessaires pour lui permettre de formuler des conclusions ». S'appuyant sur l'avis consultatif relatif à l'*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie* (avis du 30 mars 1950, CIJ Recueil 1950, 65 (*Interprétation des traités de paix*)) Israël en particulier estimait « que la Cour ne saurait donner un avis sur des questions soulevant des points de fait qui ne peuvent être éclairés contradictoirement » (*Conséquences juridiques de l'édification d'un mur*, § 55). Certes, dans la procédure con-

généralement l'issue du procès. On comprend que les parties aient recours aux moyens les plus divers – à tous les moyens possibles à vrai dire – pour faire pencher la balance.

On entend par moyens de preuve, les matériaux apportés par une partie à un différend, de sa propre initiative ou à la demande de la juridiction saisie, pour la démonstration de la réalité d'un fait qu'elle allègue ou d'un titre juridique qu'elle revendique. Le droit international et la CIJ dans sa pratique sont si peu formalistes qu'ils n'imposent aucune limitation aux moyens de preuve ni pour leur volume, ni en ce qui concerne leur nature, bien que la Cour ne cesse d'en appeler à la modération des parties dans la production quantitative des annexes documentaires à leurs écritures. En tout état de cause, la jurisprudence de la Cour ne laisse pas apparaître une typologie en la matière : elle suggère simplement une hiérarchie de la valeur probatoire des éléments de preuve qui peut varier, du reste, en fonction des circonstances propres à chaque espèce.

L'administration de la preuve est guidée par un certain nombre de principes dont ne se départit pas la Cour et qui correspondent à autant de pouvoirs qu'elle peut exercer en la matière au cours du procès. Ces principes n'éliminent cependant pas les difficultés auxquelles sont confrontées, et les parties pour leur production, et la Cour dans leur appréciation. C'est un principe établi en droit international qu'il incombe à chaque plaideur qui cherche à établir l'existence

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cernant le *Statut de la Carélie orientale*, la CPJI (avis du 23 juillet 1923, Série B N°5, 28) a décidé de refuser de donner un avis, entre autres, parce que la question posée « soulevait des points de fait qui ne pouvaient être éclaircis que contradictoirement », pour reprendre la formule précitée de l'avis consultatif dans la procédure relative à l'*Interprétation des traités de paix* (72). Mais la vraie question est celle de savoir, comme l'a fait observer la Cour, si les éléments dont elle dispose dans un cas donné « sont suffisants » pour lui permettre de donner un avis consultatif. Cette question « doit être tranchée dans chaque cas particulier », dit la Cour (*Conséquences juridiques de l'édification d'un mur*, § 56). C'est ainsi que dans son avis sus-cité relatif à l'*Interprétation des traités de paix*, puis dans l'avis sur le *Sahara occidental*, elle a bien indiqué que ce qui était décisif dans ces circonstances était de savoir « si la Cour dispose de renseignements et d'éléments de preuve suffisants pour être à même de porter un jugement sur toute question de fait contestée et qu'il lui faudrait établir pour se prononcer d'une manière conforme à son caractère judiciaire » (*Sahara occidental*, avis du 16 octobre 1975, CIJ Recueil 1975, 12, § 46 : *Conséquences juridiques de l'édification d'un mur*, § 56). Or, en l'espèce, comme ce fut le cas dans l'affaire du *Sahara occidental* (§ 47), la Cour a estimé qu'« elle dispose de renseignements et d'éléments de preuve suffisants pour lui permettre de donner l'avis consultatif demandé par l'Assemblée générale » (*Conséquences juridiques de l'édification d'un mur*, § 58).

d'un fait d'en apporter la preuve :<sup>2</sup> de même, il lui incombe de démontrer l'existence et la validité d'une règle qu'il invoque aux fins d'asseoir son argumentation juridique. C'est donc aux parties à un procès devant la Cour de prouver les faits de leur cause, à chacune d'entre elles de convaincre la Cour de la réalité, de l'exactitude et de l'authenticité de chaque donnée factuelle (événement, document, déclaration, *etc.*) qu'elle invoque et d'établir sa pertinence en tant qu'élément de preuve au regard de l'espèce.

L'effet du facteur temporel sur la valeur probatoire de certains éléments produits par les parties ne peut être négligé. La pratique montre en effet que la pertinence d'un élément de preuve ainsi que son poids spécifique parmi les matériaux probatoires dans une affaire dépendent du moment à partir duquel ledit élément de preuve existe, ou a été constitué, par rapport au fait ou à la situation dont on veut établir l'existence ou la véracité.

Sur la base de ces quelques considérations liminaires, on examinera successivement, à la lumière de la seule jurisprudence récente de la Cour : les pouvoirs de la Cour en matière d'admission et d'appréciation des moyens de preuve (B.), les difficultés liées à l'administration de la preuve (C.), et enfin le rapport de la preuve au temps (D.).

### **B. Pouvoirs de la Cour en matière d'admission et d'appréciation des moyens de preuve**

Lorsqu'elle est appelée à se prononcer sur les faits, la Cour procède nécessairement à une évaluation des preuves fournies par les parties pour étayer leurs points de vue respectifs. Sa tâche ne se limite pas à trancher la question de savoir lesquels parmi les matériaux produits à cette fin doivent être considérés

<sup>2</sup> La Cour l'a affirmé dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt du 26 novembre 1984, CIJ Recueil 1984, 392, § 101 ; elle l'a rappelé dans l'affaire *Avena et autres ressortissants mexicains* (Mexique c. Etats-Unis d'Amérique), arrêt du 31 mars 2004, CIJ Recueil 2004, 12, § 55, parce que les parties n'étaient d'accord « ni sur ce que chacune d'elles doit prouver en ce qui concerne la nationalité aux fins de l'application du paragraphe 1 de l'article 36, ni sur la manière dont les principes régissant la preuve ont été respectés dans chaque cas en ce qui concerne les faits » (*ibid.*, § 54).



comme pertinents ; « elle est aussi de déterminer ceux qui revêtent une valeur probante à l'égard des faits allégués ».<sup>3</sup>

Pour procéder à l'appréciation de la valeur probante des éléments de preuve, la Cour se laisse guider par un certain nombre de principes qu'elle applique en fonction des circonstances de chaque espèce. A cet égard, elle revendique la maîtrise du choix des éléments de preuve à prendre en compte et du poids à leur attacher.

### I. Pouvoir d'admission des preuves

En règle générale, tous les moyens ou modes de preuve sont recevables devant la Cour : il n'existe généralement pas de règle d'exclusion liée à leur nature.<sup>4</sup> Le principe fondamental en la matière est la libre admissibilité des preuves par le juge international. Ce principe s'entend non seulement comme permettant aux parties de présenter toutes les preuves qu'elles désirent, mais également comme donnant à la Cour le pouvoir de les admettre ou de les écarter. Il se dégage de la jurisprudence et des opinions de certains juges de la Cour<sup>5</sup> et d'autres juridictions internationales, mais aussi de nombreuses dispositions de compromis, de statuts ou de règlements de procédure des juridictions internationales ainsi que de la doctrine.<sup>6</sup>

Le principe de la libre admissibilité des preuves ne fera pas l'objet de développements particuliers ici, la jurisprudence récente de la Cour n'y apportant pas d'éléments nouveaux.

<sup>3</sup> CIJ, *Activités armées sur le territoire du Congo* (République démocratique du Congo c. Ouganda), arrêt du 19 décembre 2005, § 58, disponible sur : <http://www.icj-cij.org/cijwww/cdoCKET/cco/ccoFRAME.htm> (*Activités armées*).

<sup>4</sup> V. *Gérard Niyungeko*, *La preuve devant les juridictions internationales* (2005), 240.

<sup>5</sup> V. CPIJ, *Certains intérêts allemands en Haute-Silésie polonaise*, arrêt du 25 mai 1926, Série A, n° 7, 72–73. Déclaration du Président de la Cour dans l'affaire du *Sud-Ouest africain*, CIJ Mémoires, vol. X, 123 ; CIJ, *Application de la Convention pour la prévention et la répression du crime de génocide* (Bosnie-Herzégovine c. Serbie et Monténégro), mesures conservatoires, ordonnance du 13 septembre 1993, op. ind. du juge *de Shahabuddeen*, CIJ Recueil 1993, 325 ; CPIJ, *Oscar Chim*, arrêt du 12 décembre 1934, op. ind. du juge *Van Eysinga*, Série A/B, n° 63, 146.

<sup>6</sup> *Niyungeko* (note 4), 240–255.

## II. Pouvoir d'appréciation des éléments de preuve

Le principe de la libre admissibilité des preuves s'accompagne naturellement du principe de la libre appréciation des éléments de preuve produits par les parties. L'examen de la jurisprudence récente de la Cour laisse apparaître une évolution, allant d'une période caractérisée par le défaut de critères d'appréciation vers la définition d'une méthodologie et des standards d'évaluation des éléments de preuve produits par les parties à un différend devant la Cour.

### *1. La tentation de l'intime conviction*

La liberté dont dispose la Cour en matière d'appréciation des éléments de preuve paraît totale et a pu apparaître, au moins jusqu'à l'arrêt rendu dans l'affaire des *Activités armées sur le territoire du Congo*,<sup>7</sup> arbitraire en raison de l'absence d'une méthode d'évaluation précise et de motivation des choix de la Cour en la matière. On constate à cet égard, d'une part, une appréciation indifférenciée de matériaux probatoires, souvent composites, produits par les parties, d'autre part, un défaut de critère ou de norme (ou « *standard* ») d'appréciation des éléments de preuve permettant d'accueillir un élément comme preuve suffisante.

Dans l'affaire des *Plates-formes pétrolières*<sup>8</sup> par exemple, les Etats-Unis avaient produit des éléments de preuve à l'appui de l'allégation selon laquelle ils avaient agi au titre de la légitime défense parce qu'ils étaient fondés à prendre les plates-formes iraniennes pour cibles d'une attaque armée. Ces éléments de preuve visaient

à indiquer que les plates-formes recueillaient et transmettaient des renseignements sur les mouvements de navires, servaient de relais de communication militaire aux fins de coordonner les forces navales iraniennes et faisaient fonction de bases logistiques à partir desquelles étaient menées, au moyen d'hélicoptères et de petites embarcations, des attaques contre des navires de commerce neutres. Les Etats-Unis ont fait état de documents et d'autres éléments découverts par leurs forces à bord du

<sup>7</sup> Note 3.

<sup>8</sup> CIJ, *Plates-formes pétrolières* (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt du 6 novembre 2003, CIJ Recueil 2003, 161.

navire *Iran Ajr* [...], qui établiraient que les plates-formes de Reshadat serviraient de stations de communication militaire<sup>9</sup>

note la Cour dans sa décision. L'Iran avait récusé ces éléments de preuve.<sup>10</sup>

Or, face à une controverse portant sur autant d'éléments de preuve, fondés ou non, la Cour, sans exposer la démarche suivie dans l'examen et l'évaluation des éléments produits, tranche d'une phrase :

La Cour n'est pas pleinement convaincue que les éléments de preuve dont elle dispose étaient les allégations des Etats-Unis quant à l'importance des activités et de la présence militaires sur les plates-formes pétrolières de Reshadat, et elle relève qu'aucun élément n'a été produit en ce sens s'agissant des complexes de Salman et de Nasr.<sup>11</sup>

La première partie de cette phrase est déconcertante : ce n'est pas une motivation fondée sur une évaluation circonstanciée des faits, mais de l'*intime conviction*. On peut douter qu'il soit de bonne politique judiciaire ou de bonne doctrine juridique pour la Cour de trancher sur la base de l'intime conviction, qui plus est dans un contentieux civil, en particulier celui de la responsabilité de l'Etat.

Cette manière de procéder, qui a incontestablement affaibli l'arrêt de la Cour sur ce point, a été critiquée à juste titre, et de l'intérieur même de la haute juridiction. Dans son opinion individuelle au style plutôt vigoureux, le Juge *Higgins* déplorait que « la Cour n'explique [pas] quel est le *critère* de preuve à satisfaire ». <sup>12</sup> Selon le Juge, la Cour était coutumière d'un tel manquement, notamment dans l'affaire du *Détroit de Corfou*<sup>13</sup> et dans l'affaire des *Activités militaires et paramilitaires au Nicaragua et contre celui-ci*,<sup>14</sup> ce qui contraste avec l'attitude d'autres juridictions et certains tribunaux arbitraux qui ont dû

<sup>9</sup> *Ibid.*, § 74.

<sup>10</sup> *Ibid.*, § 75.

<sup>11</sup> *Ibid.*, § 76.

<sup>12</sup> Op. ind. de Mme le Juge *Higgins*, *ibid.*, 225, § 30 (italique original).

<sup>13</sup> CIJ, *Détroit de Corfou* (Royaume-Uni c. Albanie), fond, arrêt du 9 avril 1949, CIJ Recueil 1949, 4, 17 : la Cour a rejeté des preuves « sans force probante suffisante » et expliqué alors qu'il fallait tabler sur « un degré de certitude » (*ibid.*, 17).

<sup>14</sup> CIJ, *Activités militaires et paramilitaires au Nicaragua et contre celui-ci* (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt du 27 juin 1986, CIJ Recueil 1986, 14, §§ 54, 110, 159 et 216 (*Nicaragua*) : la Cour n'a même pas cherché à définir le critère de preuve qu'elle retenait dans cette affaire, se contentant de déclarer de temps à autre (v. les références ci-dessus) que selon elle, les preuves présentées n'établissaient « pas suffisamment » tel ou tel autre fait (op. ind. de Mme le Juge *Higgins* (note 12), § 32).

accepter l'obligation de procéder eux-mêmes, « de façon parfois détaillée », à la tâche juridique consistant à indiquer aux parties comparaissant devant eux comment elles peuvent s'acquitter de la charge de produire des preuves fiables à la satisfaction de la juridiction concernée.<sup>15</sup> Mme *Higgins* reprochait à la Cour de ne chercher « nullement à faire un tri, à classer [les éléments de preuve] ni à les examiner » et n'avait pas hésité à conclure, d'une formule sans appel, que « sa méthodologie laiss[ait] à désirer ».<sup>16</sup>

## 2. L'affirmation d'une méthodologie basée sur un examen détaillé et organisé des faits de chaque espèce

Cette critique semble avoir eu un écho au sein de la Cour, et pour cause. Sous l'influence probable du Juge *Higgins*, devenu entre temps Président, la Cour a exposé de façon détaillée la démarche qu'elle entendait suivre dans l'appréciation des éléments de preuve dans l'affaire des *Activités armées*. Le nombre de cas de violations d'obligations internationales alléguées par les parties ainsi que la quantité et la diversité des matériaux probatoires produits à l'appui de ces allégations étaient, comme l'a relevé le Président de la Cour, « *unprecedented* »<sup>17</sup> et les nombreuses et importantes questions, tant juridiques que factuelles, soulevées par cette abondante documentation,<sup>18</sup> d'autant plus

<sup>15</sup> Il est fait référence à cet égard notamment à la décision de la Commission des réclamations Erythrée/Ethiopie dans l'affaire *Les Prisonniers de guerre* (n°17 de l'Erythrée, Sentence partielle du 1<sup>er</sup> juillet 2003, §§ 43–53, disponible sur : <http://www.pca-cpa.org/ENGLISH/RPC/EECC/ER17.pdf>) et à l'arrêt rendu le 29 juillet 1988 par la Cour interaméricaine des droits de l'homme dans l'affaire *Velásquez Rodríguez*, fond. ILR 95, 233, §§ 127–139. Il n'est pas inutile d'indiquer que le Juge *Higgins* a été membre de la Commission des réclamations Erythrée/Ethiopie et qu'à ce titre, elle a certainement contribué à établir une méthodologie en matière d'appréciation des éléments de preuve qu'elle a finalement réussi à introduire dans l'élaboration des arrêts de la Cour sous sa présidence, comme le montre l'arrêt du 19 décembre 2005 dans l'affaire *Activités armées* (note 3) examiné ci-après.

<sup>16</sup> Op. ind. de Mme le Juge *Higgins* (note 12), §§ 38 et suiv.

<sup>17</sup> Speech by H.E. Judge *Rosalyn Higgins*, President of the International Court of Justice at the 58th Session of the International Law Commission, 25 July 2006, disponible sur : [http://www.icj-cij.org/icjwww/w/presscom/SPEECHES/speechpresident\\_higgins\\_20060725.htm](http://www.icj-cij.org/icjwww/w/presscom/SPEECHES/speechpresident_higgins_20060725.htm), 4.

<sup>18</sup> L'affaire *Nicaragua* (note 14) avait déjà donné un aperçu du volume, du rôle et des difficultés d'appréciation des éléments de preuve dans ce type de contentieux.



déliçates à apprécier que les éléments de preuve fournis étaient pour la plupart imprécis ou de source non neutre.<sup>19</sup> La Cour

estime que l'Ouganda n'a pas produit de preuves suffisantes démontrant l'implication des autorités zaïroises dans un soutien politique et militaire à certaines attaques contre le territoire ougandais. La majeure partie des éléments de preuve présentés consistent en des informations non corroborées provenant des services de renseignement militaires ougandais, et dont la source n'est généralement pas indiquée. Un grand nombre de ces documents ne sont pas signés. En outre, de nombreux autres documents ont été présentés à titre d'éléments de preuve par l'Ouganda, tels que l'allocution prononcée par le président Museveni devant le Parlement ougandais le 28 mai 2000, intitulée « Le rôle de l'Ouganda en République démocratique du Congo », et le document intitulé « Illustration chronologique des actes de déstabilisation des dissidents basés au Soudan et au Congo ». Dans les circonstances de l'espèce, ces documents n'ont qu'une valeur probante réduite, car ils n'ont pas été invoqués par l'autre Partie ni corroborés par des sources impartiales et neutres. Même les documents supposés contenir des récits de témoins oculaires sont vagues et, par conséquent, peu convaincants. Ainsi, les informations présentées comme émanant d'un déserteur des FDA, et figurant à l'annexe 60 du contre-mémoire, se limitent à la déclaration suivante : « En 1996, sous le régime de Mobutu, et avant l'attaque de Mpondwe, les FDA ont reçu des armes du Gouvernement soudanais, avec l'aide du Gouvernement zaïrois ». Les quelques rapports d'organisations non gouvernementales présentés par l'Ouganda (par exemple un rapport de HRW) sont de caractère trop général pour étayer l'allégation d'une implication congolaise si importante que la responsabilité de l'Etat en serait engagée.<sup>20</sup>

Afin de se prononcer sur des éléments aussi variés, tant du point de vue de leur origine que de leur contenu, la Cour a commencé par définir de façon précise la démarche qu'elle entendait suivre et qui, pensons-nous, pourra tenir lieu de ligne méthodologique en matière d'examen des preuves. Considérant, en effet, les faits se rapportant aux divers éléments constitutifs des demandes formulées par les parties dans cette affaire, la Cour écrit qu'

elle répertoriera les documents invoqués et se prononcera clairement sur le poids, la fiabilité et la valeur qu'elle juge devoir leur être reconnus. Conformément à sa pratique antérieure, la Cour indiquera quels sont les éléments qu'elle estime ne pas devoir examiner plus avant (voir *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, fond, arrêt, C.I.J. Recueil

<sup>19</sup> La Cour était confrontée à un matériel probatoire aussi hétérogène dans la procédure relative aux *Conséquences juridiques de l'édification d'un mur* (note 1). Elle a privilégié les nombreux rapports fondés sur des visites effectuées sur le terrain par des rapporteurs spéciaux et des organes compétents des Nations Unies ainsi que l'exposé écrit du Secrétaire général complétant les informations fournies dans son rapport (v. *ibid.*, notamment §§ 57 et 133 : op. ind. de Mme le Juge Higgins, *ibid.*, 207, § 40).

<sup>20</sup> *Activités armées* (note 3), § 298.

1986, p. 50, par. 85 ; voir également la pratique suivie dans l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, arrêt, C.I.J. Recueil 1980, p. 3).<sup>21</sup>

La Cour a dégagé dans cette affaire des *Activités armées* quelques règles de base devant guider l'appréciation, par elle, des éléments de preuve et qu'il convient de rappeler dans le contexte du présent propos, en raison de leur portée générale. Elle écrit :

La Cour traitera avec prudence les éléments de preuve spécialement établis aux fins de l'affaire ainsi que ceux provenant d'une source unique. Elle leur préférera des informations fournies à l'époque des événements par des personnes ayant eu de ceux-ci une connaissance directe. Elle prêter une attention toute particulière aux éléments de preuve dignes de foi attestant de faits ou de comportements défavorables à l'Etat que représente celui dont émanent lesdits éléments (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, fond, arrêt, C.I.J. Recueil 1986, p. 14, par 64). La Cour accordera également du poids à des éléments de preuve dont l'exactitude n'a pas, même avant le présent différend, été contestée par des sources impartiales. La Cour relève par ailleurs qu'une attention particulière mérite d'être prêtée aux éléments de preuve obtenus par l'audition d'individus directement concernés et soumis à un contre-interrogatoire par des juges rompus à l'examen et à l'appréciation de grandes quantités d'informations factuelles, parfois de nature technique.<sup>22</sup>

Ainsi, de même que la Cour n'est liée par aucun système de preuve, elle apprécie souverainement les éléments de preuve fournis. Pour autant, elle ne procède pas, comme on peut le noter, de façon arbitraire. Elle s'est donnée des règles et se construit une méthodologie en la matière qu'elle est nécessairement appelée à ajuster en fonction de l'espèce et des difficultés à administrer la preuve dans certaines affaires. Elle ne peut plus se focaliser seulement sur les questions juridiques soulevées par une espèce ; elle se doit d'examiner attentivement et de soupeser chaque élément de preuve produit.

### C. Difficultés liées à l'administration de la preuve

Certaines de ces difficultés tiennent aux types de moyens de preuve choisis par les parties, d'autres sont liées à l'accès aux éléments de preuve.

<sup>21</sup> *Ibid.*, § 59.

<sup>22</sup> *Ibid.*, § 61.

### I. Difficultés liées aux types de moyens de preuve

On appréciera ces difficultés à la lumière de cinq types de moyens de preuve auxquelles les parties ont eu recours dans des affaires récentes ou dont l'exploitation aurait pu mieux informer la décision de la Cour dans certaines de ces affaires : le matériau cartographique, la descente sur les lieux, les textes coloniaux, les affidavits et autres témoignages, les consultations des spécialistes.

#### 1. Le matériau cartographique

Le matériau cartographique constitue assurément un des moyens de preuve le plus usité dans les différends frontaliers et territoriaux. Les cartes ont pour elles la force de l'évidence visuelle : la prétention étayée par une carte saute aux yeux immédiatement et *a priori* parle plus fort que tous les discours.

L'importance des cartes dépend de leur statut juridique, leur provenance, leur auteur et les circonstances dans lesquelles elles ont été dressées, mais aussi de leur finalité ainsi que de la cohérence d'une série de cartes générales ou particulières se rapportant aux limites qui y sont représentées. Le statut juridique du matériau cartographique est tributaire de l'identité de son auteur et de son intention. La carte peut être l'expression de la volonté des parties concernées. Bien que la tendance de la jurisprudence de la Cour – suivant en cela la jurisprudence arbitrale et une opinion doctrinale établie<sup>23</sup> – soit de limiter la valeur juridique des cartes à celle « d'une preuve concordante qui conforte une conclusion à laquelle le juge est parvenu par d'autres moyens indépendants des cartes »,<sup>24</sup> rien n'empêche qu'une carte puisse dans certains cas constituer par elle-même un titre juridique, alors que dans d'autres cas elle ne sera que la

<sup>23</sup> V. entre autres *Durward V. Sandifer*, Evidence before International Tribunal (1975), notamment 230 ; *Sakeus Akweenda*, The legal significance of maps in boundary questions: A reappraisal with particular emphasis on Namibia, BYIL 60 (1989), 205.

<sup>24</sup> CIJ, *Affaire du différend frontalier* (Burkina Faso c. République du Mali), arrêt du 22 décembre 1986, CIJ Recueil 1986, 554, § 56 ; CIJ, *Affaire du différend frontalier terrestre, insulaire et maritime* (El Salvador c. Honduras ; Nicaragua (intervenants)), avis du 11 septembre 1992, CIJ Recueil 1992, 351, § 316.

preuve d'un titre.<sup>25</sup> A cet égard, les cartes établies par des tiers, qu'il s'agisse d'Etats ou d'organisations internationales, peuvent peser d'un poids bien plus important. Sans présenter nécessairement un caractère probatoire direct, elles participent de la notoriété générale de la ligne frontière.

Dans les contentieux frontaliers et territoriaux opposant d'anciennes colonies, le matériau cartographique est constitué pour l'essentiel de cartes dressées par les anciennes puissances coloniales dans le cadre de l'exercice de leur souveraineté sur les territoires concernés. Elles présentent un grand intérêt lorsqu'il s'agit de cartes établies par une même puissance dans le cadre de son empire colonial. Cet intérêt peut être plus relatif lorsque les cartes reflètent les vues et traduisent les comportements de deux puissances coloniales distinctes, agissant chacune au nom de ses intérêts propres.

La CIJ a systématisé sa doctrine sur la valeur probante des cartes dans l'affaire du *Différend frontalier* (Burkina Faso c. Mali), dans des termes qui en font, sur cette question, un arrêt de principe. Selon la Cour, « les cartes ne sont que de simples indications plus ou moins exactes selon les cas », même si dans quelques cas, elles « peuvent acquérir une valeur juridique », à condition que ces cartes aient été intégrées parmi les éléments qui constituent l'expression de la volonté de l'Etat ou des Etats concernés.<sup>26</sup> Cette position a été rappelée plus récemment, par le Tribunal arbitral dans l'affaire *Erythrée/Yémen (Phase I : territorial sovereignty and scope of Dispute)*,<sup>27</sup> par la Commission du tracé de la frontière Erythrée-Ethiopie statuant dans le cadre de la Cour permanente d'arbitrage,<sup>28</sup> et par la Cour elle-même dans l'affaire de l'*Île de Kasikili/Sedudu*<sup>29</sup> puis dans l'affaire relative à la *Souveraineté sur Pulau Litigan et*

<sup>25</sup> V. Maurice Kamto, Le matériau cartographique dans les contentieux frontaliers et territoriaux internationaux, dans : *Emile Yakpo/Tahar Boumedra* (dir.), *Liber Amicorum Judge Mohammed Bedjaoui* (1999), 371.

<sup>26</sup> *Différend frontalier* (Burkina Faso c. République du Mali) (note 24), § 54.

<sup>27</sup> Tribunal arbitral, *Phase I : territorial sovereignty and scope of Dispute* (Erythrée c. Yémen) (1998), RSA 22, 209, §§ 375 et 380-381.

<sup>28</sup> Tribunal arbitral, *Décision concernant la délimitation de la frontière entre l'Erythrée et l'Ethiopie* (Erythrée c. Yémen) (2002), RSA 25, 83, § 3.18.

<sup>29</sup> CIJ, *Île de Kasikili/Sedudu* (Botswana c. Namibie), arrêt du 13 décembre 1999, CIJ Recueil 1999, 1045, § 84.



*Pulau Sipadan*.<sup>30</sup> La Chambre de la Cour s'est laissée guider dans l'affaire *Bénin/Niger* par cette jurisprudence dont elle a rappelé la teneur.<sup>31</sup>

Encore faut-il que le matériau cartographique disponible permette d'y voir clair dans la détermination du tracé de la frontière. Or, dans la plupart des affaires, les cartes disponibles ne permettent pas de fixer le tracé de la frontière, en particulier lorsqu'elles sont à grande échelle. Dans l'affaire *Bénin/Niger* par exemple, on a eu affaire à un matériau cartographique et photographique volumineux, composite, « diversifié tant par la date que par l'origine, la qualité technique et le degré de précision »<sup>32</sup> : cartes d'ensemble ou générales, cartes de reconnaissance, cartes topographiques régulières réalisées à partir de la couverture photographique aérienne des années 1950, cartes dérivées obtenues à partir des cartes de base sans qu'il soit nécessaire d'effectuer de nouvelles opérations de terrain ou de restitution, croquis d'itinéraires ou plans de détails des explorateurs, atlas des cercles publiés en fascicules, cartes thématiques de toutes sortes, cartes publiées dans des revues spécialisées, cartes routières. De plus, ces cartes étaient généralement à très petites échelles (allant des cartes au 1/15.000.000 aux cartes au 1/200.000, une seule carte ayant une échelle de 1/50.000).

L'objectif de ce matériau cartographique était moins la détermination précise de la ligne frontalière sur le fleuve Niger que la représentation de son cours, généralement aux fins de la navigation ou du positionnement des îles. C'est pourquoi certaines de ces cartes ne portent aucun signe indiquant le tracé de la frontière : et sur celles qui en comportent, ces signes y sont placés tantôt à gauche, tantôt à droite du cours du fleuve.

Les changements de l'emplacement des signes indiquant la frontière conduisent à la conclusion à laquelle la Cour est parvenue dans l'affaire *Kasikili/Sedudu* :

<sup>30</sup> CIJ, *Souveraineté sur Pulau Litigan et Pulau Sipadan* (Indonésie c. Malaisie), arrêt du 17 décembre 2002, CIJ Recueil 2002, 625, « La Cour relève qu'en l'espèce aucune carte agréée par les Parties n'a été annexée à la convention de 1891, qui eût exprimé officiellement la volonté de la Grande-Bretagne et des Pays-Bas quant au prolongement de la ligne frontière vers le large, à l'est de Sebatik, en tant que ligne d'attribution » (*ibid.*, § 88).

<sup>31</sup> CIJ, *Différend frontalier* (Bénin c. Niger), arrêt du 12 juillet 2005, § 44, disponible sur : <http://www.icj-cij.org/cijwww/cdocket/cbn/cbnframe.htm>.

<sup>32</sup> *Ibid.*, § 40.

Eu égard à l'absence de toute carte traduisant la volonté officielle des parties [...] ainsi que de tout accord exprès ou tacite entre celles-ci ou leurs successeurs sur la validité de la frontière représentée par une carte (cf. *Temple de Préah Vihéar, fond. arrêt, C.I.J. Recueil 1962*, p. 33-35), et compte tenu du caractère incertain et contradictoire du matériau cartographique qui lui a été soumis, la Cour ne s'estime pas à même de tirer des conclusions du dossier cartographique produit en l'espèce. Si celui-ci ne peut dès lors « conforter[r] une conclusion à laquelle le juge est parvenu par d'autres moyens, indépendants des cartes » (*Différend frontalier (Burkina Faso / République du Mali), C.I.J. Recueil 1986*, p. 554, par. 56), il n'est pas davantage susceptible de modifier les résultats de l'interprétation textuelle du traité à laquelle la Cour a procédé.<sup>33</sup>

La qualité et la précision des cartes sont généralement source de controverses entre les parties et de difficultés pour la Cour dans sa tâche d'appréciation des éléments de preuve. En dépit de l'abondante jurisprudence précitée, le problème de la valeur probante des cartes anime toujours le débat judiciaire. Mais ce débat s'affine et semble tourner désormais autour de la question de savoir si une carte peut avoir, à certaines conditions, par elle-même, la nature d'un accord international, sans être nécessairement jointe à un traité ou considérée à la lumière de celui-ci. La question n'est évidemment pas posée dans ces termes devant la Cour mais le débat judiciaire la laisse transparaître derrière les arguments de certaines parties, comme le montre l'affaire relative à la *Souveraineté sur Pulau Litigan et Pulau Sipadan*.<sup>34</sup>

Dans cette affaire, en effet, l'Indonésie a estimé que nombre des cartes qu'elle avait produites participaient de « l'expression de la volonté de l'Etat ou des Etats concernés » et que même « [s]i ces cartes ne représent[ai]ent pas un titre territorial à elles seules, elles [avaient] d'autant plus de poids que la ligne conventionnelle de 1891 y figure de façon constante comme marquant la limite entre les possessions territoriales des Parties, y compris les îles ». <sup>35</sup> L'argument paraissait un peu osé par rapport à la doctrine traditionnelle, qui n'imaginait pas que des Etats puissent exprimer leur volonté dans ou par des cartes : encore reste-t-il quelque peu en retrait par rapport à la thèse selon laquelle la carte pourrait constituer, au bénéfice de certaines conditions de forme et de fond, un titre territorial autonome.

Or, la Cour a rejeté l'argument de l'Indonésie sans que l'on puisse affirmer pour autant qu'elle ait écarté une telle hypothèse. Elle dit ne pouvoir accueillir

<sup>33</sup> *Île de Kasikili/Sedudu* (note 29), § 87.

<sup>34</sup> Note 30.

<sup>35</sup> Cité par la Cour, *Affaire relative à la licéité de l'emploi de la force* (Yougoslavie c. Portugal), arrêt du 2 juin 1999, CIJ Recueil 1999, 656, § 82.

la thèse de l'Indonésie relative à la valeur juridique de la carte jointe au mémorandum explicatif du gouvernement néerlandais. Son raisonnement est le suivant :

La Cour observe que ce mémorandum explicatif et cette carte n'ont jamais été transmis par le Gouvernement néerlandais au Gouvernement britannique, mais ont seulement été adressés à ce dernier par son agent diplomatique à La Haye, sir Horace Rumbold. Cet agent précisait que la carte avait été publiée au journal officiel des Pays-Bas et faisait partie du rapport présenté à la deuxième Chambre des Etats-généraux. Il ajoutait que « la carte semble être le seul élément intéressant d'un document qui sinon n'appelle aucun commentaire particulier ». Toutefois, sir Horace Rumbold n'attirait pas l'attention de ses autorités sur la ligne rouge figurant sur la carte avec d'autres lignes. Le Gouvernement britannique ne réagit pas à cette transmission interne. Dans ces circonstances, une telle absence de réaction à l'égard de cette ligne sur la carte jointe au mémorandum ne saurait être considérée comme valant acquiescement à ladite ligne.

Il ressort de ce qui précède que ladite carte ne peut être regardée ni comme un « accord ayant rapport à un traité et qui est intervenu entre toutes les Parties à l'occasion de la conclusion d'un traité », au sens de l'alinéa a) du paragraphe 2 de l'article 31 de la convention de Vienne, ni comme un « instrument établi par une partie [...] à l'occasion de la conclusion du traité et accepté par les autres parties en tant qu'instrument ayant rapport au traité », au sens de l'alinéa b) du paragraphe 2 de l'article 31 de la convention de Vienne.<sup>36</sup>

La Cour a appliqué, en l'occurrence, les règles d'interprétation des traités, prévues par l'article 31 de la Convention de Vienne de 1969 sur le droit des traités<sup>37</sup>, à travers l'appréciation de la valeur juridique de l'annexe (la carte) à la lumière du texte (convention de 1891). Elle n'a pas examiné la nature conventionnelle éventuelle de la carte – cela ne lui était pas demandé – et n'a donc pas dit si celle-ci pouvait, en l'espèce ou dans certaines conditions, être considérée comme un « traité » au sens de l'article 2 a) de la Convention de Vienne sur le droit des traités. Une fois de plus, rien n'interdit, à notre avis, qu'il puisse en être ainsi, ce d'autant qu'on peut inférer – par *a contrario* – du passage précité de l'arrêt de la Cour, que celle-ci aurait pu regarder la carte en question comme un « accord ayant rapport à un traité », si la carte avait été transmise formellement au gouvernement britannique, si *Sir Horace Rumbold* avait attiré l'attention desdites autorités sur la ligne rouge figurant sur la carte avec d'autres lignes, et surtout si le gouvernement britannique avait réagi à la transmission de la carte par le gouvernement néerlandais.

<sup>36</sup> *Souveraineté sur Pulau Litigan et Pulau Sipadan* (note 30), § 48.

<sup>37</sup> Convention de Vienne sur le droit des traités, 23 mai 1969, RTNU 1155, 331.

Quand il s'agit de cartes ne constituant pas une pièce maîtresse de la preuve du tracé d'une frontière mais seulement susceptibles de contribuer à l'établissement de celle-ci, il sera de bonne pratique judiciaire de les écarter si elles sont imprécises. La difficulté est plus sérieuse lorsqu'il s'agit de cartes annexées à un traité auquel elles s'intègrent et apparaissent comme sa traduction figurative.<sup>38</sup>

En premier lieu, il se peut que les données contenues dans le traité ne coïncident pas avec les informations cartographiques. Quel élément devra-t-il prévaloir dans ce cas ? On peut suggérer que ce sera le traité, le texte écrit pouvant être présumé plus accessible à tous et refléter mieux l'intention des signataires du traité qu'une carte, qui est un document technique dont la vérification de la précision relève de la compétence des seuls spécialistes en cartographie.

En second lieu, la carte annexée peut s'avérer d'une qualité et d'une précision insuffisantes à la lumière des progrès techniques. La question est de savoir si la Cour peut, *proprio motu*, apporter des précisions à ladite carte ou si sa tâche doit se limiter à vérifier si la carte comporte bien un tracé. On peut être enclin à répondre par l'affirmative en appliquant, *mutatis mutandis*, aux cartes le principe d'interprétation dégagé par la Cour permanente au sujet des dispositions textuelles, selon lequel

il est naturel que tout article destiné à fixer une frontière soit, si possible, interprété de telle sorte que, par son application intégrale, une frontière précise, complète et définitive soit obtenue.<sup>39</sup>

Mais ce serait faire fausse route. D'abord, parce qu'en matière cartographique, il n'est pas question d'interprétation mais de précision : il ne s'agit donc pas de rechercher le sens que les auteurs de la carte voulaient donner à telle coordonnée ou tel signe conventionnel, les normes techniques étant en la matière connues et intangibles, sauf renouvellement par la communauté scientifique. Ensuite, et conséquemment, la précision des données d'une carte par la Cour, l'adaptation de son objet ou son actualisation technique ne peuvent se

<sup>38</sup> Comme la Cour l'a relevé dans l'affaire du *Différend territorial* (Libye c. Tchad), les parties peuvent « indiquer les frontières en précisant littéralement, le tracé ou en portant celui-ci sur une carte, à titre d'illustration ou à tout autre titre : elles [peuvent] faire l'un et l'autre » (CIJ, *Différend territorial* (Jamahiriya arabe libyenne c. Tchad), arrêt du 3 février 1994, CIJ Recueil 1994, 6, § 51).

<sup>39</sup> CPJI, *Interprétation de l'article 3, paragraphe 2, du traité de Lausanne*, avis du 21 novembre 1925, Série B, n° 12, 20 : passage rappelé par la Cour dans *Différend territorial* (note 38), § 47.



faire qu'à la demande expresse des parties – en cas de saisine par compromis – ou d'au moins une des parties au procès – en cas de saisine par requête. Qu'une carte destinée à la navigation ait pu servir de base pour le tracé d'une frontière maritime n'est pas le problème que la Cour est appelée à résoudre dans un contentieux de délimitation maritime, si la carte en question est accompagnée des coordonnées permettant d'effectuer un tracé. Il ne lui revient pas d'aller vérifier où tombe exactement tel point de coordonnée sur le terrain – opération de démarcation qui échappe à la compétence de la Cour – ni de convertir les coordonnées d'une carte dans un référentiel donné, faute pour cette carte de fournir le référentiel dans lequel elle a été établie. Le faire serait statuer *ultra petita*. Elle ne peut le faire le cas échéant qu'à la demande expresse des parties. Encore dans ce cas, la Cour ne pourra-t-elle s'appuyer que sur les services d'un expert.

En tout état de cause, la Cour évite autant que possible de s'engager dans l'appréciation des données techniques ou cartographiques. On ne peut apprécier autrement la position de la Cour dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigeria* lorsque, examinant la question d'un point triple dans le lac Tchad, elle écrit :

Malgré les incertitudes entourant la longitude exacte du tripoint dans le lac Tchad ainsi que la localisation de l'embouchure de l'Ebedji, et bien qu'il n'ait été procédé à aucune démarcation dans le lac Tchad avant l'indépendance du Nigeria et celle du Cameroun, la Cour estime qu'il ressort des instruments applicables que, à partir de 1931 à tout le moins, la frontière dans la région du lac Tchad avait bien été délimitée et approuvée par la Grande-Bretagne et la France.<sup>40</sup>

On sait que dans cette affaire, le Cameroun avait saisi la Cour aux fins de « préciser définitivement » la frontière et que sur cette base elle décida d'examiner les dix-sept points litigieux sur cette frontière soulevés par le Nigeria. Toutefois, la Cour les traita comme des questions d'« interprétation » ou d'« application » de tel ou tel passage des instruments de délimitation de la frontière, en se gardant bien de travailler directement à l'amélioration de la qualité et de la précision des cartes Moïsel jointes aux divers traités coloniaux délimitant la frontière entre le Cameroun et le Nigeria (notamment la carte Moïsel au 1/300 000 à laquelle fait référence la déclaration *Milner-Simon* de janvier 1919<sup>41</sup>) et qui présentent de toute évidence des insuffisances.

<sup>40</sup> CIJ, *Frontière terrestre et maritime entre le Cameroun et le Nigeria* (Cameroun c. Nigeria : Guinée équatoriale (intervenant)), arrêt du 10 octobre 2002, CIJ Recueil 2002, 303, § 52.

<sup>41</sup> Cf. *ibid.*, § 48.

Ce que la Cour a rappelé à propos du droit des puissances mandataires relativement à la détermination de la frontière vaut sur un plan général : des Etats limitrophes peuvent décider, « soit dans l'intérêt des habitants, soit par suite de l'inexactitude [d'une] carte », <sup>42</sup> de modifier la frontière et par suite les données cartographiques initiales. Ils peuvent le faire d'« un commun accord » : la Cour ne peut y procéder *sua sponte*.

## 2. La descente sur les lieux

Un des modes d'établissement de la preuve en droit international est la visite *locus in quo*. Comme les autres juridictions internationales, la Cour a le pouvoir d'ordonner des descentes sur les lieux ou des inspections des objets sur lesquels porte le litige. <sup>43</sup> Elle peut l'ordonner d'office ou à la demande des parties, ainsi qu'il ressort de l'article 66 de son Règlement de 1978. <sup>44</sup>

On constate que la haute juridiction mondiale ne recourt que très rarement à ce mode de preuve, encore est-ce à l'initiative des parties. En effet, en un demi siècle de fonctionnement la CIJ a effectué sa première – et pour l'instant son unique – descente sur les lieux dans l'affaire relative au *Projet Gabčikovo-Nagymaros*, à la demande conjointe des deux parties, la Slovaquie et la Hongrie, matérialisée notamment par un protocole d'accord du 14 novembre 1995 : <sup>45</sup> encore le *locus in quo*, dans cette affaire, n'avait-il pas pour but d'établir la preuve d'une situation, mais seulement de visiter le lieu où était prévu le projet en cause. Pour le moment, elle ne fait donc pas mieux que la CPJI qui fit une descente sur les lieux dans l'affaire des *Zones franches de la Haute-Savoie et du pays de Gex* à la demande d'un compromis d'arbitrage entre les gouvernements français et suisse. <sup>46</sup>

Il est regrettable, à la lumière de quelques affaires récentes dont elle a eu à connaître, que la Cour n'use pas du pouvoir qui lui est reconnu par son

<sup>42</sup> *Ibid.*, § 51 (nos italiques).

<sup>43</sup> *Niyungeko* (note 4), 230.

<sup>44</sup> Règlement de la Cour, 14 avril 1978, disponible sur : [http://www.icj-cij.org/cij/www/cdocumentbase/cbasictext/cbasicrulesofcourt\\_20050929.html](http://www.icj-cij.org/cij/www/cdocumentbase/cbasictext/cbasicrulesofcourt_20050929.html).

<sup>45</sup> CIJ, *Projet Gabčikovo-Nagymaros* (Hongrie c. Slovaquie), arrêt du 25 septembre 1997, CIJ Recueil 1997, 7, § 11.

<sup>46</sup> CPJI, *Zones franches de la Haute-Savoie et du pays de Gex*, avis du 30 octobre 1924, Série C, n° 17, vol. II, 493.

Règlement, de « décider d'office » d'exercer *in situ* ses fonctions relatives à l'établissement des preuves. Elle aurait assurément évité d'être induite en erreur ou de trancher certains points litigieux sur la base des impressions créées par une présentation inexacte de certains faits de la cause. Dans son ordonnance du 15 mars 1996 en indication des mesures conservatoires dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigeria*, elle avouait sa difficulté à connaître l'exactitude des faits au terme des plaidoiries des deux parties :

Considérant que les versions contradictoires que les Parties ont présentées des événements survenus le 3 février 1996 dans la presqu'île de Bakassi, ainsi que de ceux qui s'y sont à nouveau produits les 16 et 17 février 1996, n'ont pas permis à la Cour de se faire à ce stade une image claire et précise de ces événements.<sup>47</sup>

Elle dira plus tard dans son arrêt au fond, à propos, d'une part, des plaintes du Cameroun concernant « divers incidents frontaliers survenus non seulement à Bakassi et dans la région du lac Tchad mais encore en mer et tout le long de la frontière terrestre entre les deux Etats de 1970 à 2001 »,<sup>48</sup> et, d'autre part, des demandes reconventionnelles du Nigeria que, « là encore, aucune des Parties n'apporte de preuves suffisantes des faits qu'elle avance ou de leur imputabilité à l'autre Partie ». La Cour conclut qu'elle « ne saurait par suite accueillir ni les conclusions du Cameroun, ni les demandes reconventionnelles du Nigeria fondées sur les incidents invoqués ».<sup>49</sup>

La seule façon pour elle de se faire une opinion exacte, ou la plus proche possible, de la réalité eut été de faire une descente sur les lieux, de voir les positions des deux armées sur le front et d'interroger éventuellement les autorités civiles et militaires de la zone concernée. Elle aurait eu là également une occasion de se faire une idée claire de la géographie et de l'hydrographie de la zone, toutes choses qui lui auraient permis de mieux apprécier les chiffres des populations pouvant habiter la péninsule litigieuse. Or, il n'est pas douteux que

<sup>47</sup> CIJ, *Affaire de la frontière terrestre et maritime entre le Cameroun et le Nigeria* (Cameroun c. Nigeria), ordonnance du 15 mars 1996, CIJ Recueil 1996, 13, § 38. La Cour estima néanmoins que les déclarations faites par les parties montraient à suffisance « qu'il y a eu des incidents militaires et que ceux-ci ont causé des souffrances, des pertes en vies humaines – tant militaires que civiles –, des blessés et des disparus, ainsi que des dommages matériels importants » (*ibid.*) ; elle releva par voie de conséquence « que des actions armées sur le territoire en litige pourraient mettre en péril l'existence d'éléments de preuve pertinents au fin de la présente instance » (*ibid.*, § 42).

<sup>48</sup> *Frontière terrestre et maritime entre le Cameroun et le Nigeria* (note 40), § 323.

<sup>49</sup> *Ibid.*, § 324.

c'est au moins en partie sur la base de l'idée inexacte, selon laquelle la péninsule de Bakassi serait habitée par 150 000, 500 000 voire 1 000 000 Nigériens que la Cour a mis un accent particulier sur la nécessité pour la République du Cameroun d'assurer la protection des Nigériens habitant la péninsule et la région du lac Tchad, au point de « prendre acte »<sup>50</sup> dans le dispositif de son arrêt du 10 octobre 2002 de « l'engagement pris à l'audience » par l'agent du Cameroun à ce sujet, et ce en violation du « principe bien établi »<sup>51</sup>, selon lequel la Cour ne statue que sur les conclusions des parties, comme l'a rappelé le Juge *Para-Aranguren*<sup>52</sup> dans son opinion individuelle jointe à cet arrêt.

Un autre exemple tiré de la même affaire, qui plaide en faveur des descentes sur les lieux est la vérification d'un tracé frontalier controversé par les parties, notamment dans le secteur de la rivière Kerawa. Comme on l'a rappelé précédemment, la Cour avait accepté d'examiner dix-sept points litigieux soulevés par le Nigeria, au motif qu'elle voulait « préciser définitivement » la frontière, comme le Cameroun lui-même l'avait demandé dans sa requête introductive d'instance. Dans le secteur de la Kerawa, elle a suivi la demande du Nigeria, faisant passer la frontière juste à l'est de deux villages dénommés Shriwe et Ndeba qui se trouvent à l'emplacement actuel des villages Chérivé et Ndabakora et qu'elle laisse en territoire nigérian. Or, selon la Cour, « seul le chenal oriental remplit cette condition ».<sup>53</sup>

Sur le terrain cependant, il apparaît que le chenal oriental n'a pas un cours continu et, de plus, ni le paragraphe 18 de la déclaration *Thomson-Marchand*<sup>54</sup> décrivant la frontière dans cette zone, ni l'arrêt de la Cour du 10 octobre 2002 n'indiquent le point de rencontre entre le chenal oriental et le cours principal de la Kerawa par lequel se poursuit la frontière. Une descente sur le terrain aurait permis à la Cour de préciser, non seulement « définitivement », mais aussi

<sup>50</sup> *Ibid.*, § 325.

<sup>51</sup> CIJ, *Droit d'asile* (Colombie c. Pérou), fond. arrêt du 20 novembre 1950, CIJ Recueil 1950, 395, 402.

<sup>52</sup> Comme l'a relevé le Juge, ni le Cameroun ni le Nigeria n'avaient demandé à la Cour dans leurs conclusions de prendre acte de cela. Dès lors, au regard de ce que la Cour elle-même a dit dans l'affaire du *Mandat d'arrêt*, elle a statué *ultra petita* (*Mandat d'arrêt du 11 avril 2000* (République démocratique du Congo c. Belgique), arrêt du 14 février 2002, CIJ Recueil 2002, 3, § 43).

<sup>53</sup> *Frontière terrestre et maritime entre le Cameroun et le Nigeria* (note 40), § 95.

<sup>54</sup> V. pour le paragraphe 18 de la déclaration *Thomson-Marchand* l'arrêt de la Cour dans l'affaire *Frontière terrestre et maritime entre le Cameroun et le Nigeria* (note 40), § 92.



complètement, la frontière dans ce secteur où le vide constaté est source de désaccord profond entre les deux Etats.

### 3. Les textes coloniaux, éléments de preuve du « titre colonial » ou titres juridiques ?

Dans l'espace colonial, en particulier dans l'empire colonial français, les limites territoriales n'étaient rien d'autre que des délimitations entre différentes divisions administratives ou colonies relevant de la même autorité coloniale. Ces limites intercoloniales ne sont devenues des frontières internationales entre Etats qu'au moment de l'indépendance ; ce moment constitue la « date critique » dans les contentieux frontaliers ou territoriaux entre d'anciens territoires coloniaux. Comme la Chambre de la Cour l'a rappelé récemment dans l'affaire *Bénin/Niger*, dans l'application du principe de l'*uti possidetis juris*, elle considère le droit colonial, dans ce contexte,

« non en tant que tel (comme s'il y avait un *continuum juris*, un relais juridique entre ce droit et le droit international), mais seulement comme un élément de fait, parmi d'autres, ou comme moyen de preuve et de démonstration ... [du] « legs colonial » » (*Différend frontalier (Burkina Faso/République du Mali)*, arrêt, C.I.J. Recueil 1986, p. 554, par. 30).<sup>55</sup>

Cette jurisprudence de la Cour amène à s'interroger sur le statut exact de ces règles du droit colonial en droit international. Si elles sont, comme l'affirme la Cour, de simples éléments de fait parmi d'autres, elles ne sauraient constituer en elles-mêmes, ou à elles seules, un titre juridique. Comme moyens de preuve, leur valeur probatoire en droit international dépend de leur validité au regard du droit colonial, que la doctrine française appelait aussi « droit d'outre-mer ». Mais de quoi seraient-elles donc la preuve ? La Cour répond : « du legs colonial » à la date critique. Mais qu'est-ce donc ce « legs colonial » ? La limite telle qu'elle résulte des textes coloniaux en question, assurément. Ce sont donc lesdits textes qui fixent ce qui devient frontière intercoloniale à la date critique, en l'occurrence celle de l'accession à l'indépendance. Autrement dit, en bonne logique, une fois établie la validité des textes coloniaux établissant les limites intercoloniales au regard du droit colonial, ces textes ne sont plus seulement des éléments de preuve, ils deviennent le *titre juridique*-même en vertu duquel l'un et l'autre Etat peuvent revendiquer une frontière intercoloniale ou une parcelle

<sup>55</sup> *Différend frontalier (Bénin c. Niger)* (note 31), §§ 28 et 46.

territoriale. La Chambre de la Cour laisse percer cette façon de voir dans son arrêt du 12 juillet 2005 dans l'affaire *Bénin/Niger* lorsqu'elle écrit :

Conformément à la démarche adoptée par la Chambre dans l'affaire du *Différend frontalier (Burkina Faso/République du Mali)*, la Chambre commencera par examiner les divers actes réglementaires ou administratifs invoqués par les Parties : en effet, aux fins de l'établissement de la souveraineté, le *titre juridique* l'emporte sur la possession effective (*C.I.J. Recueil 1986*, p. 554, par. 63).<sup>56</sup>

Ce disant, elle semble considérer que les actes réglementaires ou administratifs peuvent constituer, si leur validité au regard du droit colonial est établie, un « titre juridique ». Or, s'ils constituent un titre juridique, ils ne peuvent être en même temps la preuve dudit titre ; une chose ne peut être la preuve d'elle-même : elle doit être attestée par quelqu'un ou par quelque chose d'autre : une externalité paraît nécessaire. Ainsi donc, de la même manière que les limites territoriales coloniales « devien[nent] des frontières intercoloniales » au moment de l'indépendance, les textes coloniaux se transforment de preuves en titres juridiques à cette date critique. C'est un exemple remarquable de transmutation du fait juridique en droit et de la preuve en acte juridique international, soit par accord entre les parties, soit à la faveur d'une décision du juge international.

#### 4. *Témoignages, affidavits et sommations interpellatives*

Un autre moyen de preuve utilisé dans une affaire récente devant la Cour et dont on peut douter de la valeur pratique est constitué des témoignages. Dans l'affaire de l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*,<sup>57</sup> la Cour a, comme l'a révélé son Président, Mme *Higgins*,<sup>58</sup> anticipé plusieurs questions susceptibles de se poser en matière de preuves par témoignages et d'examen des témoins. Elle a fait quelques propositions préliminaires, notamment sur les points de savoir si l'audition des témoins devrait être précédée des affidavits,

<sup>56</sup> *Ibid.*, § 47.

<sup>57</sup> V. CIJ, *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro))*, mesures conservatoires, ordonnance du 8 avril 1993, CIJ Recueil 1993, 3 ; et surtout CIJ, *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, exceptions préliminaires, arrêt du 11 juillet 1996, CIJ Recueil 1996, 595.

<sup>58</sup> V. *Higgins* (note 17), 9–10.

comment organiser le contre-interrogatoire (« *cross-examination* »), assurer la confidentialité des témoignages pendant les auditions, quel type de traduction mettre à la disposition des témoins et de la Cour. On voit bien la délicatesse de ces questions pratiques et les conséquences qu'elles pourraient avoir aussi bien sur le déroulement que sur l'issue du procès. C'est pourquoi la Cour dut faire des arrangements particuliers avec la presse, sur la façon de gérer l'information à cet égard : elle mit également en place un plan pour aborder les témoins fort nombreux mais de niveau inégal, initialement listés, sans bloquer totalement le reste de son activité. A l'occasion, le nombre de témoins appelés fut réduit à des dimensions gérables par la Cour.

Les témoignages peuvent aussi être présentés sous forme de « sommations interpellatives ». <sup>59</sup> Une des parties y a recouru dans l'affaire du *Différend frontalier* (Bénin c. Niger) devant une Chambre de la Cour.

La première question qui se pose est celle de la nature de ces témoignages. S'agit-il d'affidavits ou de simples déclarations de personnes présentées comme étant des témoins ? En droit international, un affidavit s'entend d'une « déclaration écrite sous serment par l'intéressé ou un témoin devant l'autorité interne compétente, portant sur certains faits ou sur l'authenticité de certains documents sur lesquels s'appuie la demande ». <sup>60</sup>

Dans l'affaire précitée, il apparaissait que les déclarations contenues dans les « sommations interpellatives » n'avaient pas été faites sous serment. Il en résulte que, rigoureusement parlant, ces « sommations interpellatives » ne constituent pas des affidavits. Ces déclarations ont donc une valeur probante inférieure à celle des affidavits, si tant est qu'elles en aient du tout. Or, il ressort de la pratique internationale, qu'en eux-mêmes, les affidavits ne sont déjà crédités que d'une force probante limitée. D'une manière générale, tout en admettant les affidavits comme moyens de preuve et en se réservant d'apprécier librement leur force probante, les juridictions internationales ne leur reconnaissent qu'un poids limité. <sup>61</sup>

<sup>59</sup> V. sur ce point l'étude faite par le Niger sur la question et jointe en annexe à : Réplique de la République du Niger dans l'affaire *Différend frontalier* (Bénin c. Niger), décembre 2004, disponible sur : [http://www.icj-cij.org/cijwww/cdoocket/cbn/cbn\\_written\\_pleadings/cbn\\_replique\\_niger.pdf](http://www.icj-cij.org/cijwww/cdoocket/cbn/cbn_written_pleadings/cbn_replique_niger.pdf).

<sup>60</sup> Jean Salmon (dir.), Dictionnaire de droit international public (2001), 47 ; v. également Joseph-C. Witenberg, La théorie des preuves devant les juridictions internationales, RdC 56 (1936-II), 5, 81 et suiv.

<sup>61</sup> United States and Chilean Claims' Commission, *Elizabeth C. Murphy* (1892), dans : John Bassett Moore, History and digest of the international arbitrations to which

Le peu de crédit donné aux affidavits tient en particulier à ce que, par définition, les témoignages qu'ils contiennent sont recueillis de manière non contradictoire, en l'absence de la partie adverse et du juge.<sup>62</sup> Dès lors, en règle générale, les affidavits ne sont au mieux que des moyens de preuve de caractère secondaire qui ne peuvent servir qu'à confirmer des faits suffisamment établis par ailleurs. Par eux-mêmes et de façon autonome, ils sont en principe inaptes à prouver les faits de la cause.

La force probante des affidavits est encore plus réduite, voire nulle, lorsque dans sa déclaration une personne rapporte ce qu'elle a ouï-dire : en droit anglo-saxon, on parle de « *hearsay evidence* ». La Cour manifeste toujours une certaine méfiance à l'égard de ce type de preuve, qu'il s'agisse de témoignages oraux ou d'affidavits. Elle ne voit dans des propos attribués par le témoin à des tiers, et n'ayant pas reçu de confirmation personnelle et directe, « que des allégations, sans force probante suffisante ».<sup>63</sup> Elle a approfondi cette position dans l'affaire *Nicaragua*, sous la forme d'un énoncé de principe dont il convient de rappeler la teneur :

La Cour n'a pas retenu ce qui, dans les témoignages reçus, ne correspondait pas à l'énoncé de faits, mais à de simples opinions sur le caractère vraisemblable ou non de l'existence de ces faits, dont le témoin n'avait aucune connaissance directe. De telles déclarations, qui peuvent être fortement empreintes de subjectivité, ne sauraient tenir lieu de preuves. Une opinion exprimée par un témoin n'est qu'une appréciation personnelle et subjective dont il reste à établir qu'elle correspond à un fait : conjuguée à d'autres éléments, elle peut aider la Cour à élucider une question de fait, mais elle ne constitue pas une preuve en elle-même. De même un témoignage sur des points dont le témoin n'a pas eu personnellement connaissance directe, mais seulement par ouï-dire, n'a pas grand poids.<sup>64</sup>

La position est analogue dans la jurisprudence arbitrale.<sup>65</sup>

the United States has been a Party. Washington, Government Printing Office (1898), vol. 3, 2265. British-Mexican Claims Commission, *Virginie Lessard Cameron* (1920), RSA 5, 30. L'opinion selon laquelle les affidavits possèdent une force probante limitée a été encore émise dans l'affaire suivante: United States-Mexico General Claims Commission, *Walter J. N. Mc Curdy* (1929), RSA 4, 418, 421 ; v. encore *Witenberg* (note 60), 82.

<sup>62</sup> *Walfish Bay Boundary* (1911), RSA 11, 302.

<sup>63</sup> *Détroit de Corfou* (note 13), 17.

<sup>64</sup> *Nicaragua* (note 14), § 68.

<sup>65</sup> *Walfish Bay Boundary* (note 62), 303. Dans le sens de cette méfiance vis-à-vis de la *hearsay evidence*, v. encore : Italian-Venezuelan Commission, *Cerveti* (1903), RSA 10, 492, 496-497 ; *De Zeo* (1903), RSA 10, 526 ; German-Venezuelan Commission, *Richter* (1903), RSA 10, 415. V. aussi United States-Mexico General Claims



On relèvera que dans l'affaire *Bénin/Niger*, la majorité des sommations interpellatives produites par la partie concernée étaient fondées sur des oui-dire. On note en effet que sur les auteurs des dix-huit témoignages, une minorité seulement rapporte des faits dont ils ont été personnellement les témoins : deux « interpellés » seulement prétendent s'être rendus personnellement dans le territoire litigieux en qualité de fonctionnaires, en l'occurrence pour des exercices ou des patrouilles militaires. Les autres souvenirs personnels sont relatifs à des activités agricoles ou de chasse. Le reste des témoignages ne reflètent jamais que des oui-dire. La plupart des interpellés ne témoignent donc pas de leur propre expérience, mais évoquent des souvenirs de ce qui leur a été rapporté par des tiers.

L'éloignement dans le temps des événements sur lesquels la partie en question tentait d'obtenir aujourd'hui des témoignages oraux ne permettait pas d'espérer autre chose. Il s'agissait d'événements antérieurs à l'accession du pays à l'indépendance, et remontant quelquefois à plus de 60 ans. Par ailleurs, la plupart des personnes appelées à témoigner se sont contentées de faire des affirmations sur ce qui leur était demandé de prouver. Ainsi est-il dit, par exemple, que l'île litigieuse ne faisait l'objet d'aucune contestation ou que telle ou telle activité était exercée sur l'île par des agents de la partie productrice des témoignages, etc. Il s'agit, en somme, d'affirmations très générales qui ne sont étayées par aucun fait précis. De telles déclarations ne peuvent en aucune façon contribuer à l'établissement d'une véritable preuve. En effet, le juge international n'attribue qu'une force probante très faible ou nulle à des témoignages trop vagues.<sup>66</sup>

Il en va *a fortiori* de même des témoignages dont il est établi que les renseignements qu'ils contiennent sont faux.<sup>67</sup> Dans l'affaire *Bénin/Niger*, un

Commission, *Walter J.N. McCurdy* (note 61), 421. Dans le même sens : British-Mexican Claims Commission, *George Henry Clapham (Great Britain) v. United Mexican States* (1931), RSA 5, 201, 203 ; *Lillie S. Kling (U.S.A.) v. United Mexican States* (1930), RSA 4, 575, 584. V. encore Italian-United States Conciliation Commission, *Batchelder (The Kirinknoiska and The Thele)* (1954), RSA 14, 203.

<sup>66</sup> Dans l'affaire *Arthur Young & Company*, le tribunal des différends irano-américains a déclaré à propos d'un témoignage contenu dans un affidavit : « *the source of this information is so vague that it is insufficient to warrant a finding that such acts indeed occurred or that they are attributable to Iran* », Iran-United States Claims Tribunal, *Arthur Young & Company*, 30 novembre 1987, Iran-US CTR 17, 257.

<sup>67</sup> V. par exemple, Tripartite Claims Commission (United States, Austria and Hungary), *Jacob Margulies* (1929), RSA 6, 279, 281 : « *The false statements in these affidavits [...] affect claimant's credibility* ».

des « témoins » prétendait qu'à la période précoloniale, les pêcheurs de territoires avoisinants venaient saisonnièrement dans l'île litigieuse contre paiement d'un droit au chef d'un village situé sur le territoire de la partie intéressée par le témoignage, et un autre déclarait qu'à l'origine l'île en question appartenait audit village ; qu'en ce temps-là les éleveurs transhumants, originaires du territoire de la partie adverse, payaient un droit de place, matérialisé par un taurillon, au chef du même village. Selon toute vraisemblance, aucune des personnes interrogées n'avait 120 ans au moment des interrogatoires, âge nécessaire pour avoir des souvenirs de la période précoloniale considérée. Certes, on ne saurait écarter par principe de tels témoignages, s'agissant en particulier de l'Afrique qui reste encore, dans une large mesure, un continent des traditions orales. Mais comment s'assurer que dans le témoignage oral d'un arrière-grand-père qui a pu parvenir à son arrière-petit-fils, l'endroit indiqué est celui qui fait aujourd'hui l'objet du litige ; par exemple qu'il s'agissait bien de l'île de Lété et pas d'une autre ? Avec la longueur du temps les souvenirs peuvent être imprécis et les témoignages tout relatifs. Il est donc difficile d'accorder crédit à de telles déclarations.

On relèvera à cet égard que lorsque l'affidavit ou le témoignage est établi longtemps après les faits concernés, le juge international est enclin à ne leur accorder que très peu de crédit. C'est qu'avec le temps, le témoin a pu oublier les faits qu'il rapporte et que son témoignage peut ainsi être entaché de confusions, d'imprécisions ou d'erreurs.<sup>65</sup> Il en découle que les affidavits ou les témoignages simples, établis longtemps après les faits ou événements qu'ils rapportent, ont une force probante particulièrement faible.

Un autre élément de la faiblesse de la valeur probante des affidavits et des témoignages simples est l'incohérence des informations fournies. Dans l'affaire *Bénin/Niger*, certains des témoins interrogés par la partie intéressée ont prétendu que la pêche dans les mares de l'île litigieuse dépendait d'une

<sup>65</sup> La Commission anglo-mexicaine s'est exprimée dans ce sens dans l'affaire *Mexico City Bombardment Claims (Great Britain) v. United Mexican States* (1930), RSA 5, 76, 82, au sujet d'un affidavit présenté comme preuve de faits s'étant déroulés plus de quinze ans auparavant. L'arbitre a porté une appréciation similaire dans l'affaire *The "Kronprins Gustaf Adolf"* s'agissant de témoignages oraux : « *Considering the time elapsed since the facts in question took place, oral evidence given in 1931 and 1932 cannot be given the same weight as authentic exhibits dating from the years 1917 and 1918, and, therefore, the Arbitrator will consider such oral evidence only in so far as it finds corroboration in the documentary evidence dating from the time concerned* » (*The "Kronprins Gustaf Adolf"* (Suède c. Etats-Unis d'Amérique) (1932), RSA 2, 1241, 1246).

autorisation des autorités d'un village donné alors que d'autres ont déclaré que cette autorisation devait émaner des autorités d'un village différent.

Il est constant, dans la jurisprudence internationale, que lorsque dans ses, ou leurs, déclarations l'auteur d'un témoignage ou les auteurs d'un ensemble de témoignages se contredisent, cela affecte négativement la valeur de leurs déclarations.<sup>149</sup>

Quand bien même les affidavits et les témoignages simples auraient quelque intérêt comme moyen de preuve, il faudrait encore que soit établie leur pertinence par rapport au fond du litige. Ainsi, des témoignages tendant à confirmer des activités privées sont sans pertinence aucune dans un contentieux frontalier ou territorial, dans la mesure où de telles activités n'ont aucun effet sur le titre territorial.

### 5. Les consultations sollicitées des spécialistes

Les consultations des experts et autres spécialistes, rédigées à la demande de l'une des parties au différend, constituent un autre type de moyen de preuve qui soulève le problème de sa valeur probatoire, en particulier lorsque ces consultations sont réalisées *in tempore suspecto*. Il serait bien imprudent et hasardeux d'attribuer un quelconque poids à de telles consultations en matière de preuve, car elles ne sont rien d'autre qu'une « *self-serving evidence* ».

L'affaire *Bénin/Niger* illustre à quel point pareilles consultations ne sont pas fiables comme moyen ou élément de preuve, sans pour autant que la compétence ou l'autorité du consultant ou de l'expert sollicité soit nécessairement en cause. En effet, dans cette affaire, une des parties sollicita plusieurs spécialistes sur diverses questions en débat. Elle demanda, en particulier, une consultation d'un éminent spécialiste du droit d'outre-mer, à l'autorité académique établie de longue date,

sur le point de savoir si les dispositions de l'arrêté signé le 11 août 1898 par le Gouverneur du Dahomey ainsi que des dispositions signées le 23 juillet 1900 par le Gouverneur général de l'Afrique occidentale française ont pu continuer à

<sup>149</sup> Affaire des réclamations des sujets italiens résidant au Pérou, Réclamation Numéro 6, présentée par Don Bartolomé Costa (1901), RSA 15, 405.

s'appliquer après la publication de l'arrêté signé le 27 octobre 1938 également par le Gouverneur général de l'Afrique occidentale française.<sup>70</sup>

Le spécialiste en question indique que pour émettre son avis scientifique, quatre arrêtés lui ont été transmis : les arrêtés du 11 août 1898, du 23 juillet 1900, du 8 décembre 1934 et du 27 octobre 1938. Sur la base de ces documents, il a exposé que l'arrêté de 1938, quand bien il ne reprend pas l'expression « rive gauche » contenue dans l'arrêté du 23 juillet 1900, « maintient la situation antérieure qui fixe cette limite à la rive gauche ». Selon lui, la limite résultant des arrêtés du 11 août 1898 et du 23 juillet 1900 « est parfaitement conciliable sur ce point avec l'arrêté de 1938 et n'a donc pas été abrogée par ce dernier ».<sup>71</sup>

Cet avis paraissait pour le moins contestable au regard de l'ensemble des textes coloniaux pertinents. Mais un consultant, quelle que fût son autorité, ne peut se prononcer que sur la base des documents soumis à son appréciation. Or, en l'occurrence, il semble que la consultation fournie reposait sur une pétition de principe puisqu'elle prenait pour acquis que l'arrêté du 23 juillet 1900 procède à une délimitation des limites entre les colonies du Dahomey et du Niger, ce qui n'était manifestement pas le cas. L'auteur de la consultation aurait probablement été d'un autre avis sur le sens de cet arrêté si l'on avait mis à sa disposition le décret du 20 décembre 1900 qui confirme l'arrêté du 23 juillet 1900 en tant que, comme ce dernier, il ne fixe pas – même de manière vague – les limites du troisième territoire militaire auxquelles il se rapporte. Ce sont les arrêtés de 1934 et de 1938 qui plaçaient cette limite, dans le secteur du fleuve Niger, au cours dudit fleuve.

La Cour devrait donc considérer avec une extrême prudence ce genre de moyen de preuve, et les parties s'abstenir d'en accabler la haute juridiction qui a déjà fort à faire avec des annexes dont le nombre de volumes ne cesse de croître d'affaire en affaire.

## II. Difficultés liées à l'accès aux éléments de preuve

L'accès aux éléments de preuve par une partie peut s'avérer singulièrement difficile et, dans certains cas, tout simplement impossible. Bien que l'obligation de collaborer à la preuve soit bien établie en droit processuel international, il se

<sup>70</sup> Contre-Mémoire de la République du Bénin dans l'affaire *Différend frontalier* (Bénin c. Niger), mai 2004, Annexe n° 31, 600.

<sup>71</sup> *Ibid.*



peut qu'une des parties mette l'autre dans l'impossibilité d'accéder à des éléments de preuve en sa possession ou qu'elle oppose son refus à la demande de preuve formulée par la Cour.

L'Etat ou l'institution réfractaire à la production d'une preuve en sa possession invoquera des motifs tels que le secret défense,<sup>72</sup> l'intérêt public, peut-être aussi la force majeure ou le secret d'Etat, quand bien même il est admis qu'aucun motif ne doit autoriser la violation de l'obligation de collaboration à l'établissement de la preuve devant le juge international.

La question se pose avec une acuité particulière en cas d'expulsion soudaine d'un étranger résidant légalement et de longue date dans l'Etat d'accueil et y ayant l'essentiel de son patrimoine. Comment pourra-t-il établir la preuve du préjudice qu'il aura subi puisque les principaux éléments de preuve se trouvent dans le territoire de l'Etat expulsant, où il n'a plus accès du fait de la mesure d'expulsion. Il est possible que l'on soit confronté à ce type de difficulté d'établissement de la preuve dans une affaire actuellement pendante devant la Cour.<sup>73</sup>

Les pays anciennement colonisés connaissent une autre difficulté particulière et non négligeable d'accès aux éléments de preuve : l'accès aux archives coloniales, où se trouvent la quasi-totalité des documents pertinents pour le règlement de leurs différends frontaliers et territoriaux ou pour celui d'autres types de contentieux pouvant opposer ces Etats aux anciennes puissances coloniales. Ces puissances peuvent-elles permettre l'accès des Etats nés de la décolonisation à des documents qui leur seraient préjudiciables s'ils étaient produits devant la Cour dans le cadre de tels contentieux ? Il y a lieu d'en douter.

Le contrôle des archives coloniales par ces puissances leur confère une certaine influence sur l'issue du contentieux entre deux ex-colonies. Etant tiers au procès, le juge international n'a aucun pouvoir de contrainte sur elles.

A la lumière de ces brèves observations, il y a lieu de se demander si la règle *actori incumbit probatio* ne pourrait pas être renversée dans certains cas, en faisant peser le fardeau de la preuve sur la partie qui, dans un procès, détient des

<sup>72</sup> C'est ce qui arriva dans l'affaire du *Détroit de Corfou* où le Royaume-Uni refusa de produire des documents intitulés XCU en invoquant le secret naval : note 13, 32 ; *Nicaragua* (note 14), op. ind. de M. Lachs, 158, 158.

<sup>73</sup> *Ahmadou Sadio Diallo* (République de Guinée c. République démocratique du Congo), pendante devant la Cour depuis le 30 décembre 1998.

preuves auxquelles ne peut accéder l'autre partie, mais se montre peu coopérative.

#### D. Rapport de la preuve au temps

L'anachronisme discrédite ou affaiblit l'élément de preuve. En revanche, sa contemporanéité avec le titre ou le fait juridique controversé renforce sa valeur probatoire. La jurisprudence arbitrale est bien établie en la matière.<sup>74</sup> Le facteur temporel joue en particulier dans le cas de la preuve par témoignages : mais la question de la validité *ratione temporis* des éléments de preuve se pose également en ce qui concerne la pratique des parties par rapport à un titre.

L'exigence de la contemporanéité des éléments de preuve peut cependant être tempérée dans l'application de la règle de l'*uti possidetis*.

##### I. Exigence de la contemporanéité des éléments de preuve

L'exigence de la contemporanéité de l'acte probatoire est particulièrement justifiée en ce qui concerne la preuve par témoignages. L'écoulement plus ou moins long du temps peut altérer, on l'a vu, leur fiabilité. C'est pourquoi les juridictions internationales, en l'occurrence la CIJ, préféreront la preuve la plus proche dans le temps des faits qu'il s'agit d'établir.

Cette exigence est fort bien illustrée par un passage déjà cité de l'arrêt de la Cour dans l'affaire des *Activités armées*, où elle dit sa préférence pour « des informations fournies à l'époque des événements par des personnes ayant eu de ceux-ci une connaissance directe ».<sup>75</sup>

<sup>74</sup> On l'a relevé notamment : *Mexico-City Bombardement Claims* (note 68) ; *Gervase Serope* (1931), RSA 5, 255 ; *The "Kronprins Gustaf Adolf"* (note 68) ; *Canal de Beagle* (Argentine c. Chili), Sentence du 18 février 1977, ILR 52, 121, 206 ; *Bitlone and Marine Drive Complex Ltd*, Award on Damages and Costs, Sentence du 30 juin 1990, ILR 95, 211, 223 et suiv. (v. aussi *Niyungeko* (note 4), 399-400).

<sup>75</sup> *Activités armées* (note 3), § 61.

## II. Preuve et date critique

La valeur probatoire d'un élément de preuve dépend également de sa situation chronologique par rapport à la date à laquelle a été établi un titre juridique dont il s'agit de montrer la validité. Les éléments antérieurs à cette date ne sont pas pertinents, surtout s'ils contredisent le titre. Il peut s'agir d'un titre conventionnel ou légal (cas des actes de droit colonial fixant les limites interterritoriales au sein d'un même empire colonial) ou bien d'un titre juridique établi par application du principe de l'*uti possidetis* à la date de l'indépendance, considérée comme la date critique.

Relativement à la date critique entendue comme la date de l'acte juridique fondateur d'un titre, il y a prise en compte des événements postérieurs : a) s'ils sont plus proches de la date critique que les événements antérieurs ; b) à condition qu'ils ne conduisent pas à la modification de l'instantané territorial à la date critique. La jurisprudence de la Cour montre que celle-ci ne tient plus pour éléments de preuve pertinents les faits et actes antérieurs à l'acte constituant le titre juridique. Ainsi, dans l'affaire de la *Frontière terrestre et maritime entre le Cameroun et le Nigeria*, elle a estimé que, dès lors qu'il était démontré que l'accord anglo-allemand du 11 mars 1913 délimitait la frontière entre le Cameroun et le Nigeria, y compris dans la zone de Bakassi, les faits ou événements antérieurs à cette date n'étaient plus pertinents et ne pouvaient donc servir d'éléments de preuve.<sup>70</sup>

S'agissant des preuves par rapport à l'*uti possidetis*, la question a fait l'objet de considérations intéressantes dans l'arrêt de la Chambre dans l'affaire *Bénin/Niger*.

En premier lieu, une des parties à cette affaire soulignait qu'une application stricte du principe de l'*uti possidetis juris* rend inacceptable la référence à la situation actuelle pour déterminer l'appartenance des îles litigieuses au moment où les parties ont accédé à l'indépendance. Cette position était intenable dans la mesure où la partie en question avait recouru elle-même, à plusieurs reprises, à des éléments de preuve postérieurs à la date critique. Ayant sans doute en vue l'application concrète de son arrêt, la Chambre, dans une démarche pragmatique, se prononce sur ce point ainsi qu'il suit :

<sup>70</sup> *Frontière terrestre et maritime entre le Cameroun et le Nigeria* (note 40), §§ 200–212.

La Chambre constate qu'en tout état de cause les Parties s'accordent sur le fait que le tracé de leur frontière commune doit être établi, conformément au principe de l'*uti possidetis juris*, par référence à la situation physique à laquelle le droit colonial français s'est appliqué, telle qu'elle existait à la date des indépendances. Les conséquences de ce tracé sur le terrain, notamment en ce qui concerne l'appartenance des îles du fleuve à l'une ou l'autre des Parties, doivent cependant s'apprécier par rapport aux réalités physiques contemporaines et la Chambre ne saurait ignorer, dans l'accomplissement de la tâche qui lui est confiée par les Parties aux termes de l'article 2 du compromis, l'apparition ou la disparition éventuelle de certaines îles sur le bief fluvial concerné.<sup>77</sup>

En deuxième lieu, s'est posé le problème de l'admission des documents et cartes postérieurs à la date des indépendances comme fondement de la détermination de la frontière commune entre les deux Etats. Sur ce point aussi, les parties avaient des vues divergentes. La Chambre s'est prononcée dans les termes suivants :

La Chambre ne saurait exclure a priori que des cartes, études ou autres documents postérieurs à cette date puissent être pertinents pour établir, en application du principe de l'*uti possidetis juris*, la situation qui existait alors. En tout état de cause, le principe de l'*uti possidetis* ayant pour effet de geler le titre territorial (*Différend frontalier (Burkina Faso/République du Mali)*, arrêt, C.I.J. Recueil 1986, p. 568, par. 29), la prise en considération de documents postérieurs à la date des indépendances ne saurait conduire à une quelconque modification de l'« instantané territorial » à la date critique sauf, bien entendu, dans l'hypothèse où semblables documents exprimeraient clairement l'accord des Parties à une telle fin.<sup>78</sup>

En troisième lieu, les parties ont débattu de la valeur juridique des effectivités post-coloniales « au regard de l'*uti possidetis juris* [sic] ». Notons qu'il ne pouvait s'agir en l'occurrence de l'*uti possidetis juris* puisque la Chambre de la Cour a estimé par ailleurs « qu'aucune des Parties n'a apporté la preuve de l'existence, durant la période coloniale, d'un titre issu d'actes réglementaires ou administratifs ».<sup>79</sup> Il est question dans ces conditions de l'*uti possidetis de facto* en tant qu'il est fondé sur les effectivités. Quoi qu'il en soit, les parties ont cherché dans cette affaire à confirmer le titre juridique dont elles se prévalaient en faisant valoir des actes par lesquels leurs autorités auraient, après 1960, exercé la souveraineté sur les territoires litigieux. Selon la Chambre de la Cour « [u]ne telle démarche ne doit pas nécessairement être exclue ».<sup>80</sup> Elle s'est appuyée pour ce dire sur un arrêt rendu par une Chambre dans

<sup>77</sup> *Différend frontalier (Bénin c. Niger)* (note 31), § 25.

<sup>78</sup> *Ibid.*, § 26.

<sup>79</sup> *Ibid.*, § 75.

<sup>80</sup> *Ibid.*, § 27.



l'affaire du *Différend frontalier terrestre, insulaire et maritime* (El Salvador c. Honduras ; Nicaragua [intervenant]) qui a balisé la voie en la matière en admettant qu'il peut être tenu

compte, dans certains cas, d'éléments de preuve documentaire qui découlent d'effectivités postérieures à l'indépendance quand [...] ces éléments apportent des précisions sur la frontière de l'*uti possidetis* [...], à condition qu'il existe une relation entre les effectivités en cause et la détermination de cette frontière.<sup>81</sup>

Il apparaît ainsi, d'une part, que le principe de la contemporanéité des preuves doit être appliqué en s'inspirant de la doctrine du « droit intertemporel », en particulier en tenant compte des faits ou des facteurs dynamiques et de la réalité de la situation au moment de l'exploitation d'un élément de preuve donné ; d'autre part, que l'*uti possidetis juris* n'invalide pas automatiquement toutes les preuves postérieures à la date critique, mais qu'il fige le titre, lequel peut être étayé ou conforté par des éléments de preuve (« effectivités ») apparus après l'accession à l'indépendance, pour autant qu'ils ont une relation avec la mise en œuvre du titre découlant de l'*uti possidetis*. Autrement dit, l'*uti possidetis juris* n'interdit pas de se référer à des documents postérieurs à la date critique lorsqu'il s'agit d'identifier une situation antérieure à cette date ou de montrer la nature pérenne ou, au contraire, évolutive de cette situation. En l'occurrence, les documents postérieurs à la date de l'indépendance ont permis d'obtenir des informations, d'une part sur la variabilité éventuelle dans le temps du chenal navigable du fleuve Niger, d'autre part sur l'apparition de nouvelles îles dans le fleuve. Rappelons que dans ce rapport de la preuve au temps, en l'occurrence à l'instant crucial à partir duquel l'*uti possidetis juris* produit ses conséquences juridiques, ce sont les preuves (ou les effectivités) les plus proches dans le temps de la date critique qui doivent prévaloir, aussi bien en ce qui concerne les documents antérieurs que ceux postérieurs à ladite date.

Ainsi donc, tout en admettant que c'est bien à la date critique de 1960 qu'il fallait se situer pour identifier le chenal navigable, c'est-à-dire la ligne des sondages les plus profonds, la Chambre a estimé que le rapport produit en 1970 par l'entreprise *Netherlands Engineering Consultants* (NEDECO) sur demande des gouvernements du Dahomey, du Niger et du Nigeria « constitue la source de renseignements la plus utile sur la situation existant à la date critique ».<sup>82</sup> Il faut dire que par rapport à la période antérieure à la date critique, les documents

<sup>81</sup> *Affaire du différend frontalier terrestre, insulaire et maritime* (note 24), § 62.

<sup>82</sup> *Différend frontalier* (Bénin c. Niger) (note 31), § 109.

pertinents retenus par la Chambre se situaient entre 1896 et 1932, soit, par rapport à cette dernière date, vingt-huit ans avant l'indépendance, alors que le rapport NEDECO – « entreprise indépendante réputée pour ses compétences et son expérience »<sup>83</sup> – a été réalisé entre 1967 et 1970, soit dix ans au maximum après la date critique. Il n'est donc pas douteux que ce rapport fournit des renseignements plus précis sur la situation en 1960 que les documents antérieurs à cette date.

### E. Conclusion

Hormis l'aveu et la descente sur les lieux, les affaires récentes portées devant la Cour lui ont permis de revisiter la gamme des principaux moyens de preuve dont disposent les parties : preuves documentaires diverses comprenant les matériaux cartographiques, les actes juridiques coloniaux, les rapports des organisations internationales et des organisations non gouvernementales, les actes d'administration d'un territoire au titre des effectivités, mais aussi preuves par témoignages qu'il s'agisse des affidavits ou des témoignages simples. La panoplie des matériaux probatoires paraît illimitée et les parties ne se privent pas d'en produire le maximum disponible, au point que l'on peut s'interroger sur leur utilité concrète pour faire triompher une cause. Car il y a lieu de craindre qu'au lieu d'éclairer la Cour, ces matériaux probatoires, par trop abondants, obscurcissent les choses, ce d'autant plus qu'à l'expérience on constate que plus les éléments de preuve sont nombreux, plus grand est le risque qu'ils comportent des éléments contradictoires.

Mais est-il vraiment possible pour les parties d'être raisonnables en la matière ? Le désir de gagner le procès l'emporte sur toute autre considération. Comment s'assurer que les éléments de preuve sélectionnés suffiront pour faire triompher sa cause ? Nul ne veut courir le risque du regret, après-coup, d'être passé à côté d'une pièce qui, pensera-t-il, aurait sans doute aidé à mieux convaincre le juge ; alors on laissera à celui-ci le soin de trier dans le matériau probatoire produit les éléments qu'il jugera les plus pertinents au regard du litige qu'il est appelé à trancher. Nul ne veut s'entendre dire qu'il n'apporte pas la preuve suffisante de ses allégations ; alors on produira tout ce qui étaye, même faiblement, sa prétention.

<sup>83</sup> *Ibid.*, § 110.

La Cour peut s'en tenir à ces matériaux produits par les parties en de volumineuses annexes à leurs écritures. Elle s'y tient d'ailleurs en général, et il faut bien convenir qu'elles sont généralement suffisantes pour lui permettre de prendre des décisions juridiquement irréprochables. Mais pas dans tous les cas. Il existe pour certains types de différends une preuve qui a une valeur suprême : la preuve visuelle que procure la descente sur les lieux. Dans nombre de litiges frontaliers ou territoriaux, elle peut constituer la reine des preuves. Sans sous-estimer les contraintes pratiques et financières qui peuvent l'entourer, il nous semble que la Cour devrait y accorder un plus grand intérêt dans sa mission élevée qui est de rendre la justice entre les Etats.





## **Annex 28**

Richard Falk, “Reparations, International Law, and Global Justice”, in **THE HANDBOOK OF REPARATIONS** (P. de Greiff ed., 2006)



## CHAPTER 13

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REPARATIONS,  
INTERNATIONAL LAW,  
AND GLOBAL JUSTICE:  
A NEW FRONTIER

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RICHARD FALK

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1. POINTS OF DEPARTURE

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It is only in the last decade or so that international law has moved significantly in the direction of providing the means to pursue global justice, that is, in global arenas or by reference to global standards and procedures, on behalf of the individual and collective victims of severe injustices of the sort associated with oppressive governing regimes.<sup>1</sup> Prior to that time this class of issues pertaining to global justice was treated as marginal, at best, to the endeavors of international law, although overseas economic interests of individuals from the North received periodic protection if encroached upon by governments in the South. But in the 1990s the combination of the end of the cold war, the rise to prominence of international human rights, trends away from authoritarianism and toward constitutional democracy, and the partial eclipse of sovereignty in a globalizing world gave unexpected attention to the many facets of global justice, hitherto mainly

neglected, including steps designed to rectify the harm endured by individuals at the hands of dictatorial and abusive governments.

At the forefront of these moves was the reinvigoration of efforts to impose accountability on individuals associated with the perpetration of crimes of state, highlighted by such high-profile cases as those associated with the transnational pursuit of Augusto Pinochet and of Slobodan Milosevic.<sup>2</sup> This emphasis on accountability by leaders was reinforced by institutional and procedural innovations enabling indictment and prosecution.

Of almost equal prominence was the temporarily increased acceptance of an international responsibility on the part of the organized international community to protect vulnerable populations facing catastrophic challenges, whether from an abusive government or from an inability to provide governing authority, giving rise to a series of humanitarian interventions as responses to chaos and oppression. This historical climate of concern reached its climax with the Kosovo War under NATO auspices in 1999, and has subsequently declined markedly. Here, the duty to protect an oppressed and endangered Kosovar Albanian majority in the province of Kosovo was assumed by a regional security alliance to validate military action against a sovereign state, in this instance Serbia, even without the benefit of a prior mandate from the United Nations Security Council. Such a use of force even if credibly undertaken for protective purposes was always controversial from the perspective of international law, and depends upon the presence of political factors that were selectively present in the 1990s to a greater degree than at any other historical moment, and have subsequently almost disappeared.<sup>3</sup> The inability to mobilize support for humanitarian intervention in the setting of ongoing, massive ethnic cleansing and genocidal tactics in western Sudan during mid-2004 is indicative of how restricted to context was the surge of humanitarian diplomacy in the 1990s. And even then, without the presence of more strategic objectives of the sort present in Kosovo, but absent in Rwanda during the genocide of 1994, the prospects for humanitarian intervention by either the UN or a coalition of the willing are minimal.

As part of this climate of global opinion that seemed in the 1990s more sensitive to injustice than ever before, a new disposition to consider historic injustices endured by individuals and groups was evident in international relations. As Elazar Barkan, one of the more perceptive analysts of this welcome mutation in international attitudes, notes, there was 'the sudden appearance of restitution cases all over the world', leading him to postulate the possible beginnings of 'a potentially new international morality'.<sup>4</sup> It is in this setting of a redress of historic grievances that the issue of reparations makes its appearance, especially in the setting of transitional justice arrangements, but not only. Part of this incipient normative revolution of the 1990s was a concern with rectifying harm previously done to individuals and groups, as well as punishing perpetrators and repudiating their documented wrongdoing in an authoritative forum. What accounted for this focus



on this redress agenda at such a historical moment is uncertain, but it undoubtedly reflected a loss of a guiding geopolitical purpose after the end of the cold war combined with the growing prominence of human rights and an impulse in leadership circles to overcome the chorus of criticisms directed at the amorality of neoliberal globalization.

Barkan and others, for entirely persuasive reasons, approach these issues of restitution and reparations as primarily matters of morality and politics rather than law, that is, treating these humanitarian initiatives as reflecting the impact of moral and political pressures, rather than exhibiting adherence to previously established or newly emerging legal standards and procedures.<sup>5</sup> The sea changes in the 1990s reflected almost exclusively a combination of special circumstances generating political pressures and a mysteriously supportive moral 'window of opportunity' in a global setting. But to the extent that morality and politics created new widely shared expectations about appropriate behavior by governments, international law was being generated, even if it did not assume in most instances the positivist formality of treaty arrangements or the specificity of a meaningful legal obligation that included measures designed to ensure consistent implementation. Throughout the history of international society, the evolution of international law has been closely related to prevailing political currents, evolving moral standards, and dominant trends in religious thought. Such a linkage has been particularly evident in the war/peace context, international law essentially embodying the just war tradition as evolved by theologians, but it is also true with respect to the recent prominence of a global justice agenda in which redress and restitution play such a large part. In one sense the role of international law has been generally one of codifying behavioral trends in state practice and shifting political attitudes on the part of governments with the intention of stabilizing and clarifying expectations about the future.

It seems essential to distinguish three sets of circumstances: the first, the main preoccupation of international law and lawyers, involves disputes between states, and increasingly other actors, in which the complaining party seeks relief from alleged wrongs attributed to the defending party; the second involves war/peace settings in which the victorious side imposes obligations on the losing side, 'victors' justice, which may or may not correspond with justice as perceived from a more detached outlook; the third, achieving attention recently, involves transitions to democracy settings in which the prior governing authority is held accountable for alleged wrongs, and again reflect political outcomes of sustained struggle, but not international war. These three contexts should be kept distinct for both analytical and prescriptive purposes. In the first and second, there exists a more obvious role for international norms, procedures, and institutions than in the third, which is treated for most purposes as a matter of domestic discretion, although influenced by wider trends of *national* practice in comparable instances, and by wider global trends toward individual accountability for crimes against humanity.

To what extent these mainly encouraging developments involving the rendering of global justice have been stymied, the window closed, by the September 11 attacks and the American-led response are matters of uncertainty and conjecture at the present.<sup>6</sup> The refocusing of attention on global security issues seems to have remarginalized in general the pursuit of the global justice agenda, including the drive for reparations associated with various forms of historic redress other than those associated with transitional issues in a given country relating to the recent past.<sup>7</sup> As developments in 2003 within Argentina suggest, a change of governmental leadership at the national level can affect the approach taken to justice claims in a transition process, including those involving a renewed resolve related to individual criminal accountability and compensation for past abuse. Against this double background of an inchoate normative revolution in the 1990s and the altered historical setting of the early twenty-first century, this chapter analyzes the relevance of international law to reparations, and especially whether and to what extent reparations have acquired an international obligatory character of any practical significance.<sup>8</sup> Such significance is difficult to assess, especially as its most tangible impact may be to encourage the provision by national legal systems of remedies for various categories of losses sustained due to prior abuses of human rights. To the extent that international law is relevant at all, it is to provide *legal* arguments or *jurisprudential* background useful for representatives and advocates of victims' rights in *domestic* political arenas to the effect that victims are legally entitled to reparations, and that the domestic system is obliged to make this right tangible by providing meaningful procedures.

## 2. INTERNATIONAL LAW: AUTHORITY AND INSTRUMENTS

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The fundamental norms of international law are contained in customary international law, and reflect widely accepted basic ideas about the nature of law, its relation to legal wrongs, and the duty to provide recompense. The Permanent Court of Justice, set up after World War I, gave the most authoritative renderings of this foundation for the legal obligation to provide reparations. This most general international law imperative was set forth most authoritatively, although without any equally general prospect of implementation, in the *Chorzow Factory (Jurisdiction) Case*: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'<sup>9</sup> The Advisory

Opinion by the International Court of Justice involving the Israeli Security Wall reaffirmed this cardinal principle in ruling that Israel was under an obligation to provide reparations to the Palestinians for damages sustained due to the illegal wall built on their territory.<sup>10</sup>

A second equally important idea embodied in customary international law had to do with the nationality of claims associated with wrongs done to individuals. In essence, this norm expressed the prevailing understanding that only states were *subjects* within the international legal order, and that wrongs done to foreign individuals were in actuality inflicted upon their state of nationality. Accordingly, if the individual was stateless, a national of the wrongdoing state, or a national of a state unwilling to support the claim for reparations, there was no basis on which to proceed. This limiting notion was expressed succinctly by the Permanent Court of International Justice in the *Mavrommatis Palestine Case*: '[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.'<sup>11</sup> It is important to appreciate that these formulations were made before there existed any pretense of *internationally* protected human rights.

A third important idea in customary international law, that has persisted, forbids a state to invoke national law as a legal defense in an international dispute involving allegations of wrongdoing by the injured state. Such a principle pertains to the setting of international disputes, which is where the main precedents and doctrines of international law relative to reparations are fashioned. Somewhat surprisingly, the International Law Commission (ILC) Articles on State Responsibility, despite years of work, clarified to some extent this earlier teaching, refining and codifying it conceptually more than changing it substantively.<sup>12</sup> The ILC approach to remedial or corrective justice was based on distinguishing between restitution, compensation, and satisfaction. *Restitution* is defined in Article 35 as the effort 'to re-establish the situation which existed before the wrongful act was committed'. Such a remedy is rather exceptional. It is usually illustrated by reference to the *Temple* case before the International Court of Justice (ICJ) in which Thailand was ordered to return religious relics taken from a Buddhist temple located in Cambodia.<sup>13</sup> This primary reliance on restitution where practicable has been recently reaffirmed by the ICJ in its ruling on Israel's security wall, an important restatement of international law although contained in an advisory opinion, because it was endorsed by fourteen of the fifteen judges. The language of the Advisory Opinion expresses this viewpoint with clarity in paragraph 153: 'Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage

suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.<sup>14</sup>

Article 35(a) and (b) of the ILC Draft Articles indicates that restitution is not the appropriate form of reparations in circumstances where it is 'materially impossible' or would 'involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'.

*Compensation*, resting on the fungibility of money, is more widely used to overcome the adverse consequences caused by illegal acts. In the *Chorzow* case it was declared that where restitution cannot be provided to the wronged state, then the wrongdoer should be required to compensate up to the level of the value attributed to whatever was lost, including loss of profits. Articles 36 and 37 go along with this approach of full reimbursement, without qualifications based on capacity to pay.

*Satisfaction* is the third, and lesser known, manner of providing reparations. The ILC Articles make it a residual category in relation to restitution and compensation. As explained by du Plessis, '[s]atisfaction provides reparation in particular for moral damage such as emotional injury, mental suffering, injury to reputation and similar damage suffered by nationals of the injured state'.<sup>15</sup>

Customary international law, as well as the ILC Draft Articles of State Responsibility, impose an undifferentiated burden, as stated in Article 37, on the wrongdoing state 'to make full reparation for the injury caused by the internationally wrongful act'. As such, it gives very little guidance in specific situations where a variety of considerations may make the grant of full reparation undesirable for various reasons, although commentary by the ILC on each article does go well beyond the statement of the abstract rule.

International treaty law does no more than to restate these very general legal ideas in a variety of instruments, and without the benefit of commentary attached to the ILC articles. Because property rights are of paramount concern, the language of reparation is not used, and the more common formulations emphasize compensation for the wrongs suffered. The basic direction of these treaty norms also derives from international customary law, especially legal doctrine associated with the confiscation of foreign-owned property. The legal formula for overcoming the legal wrong accepted in international law involved 'prompt, adequate, and effective compensation'. Discussion of 'restitution' and 'satisfaction' is abandoned as the wrongdoing states are acknowledged by the United Nations to possess 'permanent sovereignty' over natural resources.<sup>16</sup>

The Universal Declaration of Human Rights shifts the locus of relief to national arenas and away from international disputes between sovereign states. Individuals are endowed with competence, and the notion of wrongdoing is generalized to encompass the entirety of human rights. Article 8 reads: 'Everyone has the right



to an effective remedy by the competent national tribunals for acts violating the fundamental human rights granted him by the constitution or by the law.' Of course, such a right tends to be unavailable where it is needed most, although the existence of the right does provide a legal foundation for reparation in future circumstances when political conditions have changed.

Article 10 of the American Convention on Human Rights (1978) particularizes a 'Right of Compensation' in a limited and overly specific manner: 'Every person has the right to be compensated in accordance with the law in the event that he has been sentenced by a final judgment through a miscarriage of justice.' It seems to refer exclusively to improper behavior of the state associated with criminal prosecution and punishment within the judicial system. It is available only on the basis of an individual initiative.

Article 14 of the Convention Against Torture and Other Cruel Inhuman and Other Degrading Treatment or Punishment (1984) imposes on parties the obligation to 'ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'. Again, the emphasis is on the legal duty of the state to provide individuals who are victims with a remedy within the domestic system of laws. That is, victims are not dependent on governments of their nationality pursuing claims on their behalf, nor are nationals barred from relief by the obstacle of sovereign immunity. Article 9 of the Inter-American Convention to Prevent and Punish Torture (1985) similarly obligates parties to 'undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture'.<sup>17</sup> In the absence of case law it is difficult to know what this standard might mean in practice, and whether it is purely aspirational or represents a genuine effort to acknowledge the full spectrum of injury that often results from torture and severe abuse. Beyond this duty of the state, Article 8 allows persons alleging torture to internationalize their claims for relief '[a]fter all the domestic legal procedures of the respective State... have been exhausted' by submitting their case 'to the international fora whose competence has been recognized by that State'.

Within the European regional system there is a right of an individual in Article 50 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) to seek 'just satisfaction' in the event that national law provides 'partial reparation' due to injury sustained as a result of a violation of the Convention. A proceeding of this nature would fall within the authority of the European Court of Human Rights. Here, too, the idea is to provide individuals with a remedy at the regional level beyond what is available within the national legal system.

These international law developments over the last half century have several different important consequences for the wider interest in reparations as provided

to a victimized group, especially in the context of transition from authoritarian regimes:

- first, there is the shift in the emphasis of international law from the protection of aliens abroad, and especially their property, to the protection of individuals who experience abuses of human rights;
- second, there is a legal recognition that the state responsible for the abuse should legally empower those who claim to have been victimized to pursue relief by way of compensation through recourse to the national judicial system;
- third, the national identity of the victim and the sovereign immunity of the state should not affect the availability of legal relief in the event of abuse;
- fourth, in the event of frustration at the national level, then some further mechanism for providing relief is becoming available at either the regional or global level, or both.

In summary, the importance of these international law developments is probably indirect, but the shift from a concern with dispute settlement to human rights does involve a major reorientation. The obligations embodied in legal instruments are vague and abstract, and are difficult and cumbersome to implement, but they do contribute to what might be called the formation of ‘a reparations ethos’ to the effect that individuals who have been wronged by applicable international human rights standards, especially in the setting of torture and kindred maltreatment, should be compensated as fully as possible. This ethos is a challenge to notions of sovereignty associated with earlier ideas that a state can do no wrong that is legally actionable, and that the wrong done to an individual is *legally* relevant only if understood as a wrong done to the state of which he or she is a national.

At the same time, the most important circumstances of reparations, leaving aside postwar arrangements, are not really addressed directly by contemporary international law. In authoritarian political settings, by definition, there is an absence of judicial independence, and there is no prospect of relief even in extreme situations. In postauthoritarian political settings, where there is an impulse to achieve redress, the magnitude of the challenge requires some categorization of the victims as well as a recognition of severe limits on the capacity of the new government to provide anything approaching ‘adequate compensation’. In this sense, the contributions of international law at this stage must be mainly viewed as indirect, and the actual dynamics of reparations arrangements reflect a variety of specific circumstances that exist in particular states. These arrangements have an ad hoc character that makes it impossible to draw any firm conclusions about *legal* expectations, much less frame this practice in the form of *legal doctrine*. For this reason, among others, it is appropriate to view reparations as primarily an expression of *moral* and *political* forces at work in particular contexts.<sup>18</sup>

### 3. SHADOWS OF MISUNDERSTANDING

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Any broad consideration of the relevance of international law to the subject matter of reparations needs to be sensitive to several background factors that could invite misunderstanding if not addressed. Such factors illuminate the tensions that have historically existed between considerations of global justice and political relationships shaped by hierarchical relations between the strong and the weak.

For most people (other than specialists in international law concerned with international disputes about wrongdoing), the idea of 'international reparations' recalls the burdens imposed on Germany at the end of World War I that were embodied in the Versailles Treaty.<sup>19</sup> These burdens were widely interpreted as accentuating the hardships faced by German society in the 1920s, and were viewed in retrospect as a damaging example of a 'punitive peace' that contributed to a surge of German ultranationalism, producing a political climate conducive to extremism of the sort represented by the Nazi movement. From an international law perspective, the reparations imposed were perfectly legal, indeed specified in a peace treaty formally accepted by Germany, but from a political perspective such reparations were viewed as imprudent, if not disastrous, and from a moral perspective, they were widely viewed as ill-deserved, mainly exhibiting the vengeful appetite of the victors in the preceding war in which neither side could convincingly claim the moral high ground. This 'lesson of Versailles' was heeded after World War II, Germany being assisted in economic recovery and political normalization despite the existence of a far stronger case for collective punishment of German society than existed in 1918, given the multiple legacy of crime and tragedy generated by Hitler's regime.<sup>20</sup> And the results are generally viewed as vindicating the soft approach, reinforcing the repudiation of Versailles.

And yet, somewhat surprisingly, the 'peace' imposed on Iraq after the Gulf War seems to have adopted the previously discredited Versailles model of punitive peace, although the terminology of reparations was largely displaced in this instance by the language of sanctions and claims, perhaps to avoid evoking bad memories. At the same time, extensive assets and oil revenues were made available, along with a procedure within the UN, to provide compensation to victims of Iraqi harm arising out of its invasion of Kuwait in 1990, and so there was a justice dimension so far as individual victims of Iraqi wrongdoing were concerned.<sup>21</sup> Thus, overall, an important ambiguity emerges: the Iraqi people were punished collectively and severely despite being entrapped in a brutal dictatorship, while the various categories of victims arising from the *international* crimes of Iraq as committed in Kuwait were the recipient of substantial reparative efforts to compensate for losses sustained. In this respect, the positive side of reparations was present. This whole framework of 'sanctions', combining the punitive with the compensatory, was given legal stature in the form of unanimous UN Security

Resolution 687, the harsh terms of which were accepted by a defeated and devastated Iraq in the 1991 ceasefire that ratified the results of the Gulf War.<sup>22</sup>

There are two observations to be made. First, in the sphere of interstate reparations, there is a confusing association of 'reparations' in language and policy both with a largely discredited process of imposing collective punishment upon a defeated state and its civilian population, and as seeking to give the victims of illegal and criminal conduct on behalf of a state a meaningful remedy for harm sustained in the form of substantial monetary compensation. Second, there is a flexible capacity for international law to provide a legal imprimatur, either by treaty or Security Council decision that ratifies a mechanism for the award of 'reparations', and gives legal expression to the geopolitical relationship that exists at the end of a war, without regard to whether the motivations for reparations are punitive or compensatory, or a mixture of the two. If the outcome of the war is 'just', and the victors are 'prudent', then the reparations imposed may contribute to global justice, but if not, not. International law provides at this point no substantive guidelines as to these assessments, and its main role is to provide victorious powers with a flexible *instrument* by which to give a peace process in accord with their goals and values an authoritative status.

The analogous dynamics of establishing reparations in the context of transitional societies also reflects power variables, although there is often not a clear dividing line between victory and defeat, but rather a political process that produces a negotiated compromise that inhibits to varying degrees the redress of past injustices by the newly emerging constitutional leadership. The arrangement is formalized exclusively through a reliance on mechanisms provided by the governing authorities enlisting the national legal system and establishing special administrative procedures. There is no direct role for international law, except to the extent of taking account of past wrongdoing as instances of 'crimes against humanity', or indirectly, as responsive to international pressures associated with imposing national means to determine accountability and rectifying past wrongs to the extent possible, given the political and economic realities. In the context of the Holocaust, and to some extent in relation to authoritarian antecedents to constitutional government, the goal of reparations is also a deterrent message to future leaders and a pledge of sorts by present leaders to repudiate the past and build a just constitutional order.

Certainly, in the background of the sort of moral and political pressures effectively brought to bear on Swiss banks by Holocaust survivors and their representatives during the 1990s was the strong sense that these individuals, or in this case sometimes their descendants, had truly been victims of internationally criminal conduct and deserved some sort of redress even if belatedly.<sup>23</sup> Decades had passed since the occasions of wrongdoing, and it was only a change in global setting that abruptly lent *political* credibility to claims that always had been actionable from *legal* or *moral perspectives*. It was this credibility that overcame the impulse to



disregard old claims as stale, and allegedly avoid opening old wounds. Such belated redress went against the traditional disposition of law to reach finality with respect to claims, both for the sake of stability and because evidence becomes less reliable and often unavailable with the passage of time.

An additional source of misunderstanding pertaining to international law relates to its state-centric orientation and traditions, which have been increasingly challenged in a variety of ways in the last few decades. The modern structure of international law was based on the idea that states were the only formal members of international society, and that the legal interests of individuals if associated with the actions of foreign governments were protected, if at all, by one's country of nationality on a discretionary basis.<sup>24</sup> International wrongs of aliens were thus treated as generating potential legal claims by a government on behalf of their aggrieved nationals, but purely as a matter of political and moral discretion, and under international law the wrong was done to the state, not to the individual who was harmed. The practice by states of reacting to such wrongs was described as 'the diplomatic protection' of nationals or aliens abroad, and was usually associated with the protection of foreign property rights. The individual beneficiary of such claims had no *legal* entitlement, and a government could ignore or waive the claims of its nationals. This statist pattern was further reinforced by ideas of nonaccountability with respect to wrongs inflicted on nations, both internationally and domestically. The doctrine of sovereign immunity meant that an individual suffering injury could not initiate any legal action in the courts of either the country where the harm took place or the country of his or her nationality. Claims of allegedly injured aliens in Third World settings were sometimes addressed by claims commissions assessing the merits of particular claims or by a lump sum settlement the funds of which were then allocated on some basis to the claimants. This background of international law is highly relevant to the circumstance of societies in the midst of transitions to democracy. There are three further observations that are relevant to this inquiry. First, the political reality of such dynamics reflected the geopolitical and hierarchical structures of the colonial era. These claims made by governments in the North involved only losses sustained by Western individuals in Third World settings. There was no reciprocity or equality given the manner with which investment and property rights were dealt with in international law. A bit later these claims for compensation involved opposition to socialist approaches to both private investment and economic development, and resisted the legal effects, as far as possible, of the rise of economic nationalism in the decades following World War II. The protection of nationals abroad was not at all in the spirit of 'reparations' (conceived as corrective justice) and reflected an opposite policy generally associated with protecting foreign investors who had characteristically been beneficiaries of 'unjust enrichment' in a variety of exploitative center-periphery relations. Ideas of state responsibility were also formulated with an eye toward fashioning an international law instrument designed for the

protection of transnational private property interests, especially in the face of allegedly confiscatory forms of nationalization. Even the most recent formulation of the law of state responsibility by the International Law Commission treats the state as the sole subject of wrongs whose victims are its nationals, and fails to address the existence of rights under international law of the victims if they are conceived of as individuals or groups. With moves toward neoliberal globalization since 1990, there has emerged a widespread intergovernmental consensus supportive of private sector autonomy, which has ended the widespread emphasis on balancing territorial rights against those of foreign investors in Third World countries. In this regard, the capitalist ethos has prevailed, at least for the foreseeable future.

Second, the kind of concerns that have been associated with transitions to democracy were completely absent from these earlier concerns of international law with harm sustained by individuals. For one thing, victims *within* society were left completely vulnerable to abuse by their own governments due to ideas of territorial supremacy of sovereign states, and thus the abuses of oppressive government toward their own citizenries remained outside the legal loop of potential responsibility. International law was completely silent as to state–society abuses so long as the victims were nationals.<sup>25</sup> The emergence of international human rights, by way of the Universal Declaration of Human Rights in 1948 and the 1966 Covenants were at first only *politically* feasible because there were no expectations of *legal* implementation, much less remedies for victims seeking reparations. The majority of governments were authoritarian, fully dedicated to traditional notions of sovereign rights, and would have opposed a legal structure that had explicit ambitions associated with implementation of individual rights. It is here where the emergence of transnational civil society actors changed the political equation, creating pressures to promote degrees of implementation for human rights that went far beyond what had been anticipated at intergovernmental levels.<sup>26</sup>

Third, since international law failed to protect the human rights of individuals as a matter of law until after World War II, there was little pressure on national legal procedures to do so. But in more than a half century since the adoption of the Universal Declaration of Human Rights there has been an extraordinary set of regional and global developments enhancing the position of the individual as the formal holder or subject of rights.<sup>27</sup> What is important here is less the exceptional *international* initiative on behalf of the victims of human rights abuse, than the influence on the erosion of sovereign exemptions from accountability in *domestic* legal arenas.<sup>28</sup> Here the indirect impact of the human rights movement has been strongly felt. It includes the empowerment of civil society actors, creating intense perceptions of injustices endured by individuals, expectations of some sort of remedial process, and the importance of taking official steps toward corrective justice by a government in the struggle to renew an atmosphere of political legitimacy. This is the case with respect to its own citizens by means of a signal

of the repudiation in the past and also to aid efforts to acquire or reacquire legitimacy within international society.<sup>29</sup> In effect, some of the traditional veils of sovereignty are lifted to facilitate transition, but this is overwhelmingly disguised directly by the adoption of a self-interested national political and moral discourse. But what seems national, even nationalistic, is undoubtedly influenced by varying degrees by what has been going on internationally, transnationally, and in other kindred states. What is most evident, particularly in Latin America, which provided the main experimental frontier, was the degree to which justice for victims was complementary to what often from the outside appeared to be a more strident insistence, effectively promoted by civil society actors, on combating what came to be described as 'the culture of impunity' toward past wrongdoing by leaders. More properly considered, this effort to impose accountability on leaders was integral to restoring the dignity of victims, constituting a direct repudiation of the past, and was thus an aspect of rendering justice to the victims, however retrospectively.<sup>30</sup> There is also evidence of a mimetic element in which national dialogues listen to one another, while adapting to their own particularities, building a trend that establishes a new pattern of expectations about justice in transitional circumstances. Such a drive for corrective justice was tempered by resource constraints and by the search for normalcy or social peace, tending to produce compromise approaches, especially encouraging an approach to feasible levels of 'satisfaction' for victims by reliance on truth and reconciliation processes adapted to the particularities of a given country. The end result is an acknowledgment of the past, but without great efforts either to punish perpetrators or to compensate victims. Symbolic forms of redress prevail, with both corrective and deterrent goals.

Such a historical process of innovative practice is somewhat puzzling from an interpretative perspective. Whether we call such patterns 'law' or 'international law' is a matter of the jurisprudential outlook, either positivist or constructivist. It is also a question of what might be called the politics and epistemology of law. A positivist approach would not regard the existing rules of international law as sufficiently clarifying as to permissible behavior to qualify fully as law. A constructivist jurisprudence attributes to the interpreters of law, both judges and scholars, a dynamic role in imparting authoritative meaning, and proceeds from the belief that legal standards cannot be objectified by language and strict canons of interpretation. I favor such an acknowledgment of the uncertainty of law on the books as a means to encourage those with discretion to interpret, apply, and enforce the law to act responsibly, which I regard as meaning that ambiguities be resolved by opting for morally guided outcomes to decision-making. Of course, discretion is not unlimited, but confined by rules of reason that identify the boundaries of interpretative reasonableness and thus accord with the idea that those interpreting the law are not free to give expression to private ideas of morality and political prudence. Legality as a clarifying condition is left in abeyance until patterns of

expectations are shaped by interpretative trends and practice.<sup>31</sup> Such a prism of evaluation would seek to relate law to widely endorsed expectations about behavior that exist in society, but would not ‘legalize’ moral sentiments that lacked such backing, however appealing, by pretending that these sentiments qualified as ‘law’. From such a perspective, then, there is a greater relevance for international legal obligations in relation to reparations practice, and wider issues of corrective or remedial justice, than would seem to derive from a strictly positivist jurisprudence. The normative revolution that seemed to get underway in the 1990s had a law-making potential if expectations of legality are created by influential institutional and societal actors. Such expectations would acknowledge as valid specific claims and demands for justice, and thereby set precedents that shape perceptions as to the evolving character of ‘the law’. If victims’ rights become established legally, expectations of participants alter in circumstances of future victimization.

#### 4. SOME LIMITING CONDITIONS

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Reparations, if conceived as central to corrective justice, pose difficulties from the perspective of international law, but these are encountered in analogous form in transitional justice settings. Even more than efforts to impose individual accountability, a reliance on reparations, especially as a means to address the various dimensions of harm endured by victims, is inevitably to be context-driven.<sup>32</sup> And because context is so decisive, the guidance functions of international law tend to be minimal beyond affirming the existence of an underlying obligation as a generality. As the 2004 Advisory Opinion on the legal status of the Israeli security wall clearly reaffirmed, there does exist in international law a well-established entitlement for the victim of legal wrongs to appropriate reparations. But between the affirmation of the legal right/duty and its satisfaction there exists a huge contextual gap. In this instance, Israel, backed by the US government, immediately repudiated the World Court decision, and the prospects of compliance are nil. The international legal standard is authoritative and context-free, but its implementation is context-dependent.

Several dimensions of this unavoidable contextuality can be identified, but such a reality also pertains at least as much to reparations within national settings, where a wide measure of prosecutorial discretion has been an attribute of efforts to bring justice to perpetrators and victims in transitional situations. So what is set forth as applicable in international contexts is also relevant with some adjustments to national contexts.



## Unevenness of Material circumstances

To the extent that reparations attempt to compensate victims for losses endured, some assessment of an ability to pay needs to be made. This assessment should take account, as well, of the extent of victimization, and whether certain forms of victimization need to be excluded from the reparations program. But in the end, the question of fiscal capabilities at the disposal of the perpetrators, or their successors, is crucial. Of course, this is true, as well, for prosecutorial efforts to impose accountability on perpetrators, which also reflects the unevenness of national capacities to sustain the 'shock' of prosecutions. Iraq after the Gulf War, with extensive oil revenues, and South Africa, with an impoverished population, are at opposite ends of the spectrum in two respects: Iraq was an instance of reparations doubling as sanctions, whereas in South Africa any attempt to provide monetary reparations would involve a massive diversion from the priorities of the new leadership to promote economic growth and address the challenge of massive poverty.

The case of South Africa is significant for this inquiry.<sup>33</sup> The new political order had repudiated its criminal past mainly by way of a truth and reconciliation process. It was deeply committed to the improvement of the material circumstances of an extremely poor majority black population. Of course, the new leadership could have taken greater account of the high degree of victimization, as well as the unjust enrichment of the white minority, by combining constitutionalism with a program for the redistribution of wealth based on past injustice. To have done so, however, would likely have doomed the political miracle of a bloodless transition from apartheid, and might have led to prolonged civil strife. The role of reparations in transitions to democracy is especially complicated, taking into consideration the entrenched interests of those associated to varying degrees with the old order, seeking to avoid overtaxing available capabilities to ensure the success of the newly emerging order, and yet providing some needs-based relief to those who suffered incapacitating harms due to prior wrongdoing. As well, in the setting of many African countries that are extremely poor, it seems unrealistic because of resource constraints to impose corrective burdens of a monetary character.<sup>34</sup> This is especially so for national settings where prolonged civil strife has victimized many, if not all, living in the society; many severely, if massive atrocities were committed on a large scale. Normally more appropriate would be symbolic measures of acknowledgment (via truth and reconciliation) along with a needs-based conception of reparations that tries, at least, to enable those who have been disabled, or find themselves in acutely vulnerable circumstances, to be given the means by which to restore a modicum of dignity to their lives.<sup>35</sup>

## Remoteness in Time

Because some claims for redress of grievances arise from events that seem in the remote past, and their redress is of a magnitude that would be disruptive to present social and economic arrangements, there is a vigorous resistance to material forms of compensation.<sup>36</sup> It is partly a matter of responsibility, the unwillingness of most members of a present generation to believe that they owe obligations to the ancestors of claimants. It is partly a matter of changed mores, a sense that ‘injustice’ needs to be measured within the historical setting of the contested behavior. It is partly a matter of scale and impact, the realization that restoring the rights of victims would be enormously expensive and subversive of currently vested property interests. And it is partly a refusal to treat those in the present as truly victimized by occurrences that took place long ago. The reality is complicated, as old wounds often have not healed despite the passage of many generations.

At the same time, remoteness has not altogether stymied efforts to obtain redress in the form of reparations under certain conditions. The exemplary case is the pursuit of Swiss bank deposits by Holocaust survivors and their heirs, as well as claims on behalf of those who had been compelled to do forced labor in Nazi times. Swiss banks agreed to pay survivors \$1.25 billion, and the German government agreed to pay compensation for slave labor.<sup>37</sup> Related efforts produced agreements with France to compensate for stolen assets during the Vichy period, ‘truth’ commissions have been set up in as many as twenty-three countries that are continuing to assess claims relating to looted works of art and unpaid insurance proceeds owed to relatives of Holocaust victims. At the same time, beneficiaries are disappointed by the level of compensation received, and more than this, distressed by the monetization of their suffering that can never be compensated. When one survivor of Auschwitz, Roman Kent, was asked whether he was happy about the results, his reply was typical: ‘Why did it take the German nation 60 years to engage the morals of the most brutal form of death, death through work?’<sup>38</sup> The pursuit of these claims on behalf of Holocaust victims has produced mixed assessments from observers, but the main relevant point is that the process has been primarily driven by moral and political pressures, with law playing a facilitative role, although lawyers have played a rather controversial role by siphoning off a considerable proportion of negotiated settlements as legal fees.<sup>39</sup> In a technical sense, the recovery of wrongfully taken property is an instance of reparations, but in its more unusual mode of restitution rather than as a means of providing compensation for injuries sustained.

In some respects, the relative success of Holocaust claimants has stimulated other categories of remote victims to be more assertive about seeking redress, although not necessarily in the form of reparations. To begin with, Asian victims of imperial Japan mounted pressures on behalf of survivors who had been engaged in forced labor, as did representatives of ‘comfort women’. Asian claimants were

able to take advantage of national laws in the USA that had been drafted in response to pressures associated with the Holocaust, although in the end were unable to proceed as potential claims had been waived in the peace treaty concluded with Japan, an exemption from responsibility that the US State Department continues to support in litigation brought before American courts. Note here that the obligations to compensate written into American law do not pretend to be 'international legal obligations', but are instances of discretionary national legislation that results from moral appeals and political leverage.

Yet remoteness has not inhibited certain categories of claims for reparative justice, especially those associated with indigenous peoples and the institutions of slavery and slave trading. These claims, building credibility in the wake of efforts on behalf of Holocaust survivors, gained unprecedented visibility in the atmosphere of the 1990s.<sup>40</sup> To the extent that symbolic reparations were pursued there were positive results in the form of acknowledgments, apologies, and media attentions to past injustices.

Remoteness definitely limited the capacity of such claimants to implement the very broad legal imperative to give victims remedies for harms endured, but it did not formally preclude relief. There was no statute of limitations applicable to bar claims. Those with limited claims and a small constituency, most notably Japanese-Americans who had suffered enforced detention in World War II, were recipients of nominal compensation payments.<sup>41</sup> These payments were important to the victims as much, if not more so, as acknowledgments of past injustice, that is, as symbolic reparations in the sense of acknowledgment and apology even though a nominal payment was involved. In contrast, descendants of slaves, although receiving some satisfaction, including a legal affirmation in authoritative global settings that slavery constituted a crime against humanity, have not been able to gain satisfaction in the form of compensation.<sup>42</sup> Unlike the case of Japanese-Americans where compensation was not a huge financial tax on the present and unlike Holocaust survivors who had formal American pressures behind them (which appeared to push the Swiss banks and others into accommodating gestures), indigenous peoples and descendants of slaves found themselves without political leverage, despite generating significant moral pressures arising from the documentation of horrendous past atrocities. Beyond this, redress in these latter instances would have been economically and politically disruptive, imposing a major and politically unacceptable burden on present public revenue flows.

### **Absence of Individuation**

The magnitude of the harm done, especially when directed at a large class of victims, makes it impractical to evaluate individual claims on a case-by-case

basis in most instances, and therefore is not consistent with the international law approach based on the individual that is embedded in human rights.<sup>43</sup> It has been historically possible under certain circumstances to create claims commissions to deal with efforts to achieve restitution of property and compensation arrangements, as was done in relation to the Iranian Revolution and the first Gulf War. In both instances, there were large pools of resources available that belonged to the accused governments, as well as antagonistic international attitudes toward the government that was being charged with improper taking of private property rights. And redress for claimants did not impose any burdens on the states that established the reparations mechanism, which distinguishes the situation from those where payment of reparations would be imposed from within. That is, the geopolitical climate was supportive of efforts to implement reparations on an individuated basis in Iran and Iraq. But these instances are the exception rather than the rule. No such redress occurs when the accused government is victorious or beyond the reach of the international community, as has been the case in relation to the USA, considering the wrongs associated with its conduct of wars in Vietnam, Panama, Afghanistan, and Iraq in the course of the last forty years, as well as in relation to both world wars of the twentieth century.

More common are those many circumstances in a wide range of countries where an oppressive past has been finally repudiated by a new political leadership, but not necessarily in a conclusive fashion. Beyond this, there are neither the administrative nor financial capabilities to process claims on an individual basis, particularly if the abuses do not involve property rights that can be established by the claimants. In such circumstances, the dynamic of redress has tended to emphasize accountability for the main perpetrators of atrocities and a collective truth-telling procedure for the community of victims, especially reliance on truth and reconciliation commissions.<sup>44</sup> Reparations are certainly not excluded, but they have not been consistently part of the process, and rarely reach the majority of victims except in pitifully small amounts. In Latin America several countries have implemented significant reparations programs, including Argentina, Chile, and Brazil, others have made efforts that are more than token. Reparations have received less attention than efforts at criminalizing the perpetrators of gross wrongs, but have been at least as significant an aspect of attempts at overall rectification.

## Generality of Obligation

Any attempt to evolve a law-centered approach to reparations must accept the frequent inability to specify the level of responsibility with the kind of precision that makes it more likely that equal circumstances will be treated equally. Of



course, this difficulty with reparations should not be exaggerated, and it should be appreciated that the more demanding rules of evidence and standards of persuasion that apply to criminal prosecution make problems of ascertaining responsibility and entitlement with respect to reparations somewhat manageable. The provision of reparations, however constructed, usually must depend in the end on a rule of reason, which accords those who administer the program, whether judicially or administratively, wide discretionary authority. Only where the idea of full compensation for losses is sustained, as in Kuwait after the Gulf War, is there operational guidance for those making decisions. Or where uniform payments are decreed, which overlook the unevenness of harm sustained, as with compensation accorded to Japanese-Americans detained during World War II, is specificity attained. In other settings, the legal mandate to award reparations operates in a manner similar to other areas of the law where the specific and the general are only loosely connected, as when such standards as 'due process' or 'the reasonable person' are used to judge legal responsibility in particular circumstances. Where the number of claimants is very large, there is a greater disposition to rely on administrative procedures that compensate victims by category of harm, and usually with no pretension that the level of reparations corresponds to the level of harm. Again, the human rights approach based on individual rights challenges this flexibility.

### **Extreme Selectivity**

To the extent that reparation claims are given support in national legal systems, there are present critical geopolitical factors that inhibit any kind of standardization of treatment. It is one thing to initiate litigation to give some remedial relief to Holocaust victims, but it would be inconceivable that comparable relief, even of a symbolic character, were to be accorded to Indochinese victims of the Vietnam War or to Palestinian victims of Israeli abuses of international human rights and international humanitarian law during the period of extended occupation of the West Bank and Gaza. The victims require political leverage, and the target of remedial abuse must be discredited or defeated for such remedies to exist. Whenever geopolitical factors become relevant to the application of legal standards, the issue of legitimacy casts a shadow over discussions of legality, especially because selective implementation means that equals cannot be and are not treated as equals. Should such a realization be allowed to taint those applications of law that can be explained by reference to geopolitical patterns of influence?<sup>45</sup>

## 5. WHAT INTERNATIONAL LAW CAN DO

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So far the emphasis has been placed on the limitations of international law in relation to the imposition of obligations to provide reparations to victims of past injustices and deprivations of rights, especially in the setting of transitions to democracy. But international law also has contributed to a generalized atmosphere of support, a reparations ethos, for compensating victims as part of its overall dedication to global justice and the enforcement of claims, and thus lends support to the domestic willingness to provide reparations when contextual factors are favorable. Beyond this, international law is part of the normative context, giving a higher level of credence to victims and their supporters who insist on reparations as part of a new political regime of 'fairness'. Such a change in the climate of credibility with respect to claims of reparations for past wrongs is perhaps most evident in the greater seriousness accorded to the grievances associated with the descendants of slaves and the representatives of indigenous peoples. These claims had previously been hardly ever mentioned in influential settings, being treated as too frivolous to warrant attention, much less action.

International law also helps by clarifying those forms of governmental abuse that constitute international crimes, and therefore cannot be shielded from legal accountability.<sup>46</sup> Certainly, the establishment of the International Criminal Court (ICC) is a step in the direction of accountability for perpetrators, and by its provisions of funds for reparations of victims, there is an agreed-upon framework that should exert an indirect influence upon those transitions to democracy that occur against an established background of gross abuse and international criminality. That is, by linking accountability for perpetrators to compensation for victims there is encoded in international law a conception of fairness and rectification of past harm that includes victims.<sup>47</sup> This is a major conceptual step forward, with policy consequences, although disappointments also arise to the extent that compensatory steps are either trivial in relation to the quantum of harm endured or are never implemented beyond nominal awards.<sup>48</sup> Perhaps the most important impact of this level of generalized obligation is to influence the approach of national legal systems, which in any event have the most opportunity to actualize international standards, including those associated with human rights, in relation to the persons who endured the wrongs or their representatives. To the extent that national programs of reparations are enacted, there are expectations generated that a transition to democracy is incomplete if it does not include efforts to address as well as possible, given contextual constraints, the harms endured by victims of a prior oppressive regime. At the same time, there exists a margin of appreciation that allows a given national government a wide range of discretion in determining what it is reasonable to appropriate for the satisfaction of past claimants.

To the extent corrective justice is taken into account, then the pressure to overcome the culture of impunity relating to transitions to democracy is of at least symbolic benefit to the victims, as well as to their families and friends. The difficulties of providing material compensation are offset to some extent by publicly and officially acknowledging past abuses, documenting the record of wrongdoing associated with a prior regime, discrediting perpetrators while expressing solidarity with a community of victims, issuing apologies, and challenging self-serving grants of amnesty. In this process, not only is the harm to those most victimized repudiated as wrong, but the general public is educated about the limits on permissible behavior by governments.

Given the degree to which transitions to democracy are carried on within national legal frameworks, where the contours of arrangements are determined exclusively by reference to domestic law, the role of international law is inherently limited. Of course, to the extent that international human rights and criminal law are internalized, they push the national approach, in circumstances of transitional justice, in the direction of providing 'just compensation' for victims as determined contextually. Beyond this, international law could impose obligations on states and other actors to provide financial capabilities via the ICC, and elsewhere, to enable those countries with limited resources and very widespread claims of victimization to receive special credits and loans for the purpose of satisfying certain categories of victimization. Whether such an undertaking could fit within the mandate of existing international financial institutions such as the World Bank or IMF is doubtful, but a special commission could be created within the UN system to receive voluntary contributions earmarked for such purposes. The record to date is not encouraging if the UN Voluntary Fund for Victims of Torture established by GA Res. 36/151 on December 16, 1981, is taken as indicative. The Fund receives contributions from governments, nongovernmental organizations, and individuals, but has managed to raise only \$54 million during its entire course since coming into existence in 1983. Another possibility, undoubtedly remote, would be to affix a 'Tobin Tax' on international currency transactions or on activities that pollute the commons, such as commercial jet international travel, thereby providing a pool of funds to be used to bolster the capabilities to realize the goals of corrective justice in transitional societies and other circumstances where international victimization has occurred. This kind of mechanism could also be used to address categories of claimants on a group basis, thereby circumventing the extraordinary bureaucratic burdens associated with judicial and administrative approaches that are based on assessing the merits of individualized claims.

## NOTES

1. For review of this dynamic see Falk, 'Reviving the 1990s Trend toward Transnational Justice: Innovations and Institutions', *Journal of Human Development* 3 (2) (2002): 169–97.
2. See Falk, 'Assessing the Pinochet Legislation: Whither Universal Jurisdiction?' and the reply by Pablo de Greiff, 'Universal Jurisdiction and Transitions to Democracy', in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Stephen Macedo, ed. (Philadelphia, PA: University of Pennsylvania Press, 2004).
3. The conclusion of the Independent International Commission on Kosovo was that the action was 'legitimate' (as it prevented an imminent instance of ethnic cleansing), but 'illegal' (as it lacked a required UNSC mandate). See the report of the commission, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford: Oxford University Press, 2000); along similar lines, but with a more comprehensive approach, see the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Centre, 2001).
4. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000), ix.
5. In this collection, de Greiff defends a nuanced position with respect to the issue of the relationship between reparations and international law: the main point is that what international law has to say about this issue is still mostly geared to the case-by-case resolution of claims, and that both this and the (related) adoption of *restitutio in integrum* as the criterion of justice in reparations, make the guidance provided by international law less than clear when the task is to create a massive program. See de Greiff, 'Justice and Reparations' (Chapter 12, this volume).
6. For a consideration of this dynamic of distraction see Falk, *The Great Terror War* (Northampton, MA: Olive Branch Press, 2003); also, Falk, 'Reviving Global Civil Society after September 11', in *Traditions, Values, and Humanitarian Action*, Kevin M. Cahill, ed. (Fordham, NY: Fordham University Press, 2003), 344–67.
7. Even in the aftermath of the Afghanistan War and the Iraq War there does not seem to be a disposition to set up a procedure to provide reparations for the numerous victims of these brutal regimes. Unlike after World War II or the Gulf War, the main goals of the occupying powers, aside from selective criminal prosecution of the leaders of the former regime, seem to involve the establishment of stability and a sense of normalcy.
8. Of course, there are a series of affirmations of a legal obligation to compensate victims of abuses that can be found in such influential documents as Article 8 of the Universal Declaration of Human Rights, Articles 2(3), 9(5), 14 of the International Covenant on Civil and Political Rights, Article 14 of the UN Convention against Torture, and Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, as well as the elaborate consideration of victims' rights in the Statute of the International Criminal Court. See also Theo van Boven, 'Basic Principles and Guidelines', E/CN.4/2000/62, January 18, 2000. It is to be noted that most of the assertions of this right to compensation situate the remedy within national legal systems. With the



exception of the ICC approach there is no attempt at an *international* remedial option made available to a victim even in the event that there is no meaningful national remedy. The Basic Principles document, in Principle 12, affirms the victim's right to pursue a remedy in all legal arenas 'under existing domestic laws as well as under international law', but without any clarification as to how such rights can be upheld in concrete circumstances. States are obliged to '[m]ake available all appropriate diplomatic and legal means to ensure that victims exercise their rights to a remedy and reparation for violations of international human rights or humanitarian law'.

9. Case concerning the Factory at Chorzow, 1927 P.C.I.J. (Ser. A) No. 9, at 29; in explaining the bearing of international law I have adapted the framework clearly set forth by Max du Plessis, 'Historical Injustice and International Law: An Exploratory Discussion of Reparation for Slavery', *Human Rights Quarterly* 25 (2003): 624–59.
10. 'On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories', ICJ Reports, July 9, 2004, para. 152.
11. *Mavrommatis Palestine Concessions Case (Greece v. UK)*, 1924 P.C.I.J. Reports (Ser. A) No. 2, at 12; for fuller account see Ian Brownlie, *Principles of Public International Law*, 3rd edn. (New York: Oxford University Press, 1982).
12. For the definitive account of the ILC treatment of reparations see James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002); for useful assessment see Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibilities', *American Journal of International Law* 96 (4) (2002): 833–56. Professor Shelton asserts that these draft articles, that is, not yet in the form of an international convention, combine persuasively the descriptive function of 'codification' with the prescriptive function of 'progressive development' in accord with the mission of the International Law Commission. She also confirms the influence of this statement of the law despite its lack of a formally obligatory character, including extensive reliance by the International Court of Justice in its decisions, and by parties in their submissions.
13. *The Temple Case*, 1962, ICJ, 6.
14. See 'On the Legal Consequences', para. 152.
15. du Plessis, *op. cit.*, at 631.
16. See especially GA Res. 1803, December 14, 1962, Res. 3171, December 17, 1973; also Declaration on the Right to Development, December 4, 1986.
17. For a careful study of reparations in the Inter-American Human Rights System see Carrillo (Chapter 14, this volume).
18. Which is one of the conclusions at which de Greiff, Segovia, and others in this volume arrive.
19. For a sense of the professional viewpoint on reparations associated with international law practice see Shelton, *op. cit.* A typical view of the Versailles approach, primarily because the reparations features were regarded as symbolically humiliating and substantively burdensome for Germany and Germans, and thereby leading to a backlash, is the following: 'The Treaty of Versailles... represented a peace without justice. The desire of the First World War victors to seek revenge against the vanquished is widely believed to have contributed to conditions which led to the Second World War.' Stuart Rees, *Passion for Peace* (Sydney: New South Wales University Press, 2003), 21. Of course, it would be simplistic to explain the rise of Hitler by reference only to an extremist reaction to Versailles. See Hannah Arendt, *The Origins of Totalitarianism*

- (London: Allen and Unwin, 1951). For a recent inquiry into the origins of ‘radical evil’ as a political reality see Ira Katznelson, *Desolation and Enlightenment: Political Knowledge After Total War, Totalitarianism, and The Holocaust* (New York: Columbia University Press, 2003).
20. The issue of punishment and responsibility was individualized after World War II, as exemplified by the Nuremberg trials. See the instructive account in Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), esp. 14–205. For the international law foundations of the Nuremberg approach see Richard Falk, Gabriel Kolko, and Robert Jay Lifton, eds., *Crimes of War* (New York: Random House, 1971), 73–176. The lesson of Versailles was reinforced by geopolitical considerations that regarded the reconstruction of Germany (and Japan) as an essential element in the containment of the Soviet Union as the cold war unfolded and came to dominate the political imagination of those shaping the policies of leading Western states in the 1940s and 1950s.
  21. See the study of the UNCC by van Houtte et al. (Chapter 9, this volume); and David Bederman, ‘The UN Compensation Commission and the Tradition of International Claims Assessment’, *NYU Journal of International Law and Politics* 27 (1) (1998).
  22. For a range of critical assessments of sanctions imposed on Iraq see Anthony Arnone, ed., *Iraq Under Siege: The Deadly Impact of Sanctions and War* (Cambridge, MA: South End Press, 2000); a broader perspective is to be found in David Cortright and George A. Lopez, eds., *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO: Lynne Rienner, 2000), esp. 37–61. Also, Falk, ‘Iraq, the United States, and International Law: Beyond the Sanctions’, in *Iraq: The Human Cost of History*, Tareq Ismail and William W. Haddad, eds. (London: Pluto Press, 2004).
  23. See Michael J. Bazylar, ‘Nuremberg in America: Litigating the Holocaust in United States Courts’, *University of Richmond Law Review* 34 (1) (2000). For a general study see Gregg J. Richman, *Swiss Banks and Jewish Souls* (New Brunswick, NJ: Transaction, 1999).
  24. See Richard B. Lillich, *International Claims: Their Adjudication by National Commissions* (Syracuse, NY: Syracuse University Press, 1962) on the nationality of claims, and their discretionary prosecution, as well as international practice; discussed earlier in this chapter.
  25. The role of sovereignty in creating sanctuaries for state wrongs is impressively depicted in Ken Booth, ‘Human Wrongs and International Relations’, *International Affairs* 71 (1) (1993): 103–26.
  26. This argument is set forth in greater detail in Falk, ‘The Challenges of Humane Governance’, in *Concepts and Strategies in International Human Rights*, George J. Andreopoulos, ed. (New York: Peter Lang, 2002), 21–50; for scholarly treatment that fails to address this hypothesis of nonimplementation see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999).
  27. For various aspects of this evolution see Andreopoulos, op. cit.; also Falk, *Human Rights Horizons: The Prospect of Justice in a Globalizing World* (New York: Routledge, 2000); for theoretical inquiry into the expanding status of individual rights see Jack Donnelly, *Universal Human Rights: In Theory & Practice* (Ithaca, NY: Cornell University Press, 2003); the most comprehensive assessment of this trend can be found in Henry J. Steiner and Philip Alston, eds., *International Human Rights in Context*, 2nd edn. (New York: Oxford University Press, 2000).

28. Donnelly makes this point strongly.
29. For a pioneering study of legitimacy see Thomas M. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990); further elaborated and explored in impressive detail in Thomas M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995). Despite the sweep of coverage in this latter study, Franck gives no attention whatsoever to issues of corrective justice, and limits his relevant coverage to issues of ‘fairness’ associated with alien property claims (453–73).
30. Of course, from another perspective, Germany after 1945 could be described in a similar manner, but Germany was taking steps in the aftermath of a devastating military and political defeat, and in the midst of a foreign occupation, to restore its standing as a legitimate state. It seems like an antecedent case to that of victim-oriented reparations as conferred by Latin American legal initiatives. See the studies on German reparations by Ariel Colonomos and Andrea Armstrong (Chapter 10, this volume) and John Authers (Chapter 11, this volume).
31. Although not so formulated, this jurisprudence derives from the work of the New Haven School, especially Myres McDougal, Harold Lasswell, and Michael Reisman. For the most comprehensive overview see McDougal and Lasswell, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven, CT: Yale University Press, 1992). A constructivist account of political and conceptual reality is most explicitly set forth by Alexander Wendt in *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).
32. Reparations can also be conceived, in part, as punitive, or at least directed toward burdening perpetrators with obligations. For insightful discussion of some of these issues see Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, MA: Beacon, 1998).
33. See the study of South African reparations by Colvin (Chapter 5, this volume).
34. For one such example, see the study of reparations in Malawi by Cammack (Chapter 6, this volume).
35. A harm-based conception is more in accord with ideas of corrective justice, treating the victim as an autonomous subject entitled to compensation, at least to the extent otherwise feasible.
36. The issue of intertemporality is carefully considered by du Plessis, *op. cit.*, in relation to efforts to obtain reparations on behalf of descendants of slaves. Interesting issues are posed as to the nature of victimization, and whether the grant of reparations, even in symbolic amounts, would not heal the inherited wounds of slavery and past forms of racial persecution and discrimination.
37. See study by Authers (Chapter 11, this volume).
38. Quoted in ‘Satisfaction not Guaranteed’, a review of books on the Holocaust dynamic by John Authers, *Financial Times*, August 23, 2003.
39. Among the treatments of this process see Stuart Eizenstat, *Imperfect Justice* (New York: Public Affairs Press, 2003); Michael Bazylar, *Holocaust Justice* (New York: New York University Press, 2003); and for a skeptical account see Norman Finkelstein, *The Holocaust Industry* (London: Verso, 2000).
40. These claims categories are included in Barkan, *op. cit.*, and du Plessis, *op. cit.*; see also Falk, ‘Reviving the 1990s Trend toward Transnational Justice’, *op. cit.*

41. See study on reparations for Japanese-Americans by Yamamoto and Ebesugawa (Chapter 7, this volume).
42. For instance, in the declaration adopted at the 2001 Durban UN Conference on Racism and Development. It is notable that the US government withdrew its delegation from the conference, partly to protest criticism of Israel and partly because of reparation claims advanced in relation to the condemnation of slavery. On this issue generally see du Plessis, *op. cit.*, for extensive treatment.
43. de Greiff spells out the possible consequences of a case-by-case approach (Chapter 12, this volume).
44. For an admirable overview see Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).
45. It should be noted that this same selectivity applies in many crucial areas of international law, including that of humanitarian intervention, regulation of nonproliferation of weaponry of mass destruction, and enforcement of UN Security Council resolutions. It is an aspect of the balancing act that conjoins law and power within *any* social order, but its influence is more salient and pronounced in relation to global policy concerns.
46. See a useful overview in Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: Norton, 1999).
47. For an analysis of reparations and the ICC see Pablo de Greiff and Marieke Wierda, 'The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints', in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Marc Bossuyt, Paul Lemmens, Koen de Feyter, and Stephan Parmentier, eds. (Antwerp: Intersentia, 2005).
48. Such nominal forms of satisfaction can be worse than nothing to the extent that the claimant continues to feel the anguish associated with harm while the impression is spread that reparative justice has been rendered, setting the stage for reconciliation.



## **Annex 29**

Ruth Teitelbaum, “Recent Fact-finding Developments at the International Court of Justice”, 6  
*Law and Practice of International Courts and Tribunals* 119 (2007)





## Recent Fact-Finding Developments at the International Court of Justice

Ruth Teitelbaum\*

### Abstract

This article discusses the Court's treatment of evidence and the burden of proof with emphasis on recent cases involving armed conflict, genocide and violations of human rights. The article frames the discussion by examining the Court's powers within its Statute and Rules and asks whether the Court is making adequate use of those powers. The article evaluates the Court's use of its fact-finding powers in relation to the following matters: the standard and burden of proof, the drawing of inferences and the use of secondary evidence, the treatment of facts derived from U.N. Reports, the reliance on outside commissions and fact-finding bodies for gathering evidence, and finally, the treatment of evidence based on the decisions of other international courts.

### Keywords

Burden of proof; confidentiality; *Congo v. Uganda*; *Corfu Channel*; evidence; *Genocide* case; inferences; *Nicaragua* case; *Oil Platforms* case; public knowledge

### I. Introduction

According to Highet, “[t]he Court’s power to make factual determinations is not merely derivative from its powers: it is a basic part of the original purpose for an international court.”<sup>1</sup>

Certain authors have noted, however, that the International Court of Justice (hereinafter “the Court” or “the ICJ”) is poorly equipped for handling complex

\*<sup>1</sup> Ruth Teitelbaum is currently serving as an Associate Legal Officer at the International Court of Justice. This article was written in her personal capacity only. She was not assigned to or involved in any of the cases discussed in the article. The author wishes to thank Judge Buergenthal for his encouragement and for his thoughts on how to approach the topic of fact-finding. The author also wishes to thank John Crook for his helpful comments on an earlier draft of this article.

<sup>1</sup> See Keith Highet, “Evidence, The Court, and the Nicaragua Case, 81 *American Journal of International Law* (1987), 6. Highet refers to Article 36(2) of the Court’s Statute.

The full text of Article 36(2) reads as follows:

#### Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

facts.<sup>2</sup> In particular, some have indicated that the Court is not well suited for handling complex cases involving armed conflicts and human rights violations.<sup>3</sup> Given the increase in the number of such complex cases in recent years, the following questions merit consideration: (1) is the Court, due to the limitations of its Statute and Rules, unable to meet the fact-finding demands of those cases, and (2) are the Court's fact-finding shortcomings due to the Court's own reticence to take advantage of the tools already available to it under its current legal framework. In light of these general questions, this article will examine certain issues that have arisen in the context of ICJ fact-finding, with emphasis on some of the Court's recent activity, including the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)* ("the *Oil Platforms*"),<sup>4</sup> the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*<sup>5</sup> ("the *Congo v. Uganda case*"), and the case concerning the

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2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
- a. the interpretation of a treaty;
  - b. any question of international law;
  - c. *the existence of any fact which, if established, would constitute a breach of an international obligation;*
  - d. the nature or extent of the reparation to be made for the breach of an international obligation.

The Statute and Rules of Court may be found in *I.C.J. Acts and Documents No. 5*. The Court's Statute and other basic documents are also available on its web site at <<http://www.icj-cij.org/icjwww/ibasic-documents.htm>>.

<sup>2</sup> See Stephen M. Schwebel, "Three Cases of Fact-Finding by the International Court of Justice," *Fact-Finding Before International Tribunals*, Edited by Richard B. Lillich (1991), 2. See also Thomas M. Franck, "Fact-Finding in the I.C.J.," also in *Fact-Finding Before International Tribunals*, 21.

The Court's treatment of facts was also discussed recently by John Crook during an American Society of International Law (ASIL) Briefing held at Tillar House, "The Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) and Its Implications for the Rules on the Use of Force", 13 March 2006.

<sup>3</sup> According to Professor Hurst Hannum:

"... there is an element of timeliness in most human rights work that is more crucial than that present in situations where monetary compensation is the primary issue. Without underestimating the impact of, e.g. nationalizations or the extension of fishing zones on individual companies or even the economy of an entire society, the deliberate (not to say lethargic) pace of international tribunals such as the International Court of Justice or the Iran-United States Claims Tribunal is not well-suited to the resolution of issues involving, e.g., on-going torture, repression of political opposition, killings, and arbitrary detention."

See Hurst Hannum, "Fact-Finding by Nongovernmental Human Rights Organizations," *Fact-Finding Before International Tribunals*, Lillich, *supra* at 294.

<sup>4</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, *I.C.J. Reports 2003*. The judgment, oral and written pleadings are available on the Court's web site at <<http://www.icj-cij.org/icjwww/idecisions.htm>>.

<sup>5</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005. The judgment, written and oral pleadings are available on the Court's web site at <<http://www.icj-cij.org/icjwww/idecisions.htm>>.



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*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (the “Genocide” case).<sup>6</sup>

## II. Control over the Fact-Finding Process

That it is for the party asserting a fact to discharge the burden of proof is a principle generally applied by the ICJ in addition to other international courts and tribunals.<sup>7</sup> The Court made clear in the *Genocide* judgment that the burden was on Bosnia and Herzegovina to establish the facts that it had claimed.<sup>8</sup> While the burden of proof clearly falls on the party alleging a fact, the question of who drives the fact-finding process at the ICJ, the parties or the Court, does not always have such a straightforward answer.

The rules governing burden of proof at the Court may be said to resemble those of a civil law court more closely than a common law court.<sup>9</sup> The French Civil Code,<sup>10</sup> for example, provides in Article 10 that “[t]he judge has the authority to

<sup>6</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007. The judgment, written and oral pleadings are available on the Court’s web site at <<http://www.icj-cij.org/icjwww/idecisions.htm>>.

<sup>7</sup> See Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals, Volume I, Studies and Materials on the Settlement of International Disputes*, Series Editor, Peter Malanczuk, University of Amsterdam (1996), p. 54.

See also, Durward V. Sandifer, *Evidence before International Tribunals* (rev. ed. 1975) 95–175.

<sup>8</sup> See the *Genocide* judgment, *supra* note 6, para. 204, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction of the Court and Admissibility of the Application*, 26 November 2004, *I.C.J. Reports 1984*, p. 437, para. 101. The judgment, written and oral pleadings are available on the Court’s web site at <<http://www.icj-cij.org/icjwww/idecisions.htm>>.

<sup>9</sup> See Keith Highet, *supra*, note 1, at 6: “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.”

Lalive has also observed that “the almost total absence of restrictions relative to the admissibility of evidence more nearly approaches the continental than the Anglo-American system. In this regard, the practice of the Court shows that even the absence of relevance is not a sufficient reason, as a general rule, for its rejection.” Pierre Lalive, “Quelques Remarques sur la Preuve devant la Cour Permanente et la Cour Internationale de Justice” 7 *Annuaire Suisse de Droit International* 77, 102 (1950), cited in (and translated by Sandifer, *supra* note 7).

<sup>10</sup> See Christian Dodd, *The French Code of Civil Procedure in English* (2004). The French Civil Code is accessible in French and in English translation on the internet at <<http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r=7079>>.

*Article 9* Each party must prove, according to the law, the facts necessary for the success of his claim.

*Article 10* The judge has the authority to order *sua sponte* any legally appropriate investigation measures.

*Article 11* The parties are held to cooperate for the implementation of the investigation measures, even if the judge notes the consequences of abstention or refusal to do so. Where a party holds evidence material, the judge may, upon the petition of the other party, order him to produce it, where necessary under a periodic penalty payment. He may, upon the petition by one of the parties, request or order, where necessary under the same penalty, the production of all documents held by third parties where there is no legitimate impediment to doing so.

See also, Claude Giverdon, “The Problem of Proof in French Law,” 31 *Tul. L. Rev.*, 2, 45, cited in Sandifer, *supra* note 7 at 142 and 155.

order *sua sponte* any legally appropriate investigation measures.” While a party must prove the necessary facts in order to succeed on its legal claim, the judge may seek a document from a party when the document that the party is holding is deemed material in the case. Unlike a common law system which allows for discovery procedures that are very much in the hands of the parties, a civil law system places the judge at the center of the fact-finding process, allowing the judge to demand from the parties whatever evidence he deems relevant.<sup>11</sup>

Like a civil law court, the ICJ has the authority to seek evidence from the parties. The Court may call upon a party to produce evidence pursuant to Article 49 of its Statute. The Court may, in accordance with Article 62(2) and 68 of the Rules of Court, call witnesses, however it has not yet made use of this power.<sup>12</sup> It may entrust an independent body or commission with “the task of carrying out an enquiry or giving an expert opinion” in accordance with Article 50 of its Statute.<sup>13</sup> In addition, the Court, in accordance with Article 62 of its Rules, 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 49 of the Statute and Article 62 of the Rules of Court equip the Court with powerful tools for collecting evidence, ones that could be used at any time, whether during the written stage of the proceedings, during the oral proceedings, or even during deliberations if the Court so wishes. In contrast, however, to civil law judges who take on an active role in the fact-finding process and seek evidence from the parties when necessary,<sup>14</sup> the Court, while equipped with the

<sup>11</sup> See Stephen N. Subrin, “Discovery in Global Perspective: Are We Nuts?” 52 *DePaul L. Rev.* 299 (2002–2003)

<sup>12</sup> See Shabtai Rosenne, *The Law and Practice of the International Court 1920–2005*, Fourth Edition, Volume III, Procedure (2006), 1320–1332.

<sup>13</sup> As noted by Rosenne, *supra*, the Permanent Court of International Justice appointed a committee of experts in the *Chorzów Factory* case, series A 17 (1928) 99; A 18 (1929) 14. The International Court of Justice appointed experts in the *Corfu Channel* (Merits) case, 124, 132 (Annex 1), 142 (Annex 2). It has also hired cartographers and other experts in several delimitation cases, including the *Gulf of Maine* case. See also, Sir Robert Jennings, *International Lawyers and the Progressive Development of International Law, Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* 416 (1996). In the *Nicaragua* case, the Court declined to make use of its power to entrust a commission under Article 50 of its Statute, noting that “[i]n the present case, however, the Court felt it was unlikely that an enquiry of this kind would be practical or desirable, particularly since such a body, if it was properly to perform its task, might have found it necessary to go not only to the applicant State, but also to several other neighbouring countries, and even to the respondent State, which had refused to appear before the Court.” *Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States), Merits, (Judgment of 27 June 1986)*, ICJ Rep. 14, para. 61.

<sup>14</sup> See Craig P. Wagnild, “Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation,” *Asian-Pacific Law & Policy Journal*: Vol. 3 Issue 1 (Winter 2002) 1, 4.

“Authority and control over the gathering of evidentiary facts is vested in the court, with the judge assuming the primary responsibility for taking and receiving evidence. Japanese attorneys have no



power and tools similar to those of civil law judges, has generally refrained from seeking information beyond that which the parties have presented during the written and oral phases.<sup>15</sup>

In addition, the Court has tended to refrain from providing guidance to the parties concerning evidence prior to the rendering of decisions. Whereas in a common law system such as the United States, discovery procedures may be considered “fishing expeditions”, the opposite extreme may be said to be occurring at the ICJ, namely, counsel tend to throw in thousands of pages of annexes in their written pleadings, not knowing how the fifteen Members of the Court will sort through it, and simply hoping for the best. The Court has recognized this tendency and has called for some restraint in this regard, having made its *Practice Directions* available on the Court’s web site. *Practice Directions II* and *III* provide the following:

*Practice Direction II*

Each of the parties is, in drawing up its written pleadings, to bear in mind the fact that these pleadings are intended not only to reply to the submissions and arguments of the other party, but also, and above all, to present clearly the submissions and arguments of the party which is filing the proceedings. In the light of this, at the conclusion of the written pleadings of each party, there is to appear a short summary of its reasoning.

*Practice Direction III*

The Court has noticed an excessive tendency towards the proliferation and protraction of annexes to written pleadings. It strongly urges parties to append to their pleadings only strictly selected documents.

While the Court has asked the parties to exercise restraint in submitting voluminous annexes, the Court’s failure to give some guidance to the parties in terms of the burden of proof required, *prior* to the rendering of its decisions, may contribute to the excessive annexes and lack of focus in the written pleadings on the part of counsel.

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real power to compel the production of evidence or to elicit testimony from either adverse or third parties, and must therefore rely on voluntary cooperation or seek intervention by the court. This is in stark contrast to U.S. discovery, which is conducted mostly by the parties themselves only with minimal court supervision.”

<sup>15</sup> In the *Corfu Channel* case, the Court, finding that the first report submitted by the experts in the case had not been entirely conclusive, by a decision of 17 January 1949, asked the experts to go to Saranda and to verify, complete and if necessary, modify their answers. *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949, 1949 ICJ Rep. 4, para. 21. Also available on the Court’s web site at

### III. Standard of Proof<sup>16</sup>

The Court's determination of the standard of proof may be said to be made on an *ad hoc* basis, and is only revealed at the end of the process when the Court delivers its judgment.<sup>17</sup> While the Court's Statute in Article 36(2)(c) clearly sets forth the Court's power to determine "the existence of any fact which, if established, would constitute a breach of an international obligation", nowhere do the Court's Statute or Rules set forth a standard for the probative value or sufficiency of evidence, nor does a *prima facie* case need to be made in each instance to for a party's allegations.<sup>18</sup> This is in contrast, for example, with the United Nations Truth and Reconciliation Commission, the mandate of which included different categories of standards of proof, namely, overwhelming evidence, substantial evidence and sufficient evidence.<sup>19</sup>

The Court's Statute and Rules do not state which types of evidence the Court will weigh more favorably, or what level of proof a party needs to meet in order to succeed on a claim; rather, the Court will apply its discretion and weigh the evidence according to the nature of the claims. According to Rosenne:

[t]he probative value of the evidence depends upon the question at issue, and is determined by the substantive rules of international law through the application of which the Court will reach its decision.<sup>20</sup>

Rosenne notes that allowing the probative value of the evidence to turn on the question at issue, as determined by the substantive rules of international law, may

<<http://www.icj-cij.org/icjwww/iddecisions.htm>>. See also *A Dialogue at the Court, Proceedings of the ICJ/UNITAR Colloquium held on the occasion of the Sixtieth Anniversary of the International Court of Justice*, April 1996, 30.

<sup>16</sup> For a general discussion of burden of proof in international dispute settlement, see Joseph C. Witenberg, *La théorie des preuves devant les juridictions internationales*, *Recueil des Cours*, Paris, 1936, II, 5–102, followed by Joseph C. Witenberg (1951), *Onus probandi devant des juridictions arbitrales*, 55 *Rev. Gén. de Droit Int'l Public* 321. See also, D. Sandifer, *supra* note 7, 464 (rev. ed. 1975), 123–175.

<sup>17</sup> Amerasinghe has noted that in regard to legal presumptions, "[t]he effect of a legal presumption on the burden of proof is not easily described. International tribunals do not usually reveal their decisions on facts before the end of the proceedings. This is a stage in the proceedings at which the party against whom the existence of a fact is presumed has no further opportunity to produce evidence to prove the contrary." C.F. Amerasinghe, "Presumptions and Inferences in Evidence in International Litigation," 3 *Law and Practice of International Courts and Tribunals* 395, 401 (2004).

<sup>18</sup> As noted by Highet, *supra*, note 1, at 6: "The basic rule of thumb is that the Court is always free to draw its own conclusions: sometimes ignoring the factual assertions completely, sometimes finding that a point is made or established by default; sometimes seeking new evidence; sometimes accepting and excluding evidence from consideration. *It is erroneous to view the Court's procedure as requiring that a prima facie case be made out in each instance by the presentation of testimony, as in municipal criminal or civil proceedings.*"

<sup>19</sup> See *Report of the Commission on the Truth for El Salvador: From Madness to Hope*, U.N. Doc. S/25500, Annexed (1993) English version). See also, Thomas Buergenthal, "The United Nations Truth Commission for El Salvador," 27 *Vanderbilt Journal of Transnational Law* 497, 512 (1994).

<sup>20</sup> Shabtai Rosenne, *The Law and Practice of the International Court* 580 (1965), at 582.



appear circular, but he observes that it is “a reasonable interpretation of the criterion of relevance.”<sup>21</sup> What happens, however, when the Court must first establish the existence of a fact, then determine whether that fact is relevant in respect of the substantive international legal obligations?<sup>22</sup> The Court faces more cases in which it must not only determine the relevancy of certain facts, but must first establish which facts occurred. As noted in the *Genocide* judgment:

When turning to the facts of the dispute, the Court must note that many allegations of fact made by the Applicant are disputed by the Respondent. That is so notwithstanding increasing agreement between the Parties on certain matters through the course of the proceedings. The disputes relate to issues about the facts, for instance the number of rapes committed by Serbs against Bosnian Muslims, and the day-to-day relationships between the authorities in Belgrade and the authorities in Pale, and the inferences to be drawn from, or the evaluations to be made of, facts, for instance about the existence or otherwise of the necessary specific intent (*dolus specialis*) and about the attributability of the acts of the organs of Republika Srpska and various paramilitary groups to the Respondent. The allegations also cover a very wide range of activity affecting many communities and individuals over an extensive area and over a long period. They have already been the subject of many accounts, official and non-official, by many individuals and bodies. The Parties drew on many of those accounts in their pleadings and oral argument.<sup>23</sup>

Linking the probative value of evidence to the rules of international law, when the facts are in dispute between the parties, may result in pre-empting the question of whether certain events occurred by deciding that they are irrelevant as a matter of law. Some authors have criticized the *Nicaragua* judgment in this regard.<sup>24</sup>

In the *Oil Platforms* and the *Congo v. Uganda* judgments, the Court applied something similar to a clear and convincing standard of proof. In the *Oil Platforms*

<sup>21</sup> *Id.*

<sup>22</sup> The Court recognized this problem in paragraph 57 of the *Nicaragua* decision:

“One of the Court’s chief difficulties in the present case has been the determination of the facts relevant to the dispute. First of all, there is marked disagreement between the Parties not only on the interpretation of the facts, but even on the existence or nature of at least some of them. . . . [t]here is the secrecy in which some of the conduct attributed to one or other of the Parties has been carried on. This makes it more difficult for the Court not only to decide on the imputability of the facts, but also to establish what are the facts. Sometimes there is no question, in the sense that it does not appear to be disputed, that an act was done, but there are conflicting reports, or a lack of evidence, as to who did it. The problem is then not the legal process of imputing the act to a particular State for the purpose of establishing responsibility, but the prior process of tracing material proof of the identity of the perpetrator. The occurrences of the act itself may however have been shrouded in secrecy. In the latter case, the Court has had to endeavour first to establish what actually happened, before entering on the next stage of considering whether the act (if proven) was imputable to the State to which it has been attributed. *Supra*, note 13.

<sup>23</sup> Paragraph 202 of the *Genocide* judgment, *supra* note 6.

<sup>24</sup> Judge Schwebel has observed that the Court in the *Nicaragua* case, with respect to the issue of whether Nicaragua had been providing arms and other material support to the Salvadoran insurgents “chose to deal only with the charge of provision of arms, a choice that suited its legal conclusion that, even if Nicaragua had supplied arms to the Salvadoran insurgency, such supply was not tantamount to an armed attack.” See Stephen M. Schwebel, “Three Cases of Fact-Finding by the International Court of Justice, *Fact-Finding Before International Tribunals*, *supra* note 2, 15.

judgment, the Court found that the evidence presented by the United States in support of its contention that Iran bore responsibility for the attack on the *Sea Isle City* was insufficient. It concluded that “the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, ha[d] not been discharged.”<sup>25</sup> Although the Court did not spell out exactly what the burden of proof was for the United States to meet, it concluded that the satellite imagery was too vague, and it appeared to have examined the evidence against a clear and convincing standard of proof.<sup>26</sup>

In the *Oil Platforms* judgment, the Court described the burden of proof necessary for the United States to prove that it was the subject of an armed attack by Iran: one of “specific intent”, plus a showing that the attack was one of a “most grave” form of the use of force.<sup>27</sup> While the Court cited the case concerning *Military and Paramilitary Activities in and against Nicaragua* for “the most grave form of the use of force” requirement, the origin of the specific intent standard was not clear; it was mentioned neither in the Treaty of Amity, Economic Relations and Consular Rights nor in the U.N. Charter.

In the *Congo v. Uganda* judgment, the Court made more of an effort in terms of specifying the burden of proof for the various claims made by the parties.<sup>28</sup>

As it has done in the past, the Court will examine the facts relevant to each of the component elements of the claims advanced by the Parties. In so doing, it will identify the documents relied on and make its own clear assessment of their weight, reliability and value. In accordance with its prior practice, the Court will explain what items it should eliminate from further consideration (see *Paramilitary Activities – Nicaragua*, Judgment, p. 50, para. 85, see also *US Diplomatic and Consular Staff in Tehran*, Judgment ICJ Reports 1980, p. 3).<sup>29</sup>

The Court considered the evidence in terms similar to that of a clear and convincing standard of proof: “[t]he Court makes no findings as to the responsibility of each of the Parties for any violations of the Lusaka Agreement. It confines itself to stating that it has not received convincing evidence that Ugandan forces were present at Mobenze, Bururu, Bomongo and Moboza in the period under consideration by the Court for purposes of responding to the final submissions of the DRC.”<sup>30</sup>

The Court employed the phrase “it has not been established to its satisfaction” when describing the evidence submitted by Congo in an attempt to prove that Uganda participated in the attack on Kitona on 4 August 1998.<sup>31</sup> The Court also dismissed evidence based on the ground that it failed to be probative. For

<sup>25</sup> Para 61 of the *Oil Platforms* Judgment, supra note 4.

<sup>26</sup> Id. at para. 58.

<sup>27</sup> Id. at para. 64.

<sup>28</sup> See John Crook, supra note 2.

<sup>29</sup> Para. 59 of *Congo v. Uganda* judgment, supra note 5. See also, John Crook, supra, note 2.

<sup>30</sup> Para. 91 of *Congo v. Uganda* judgment, supra note 5.

<sup>31</sup> Id. at para. 44.



example, the Court observed that it had examined the evidence in support of Uganda's claim that the Sudan was supporting anti-Ugandan groups which were based in Congo, and that the Ugandan political report of 1998, in addition to a speech by President Museveni in 2000, could not constitute "probative evidence of the points claimed."<sup>32</sup> In the *Congo v. Uganda* case, one of the questions facing the Court was whether Uganda occupied Congolese territory in violation of international law. The Court began by stating that in order to determine whether Uganda was "actually" occupying the territories in question, there had to be "sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question," citing the Laws and Customs of War on Land (Hague II); July 29, 1899, Article 42: "Territory is considered occupied when it is actually placed under the authority of the hostile army."<sup>33</sup> While the Court had at its disposal a fairly clear definition of occupation according to *jus in bello*, in determining what evidence would be sufficient to establish the exercise of authority by the intervening State, it created a more specific requirement for the burden of proof:

In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.<sup>34</sup>

The added "substitution of authority requirement" was another way of asking for a higher standard of proof, one that went beyond a sufficient or clear and convincing standard, leaning towards a beyond any doubt standard. The Court could have stated that a claim of illegal occupation required a higher standard of proof than other claims, such as a beyond any doubt standard. Rather, it used its creative interpretation of the legal standard and avoided drawing a clear line in respect of the burden of proof.

In the *Genocide* case, the Court dedicated a significant portion of its judgment to the burden of proof. It stated in paragraph 208 that while the Applicant argued that the standard of proof should have been "the balance of evidence or the balance of probabilities, inasmuch as what is alleged is a breach of treaty obligations," the Respondent contended that the standard of proof should be that "there be no room for reasonable doubt." The Court at times seemed to consider the facts in terms of a clear and convincing level of proof. In paragraph 209, it notes that "[t]he Court has long recognized that claims against a State involving charges

<sup>32</sup> Id. at para. 123.

<sup>33</sup> Cited in para. 172 of *Congo v. Uganda* judgment, supra note 5. The Hague Convention II was replaced by the 1907 Hague Convention IV, 187 CTS 227; 1 Bevens 631. (The language of Article 42 remained the same). The text of The Hague Convention IV is available at <<http://www1.umn.edu/humanrts/instreet/1907c.htm>>, and on the IRC web site at <<http://www.icrc.org/eng>>.

<sup>34</sup> Supra note 5, para. 173.

of exceptional gravity must be proved by evidence that is fully conclusive.”<sup>35</sup> At other times, the Court applied a standard of proof closer to that which Serbia had asked for, namely, “beyond any doubt”:

[...] There is thus little doubt that the atrocities in Srebrenica were committed, at least in part, with the resources which the perpetrators of those acts possessed as a result of the general policy of aid and assistance pursued towards them by the FRY. However, the sole task of the Court is to establish the legal responsibility of the Respondent, a responsibility which is subject to very specific conditions. One of those conditions is not fulfilled, *because it is not established beyond any doubt in the argument between the Parties whether the authorities of the FRY supplied – and continued to supply – the VRS leaders who decided upon and carried out those acts of genocide with their aid and assistance, at a time when those authorities were clearly aware that genocide was about to take place or was under way; in other words that not only were massacres about to be carried out or already under way, but that their perpetrators had the specific intent characterizing genocide, namely, the intent to destroy, in whole or in part, a human group, as such.* [emphasis added]<sup>36</sup>

In the same way that the Court devised a standard of proof in the *Oil Platforms* case in respect of specific intent, and in the same way as it created a standard of proof for illegal occupation in the *Congo v. Uganda* case, in the *Genocide* case, the Court employed a very narrow definition of its own design, a requirement that there be a showing, *beyond any doubt*, that there was a *continual* supply of assistance. There was no legal text or jurisprudence to support the requirement that there be, beyond any doubt, a continual supply of assistance. By creating this narrow definition of its own design, the Court avoided making a factual finding on this complex matter by either calling on one of the parties to produce evidence or by drawing inferences.

In light of these experiences, the Court might consider whether, either prior to the submission of written pleadings, after the first round of written pleadings, or prior to the oral hearings, it should ask the parties to meet a specific burden of proof for certain claims. For example, in the *Genocide* case, the Court could have required early on in the proceedings, that there be “overwhelming evidence” of control on the part of the Serbian authorities.<sup>37</sup> Had the Court made its requirements for the standard of proof clear at an earlier stage in the *Genocide* case, such guidance may have helped focus the parties on the core issues. In the event, Bosnia and Herzegovina spent an enormous amount of its written and oral pleadings in an effort to establish patterns from which the Court could draw inferences, a method which was clearly rejected by the Court.

<sup>35</sup> The Court cites the *Corfu Channel* case in this regard, *Corfu Channel (United Kingdom v. Albania), Judgment, I.C.J. Reports 1949*, p. 17.

<sup>36</sup> Paragraph 422 of the *Genocide* judgment, supra note 6.

<sup>37</sup> See Robert Pietrowski, “Evidence in International Arbitration,” *Arbitration International*, Vol. 22, No. 3, 373, 379. Pietrowski observes that “[a] higher standard of proof may be applied in cases involving particularly sensitive allegations of wrongdoing such as conduct *contra bonos mores*.” He cites *Ireland v. United Kingdom* (1978) 25 ECHR (ser. A) 65, and the *Velasquez Rodriguez* case, Judgment (merits), Inter-American Court of Human Rights, Series C: Decisions and Judgments, No. 4 (1998), para. 138.



In addition to the possibility of the Court taking on a more active role in guiding the parties prior to the rendering of its decisions, the parties, by special agreement, could ask the Court to issue an order on relevancy of certain evidence and the standard of proof required for certain allegations prior to the submission of written pleadings.<sup>38</sup> Of course, it may not be obvious to the Court how the evidence should be weighed and the burden of proof shifted until very late in the proceedings.<sup>39</sup> However, at least by the oral pleadings stage, some guidance to the parties in terms of evidentiary requirements would be of assistance to the parties, who might, as a result, submit more focused pleadings.

#### IV. “Confidential” Documents and Inferences from Silence

One means of establishing facts that is not spelled out in the Court’s Statute or Rules is the drawing of inferences, a tool that is generally used by all international tribunals.<sup>40</sup> The question of whether the Court could draw inferences in view of one party’s refusal to produce a document on confidentiality grounds occurred in the *Corfu Channel* case. As noted by Rosenne, the Court, pursuant to Article 49 of its Statute, called on the British agent to produce a document concerning admiralty orders.<sup>41</sup> The British agent refused to produce the document on the grounds of naval secrecy. The Court did not draw any negative inferences as a result of this silence on the part of the British government.<sup>42</sup> Professor Anthony

<sup>38</sup> It is not uncommon for arbitral tribunals to issue preliminary orders on evidence, in addition to other matters such as disclosure of documents.

In a recent ICSID Arbitral decision *Biwater Gauff (Tanzania) Ltd. v. Tanzania (Republic of)*, ICSID Case No. ARB/05/22, for example, the Tribunal issued a procedural order concerning the production of evidence. Procedural order available at <<http://www.investmentclaims.com/decisions/BiwaterProceduralOrderNo224May2006.pdf>>. An article concerning this ICSID tribunal’s recent order on transparency may be found in this issue of the *Law and Practice of International Courts and Tribunals* on pp. 97–118. For a discussion of some of the potential problems with *ad hoc* procedural innovations in international arbitration, see William W. Park, “Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion” (The 2002 Freshfields Lecture), 19 *Arbitration International* 279 (2003).

<sup>39</sup> See Durward V. Sandifer, *Evidence Before International Tribunals*, Vol. 13, *Procedural Aspects of International Law Series* (1975), 124.

<sup>40</sup> See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 304, cited in Pietrowski, *supra* note 37 at 381. See also C.F. Amerasinghe, “Presumptions and Inferences in Evidence in International Litigation,” 3 *Law and Practice of International Courts and Tribunals* (2004) 395.

<sup>41</sup> See Shabtai Rosenne, *supra* note 12 at 1322. See also, Anthony Carty, “The Corfu Channel Case and the Missing Admiralty Order,” 3 *Law and Practice of International Courts and Tribunals* (2004) 1. See also, Milan Bartoš, “L’intervention Yougoslave dans l’Affaire du Détroit de Corfou,” *Comunicazi e Studi Vol. Quattordicesimo* (1975), 41, 50.

<sup>42</sup> “In accordance with Article 49 of the Statute of the Court and Article 54 of its [1946] Rules, the Court requested the United Kingdom Agent to produce the documents referred to as XCU for the use of the Court. Those documents were not produced, the Agent pleading naval secrecy; and the United Kingdom witness declined to answer questions relating to them. It is not therefore possible to know the real content of these naval orders. The Court cannot, however, draw from this refusal to produce the

Carty published an intriguing article in a previous issue of this journal concerning the secret naval document which is now available in the British National Archives. He observed:

[...] The document would disclose technical information about communications and especially aerial reconnaissance. These would show a general hostile intention towards Albania, which at least in general terms, had been denied by the UK Representative in the Security Council.

It was brilliantly argued by the Admiralty that the Court should be left to infer British intentions from the actions of the squadron that day. This would be safer than inviting the Court to explore the confused and contradictory expressions of intention of various branches of the British Administration through such documents as XCU, which, in any case, could not be read on their own. The Prime Minister accepted this advice, which judged exactly how the Court would and did 'jump'.<sup>43</sup>

The question of the production of confidential documents and the drawing of inferences from the refusal to produce them also arose in the *Genocide* case. The Court noted in its judgment that Bosnia and Herzegovina had requested the Court to call upon Serbia and Montenegro to produce certain documents under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court. According to paragraph 207 of the judgment, “[t]he documents had been classified, according to the Co-Agent of the Respondent, by decision of the Council as a military secret, and by a confidential decision of the Council of Ministers of Serbia and Montenegro as a matter of national security interest.”<sup>44</sup> The Court decided not to call on Serbia and Montenegro to produce the document. The procedural history of the judgment does not indicate the reasons for the Court’s decision on this matter. It simply states in paragraph 44 that, having received Serbia and Montenegro’s views on Bosnia and Herzegovina’s request, the Court declined to grant it. However the procedural history of the judgment notes that the Court “reserved the right to exercise subsequently, if necessary, its powers under Article 49 of the Statute and Article 62, paragraph 1, of the Rules of Court, to request, *proprio motu*, the production by Serbia and Montenegro of the

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orders any conclusions differing from those to which the actual events gave rise. [...]” *Corfu Channel (United Kingdom v. Albania)*, Judgment of 9 April 1949 ICJ Rep. 4, p. 32.

In the case concerning *Sovereignty over Certain Frontier Lands*, there arose an issue with regard to Belgium’s refusal to produce a document which it claimed not to have in its possession. The Netherlands ended up providing the document. One of the judges, Judge Moreno Quintana, in his dissenting opinion, stated that “[i]n producing it in this case the Netherlands has discharged its obligation as to the burden of proof resting on each of the Parties under Article II of the Agreement submitted to the Court and in accord with the law laid down by the Court in the *Minquiers and Ecrehos* Case (see Reports, p. 52). Belgium, which has not produced its copy—must in accordance with a well known principle of procedure, bear the consequences of its negligence.” *ICJ Reports 1959* at 256. Cited in Sandifer, *supra* note 7, 149.

<sup>43</sup> Anthony Carty, “The Corfu Channel Case—and the Missing Admiralty Order,” 3 *Law and Practice of International Courts and Tribunals* Vol. 1 (2004), 3.

<sup>44</sup> *Supra* note 6. See also, CR 2006/43, p. 28. Public sitting held on 8 May 2006, paras 56–59. (Obradović)



documents in question.”<sup>45</sup> The Court never exercised its power under Article 49 of the Statute and Article 62 of the Rules of Court. Nevertheless, the Court observed that “it [had] not failed to note the Applicant’s suggestion that the Court may be free to draw its own conclusions.”<sup>46</sup> The Court’s wording in this last sentence is puzzling; from what basis could the Court draw conclusions if it never asked Serbia and Montenegro to produce the document in the first place? Whereas the Court in the *Corfu Channel* case had asked the United Kingdom to produce the document, then decided, perhaps unwisely,<sup>47</sup> not to draw adverse inferences from its failure to produce it, in this case the Court did nothing at all. Article 49 of the Court’s Statute states that, “[t]he 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.*” (emphasis added) In this case, the Court could not take any formal note of Serbia and Montenegro’s refusal to produce the redacted documents, given that the Court never exercised its powers under Article 49 in the first place. Notwithstanding its unwillingness to request production of the document from Serbia and Montenegro, the Court seemed to think that it could, in principle, draw “conclusions” from the fact that Serbia and Montenegro did not submit the document voluntarily, either to the Court, which had not asked for the document, or to Bosnia and Herzegovina which, in the absence of ICJ discovery procedures, had no power to ask Serbia and Montenegro for the document.<sup>48</sup>

As observed in the dissenting opinions by Vice-President Al-Khasawneh and Judge *ad hoc* Mahiou,<sup>49</sup> the Court never drew any conclusions from the missing document. Vice-President Al-Khasawneh’s dissent was highly critical of the Court’s decision in this regard:

<sup>45</sup> Paragraph 44 of the *Genocide* judgment, *supra* note 6.

<sup>46</sup> *Id.* at paragraph 206.

<sup>47</sup> See Carty, *supra* note 43.

<sup>48</sup> In the *Avena* decision, the Court similarly seemed to conclude, without saying as much directly, that the parties should seek documents from each other in preparation of ICJ litigation despite the absence of discovery procedures at the Court. The Court also left open the possibility that the United States could have requested the document through the Court. See *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Rep. (2004)* 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.”

However, as the *Genocide* case shows (*supra* note 46), the Court is reluctant to seek a document from one party following the request of another.

<sup>49</sup> See dissenting opinion of Judge *ad hoc* Mahiou, paras. 56–63, *supra* note 6.

It is a reasonable expectation that those documents would have shed light on the central questions of intent and attributability. The reasoning given by the Court in paragraph 206 of the Judgment, “[o]n this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially readily accessible ICTY records...”, is worse than its failure to act. [...] It would normally be expected that the consequences of the note taken by the Court would be to shift the *onus probandi* or to allow a more liberal recourse to inference as the Court’s past practice and considerations of common sense and fairness would all demand. This was expressed very clearly by the Court in the *Corfu Channel* Judgment...<sup>50</sup>

The Court’s approach to Bosnia and Herzegovina’s request for the redacted documents highlights the question of how active a role the Court should take with respect to fact-finding in addition to the issue of who has control over the process, the parties or the Court. Given the asymmetry between the parties’ access to documents, the Court’s failure to act also resulted in an unequal treatment of the parties. In this regard it is worth recalling Judge Owada’s observation in his separate opinion in the *Oil Platforms* decision:

[...] there is no denying the fact that there undoubtedly exists an asymmetry in the situation surrounding this case as described above, in terms of producing evidence for discharging the burden of proof, between the position of the Applicant in its claim against the Respondent and the position of the Respondent in its defence against the Applicant. I am prepared to accept that this asymmetry is inherent in the circumstances of the present case and that there is little the Court can do under the circumstances. It is primarily the task incumbent upon the party which claims certain facts as the basis of its contention to establish them by producing sufficient evidence in accordance with the principle *actori incumbit onus probandi*.

Accepting as given this inherent asymmetry that comes into the process of discharging the burden of proof, it nevertheless seems to me important that the Court, as a court of justice whose primary function is the proper administration of justice, should see to it that this problem relating to evidence be dealt with in such a way that utmost justice is brought to bear on the final finding of the Court and that the application of the rules of evidence should be administered in a fair and equitable manner to the parties, so that the Court may get at the whole truth as the basis for its final conclusion. It would seem to me that the only way to achieve this would have been for the Court to take a more proactive stance on the issue of evidence and that of fact finding in the present case.<sup>51</sup>

As noted by David Small in a previous article in this journal concerning the *Oil Platforms* judgment, the United States, whose military actions were on the public record, had the burden of proving a source of attacks which were not on any public record.<sup>52</sup> Judge Owada’s dissent cited above notes that this asymmetrical access to information was an inherent problem in the *Oil Platforms* case. While the Court could have taken a more “proactive stance” on evidence in the words of Judge Owada, it was unlikely that it could have solved the overwhelming problem of

<sup>50</sup> Paragraph 35 of Vice-President Al-Khasawneh’s dissenting opinion, *supra* note 6.

<sup>51</sup> Paragraphs 46 and 47 of Judge Owada’s dissenting opinion, *supra* note 4.

<sup>52</sup> See David H. Small, “The Oil Platforms Case,” 3 *Law and Practice of International Courts and Tribunals* (2004), 113, 120–121. David Small also refers to the asymmetry of access to evidence in the *Nicaragua* case, *supra* note 13.



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the asymmetrical access to information in that case. In contrast, the *Genocide* case, with regard to the question of whether Bosnia and Herzegovina could obtain the redacted minutes of the Supreme Defence Council, presented a curable problem.

Given that the Court's legal structure did not allow for discovery to take place between Bosnia and Herzegovina and Serbia and Montenegro, it was up to the Court to call on Serbia and Montenegro to produce the document. Nothing in the Statute explicitly states that the powers exercised under Article 49 of the Statute or Article 62 of the Rules of Court must be taken *proprio motu*, or that its decision to call on one of the parties to produce a decision could never be triggered or influenced by a request from one of the parties. Unless the Court were to take on a more active role, it would indeed be difficult for the Court to ever know, in the absence of a request from one of the parties, when a situation would arise which would necessitate the Court's calling on one of the parties to produce a document. Nevertheless, despite the absence of any discovery procedures at the Court, the Court seemed to view the request for the production of the redacted minutes as a matter in the hands of the parties, not the Court. For this reason the Court noted that it might "be free to draw its own conclusions."<sup>53</sup>

Serbia and Montenegro contested the argument that the Court could draw negative inferences from Serbia and Montenegro's refusal to produce un-redacted portions of certain materials:

... negative inferences from the alleged non-production of evidence requested by the Applicant ... cannot be drawn in this case, for the following reasons:

- (1) The Court has not called on the respondent State to produce any document.
- (2) The Applicant failed to request the production of the documents *in due time*. Instead, the Applicant took the position that the case was ready for the hearing and repeatedly asked the Court to commence the hearings without delay. Today, the Applicant's request seems rather like an excuse for the lack of evidence and a further attempt to shift the burden of proof to the Respondent.<sup>54</sup>

Perhaps the Court should have been reminded of the missing document story in the *Corfu Channel* case and, in light of what that document now reveals, should have questioned the motives for Serbia and Montenegro's refusal to produce the redacted minutes. Serbia and Montenegro rightly pointed out the reasons why the Court should refrain from drawing a negative inference in this case; if the Court was unwilling to call on Serbia and Montenegro to produce the redacted documents in the first place, drawing any inferences from the non-production of the document would result in an arbitrary treatment of the parties.

For comparison with another international tribunal's procedure regarding negative inferences, the Rules of Procedure of the Inter-American Commission of

<sup>53</sup> Paragraph 206 of the *Genocide* judgment, *supra* note 6.

<sup>54</sup> CR 2006/43, p. 28, para. 60. Public sitting held on Monday 8 May 2006. (Obradović)

Human Rights specifically allow for inferences to be drawn from silence on the part of a government:

The facts reported in the petition whose pertinent parts have been transmitted to the government... shall be presumed to be true if, during the maximum period set by the Commission... the government has not provided the pertinent information, as long as other information does not lead to a different conclusion.<sup>55</sup>

The Court might consider whether, in the situation of a recalcitrant State which refuses to provide documents over which it has access, the Court, by means of a procedural order, could notify the party that it will draw adverse inferences from that party's silence if it fails to cooperate with the Court's request to produce a document pursuant to Article 49 of its Statute. The Court could apply a similar presumption to that of the Inter-American Commission noted above, following a step-by-step determination of (1) whether State A has made a best effort attempt at obtaining evidence from State B; and (2) whether State B has control over the evidence sought by State A.<sup>56</sup>

The issue of the redacted documents in the *Genocide* case brought to light some other considerations in terms of access to information and equal treatment of the parties. While the Court had access to the judgments of the ICTY, both through the internet and through the documents submitted by the parties' pleadings, it did not have access to the confidential reports, depositions and other investigative materials relied on by the ICTY Prosecutor and defense counsel. Another twist in the *Genocide* case was the fact that certain members of counsel for Bosnia and Herzegovina involved in the ICJ proceedings had previously worked for the Office of the Prosecutor of the ICTY. While questions were raised concerning the

<sup>55</sup> Thomas Buergenthal, "Judicial Fact-Finding: Inter-American Human Rights Court," *Fact-Finding Before International Tribunals*, supra note 2 at 264–265. The American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969), is available at <<http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>>. The Statute of the Inter-American Court and other basic documents are available on the above-mentioned web-site.

<sup>56</sup> Jeremy Sharpe has described the following requirements "distill[ed] from arbitral awards and decisions" for the drawing of adverse inferences:

- (1) the party seeking the adverse inference must produce all available evidence corroborating the inference sought;
- (2) the requested evidence must be accessible to the inference opponent;
- (3) the inference sought must be reasonable, consistent with facts in the record and logically related to the nature of the evidence withheld;
- (4) the party seeking the adverse inference must produce *prima facie* evidence; and
- (5) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought."

See Jeremy Sharpe, "Drawing Adverse Inferences from the Non-production of Evidence," *Arbitration International*, Vol. 22, No. 4 (2006) 549, 551.



access to confidential documents resulting from this cross-over of ICTY counsel, the Court did not make any pronouncement on the matter.<sup>57</sup>

Article 66 of the Rules of Court states that “[t]he Court may at any time decide, either *proprio motu* or at the request of a party, to exercise its functions with regard to the obtaining of evidence at a place or locality to which the case relates, subject to such conditions as the Court may decide upon after ascertaining the views of the parties. The necessary arrangements shall be made in accordance with Article 44 of the Statute.” There is a question of how much limitation Article 44 of the Statute places on Article 66 of the Rules of Court. It could mean that, if the Court, pursuant to Article 66 of the Rules, had attempted to obtain redacted documents from the Supreme Defence Council, it would have had to have applied to Serbia and Montenegro, the State, but it could not have sought such a document from the ICTY. However, if Serbia and Montenegro had consented, in theory it could have allowed the Court to have tried to obtain documents from the ICTY or other tribunal through a request. As the issue of overlap between criminal tribunals may come to the Court again, it is worth considering whether the Court might contemplate entering into some type of fact-finding agreement with international criminal tribunals.

## V. Inferences and Indirect Evidence

In the *Corfu Channel* case, the Court found that the fact that a State exercises control over a territory “has a bearing upon methods of proof available to establish knowledge of that State as to events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This

<sup>57</sup> See CR 2006/43, para. 62. Ms. Joanna Korner, counsel for Bosnia and Herzegovina, had served as the principal trial attorney of the ICTY’s Office of the Prosecution. During the oral proceedings counsel for Serbia and Montenegro seemed to question the propriety of having former counsel from the ICTY represent one of the parties at the ICJ:

- “61. During our presentation on the relationship between the Yugoslav army and the army of Republik Srpska, we made indisputable some issues which, according to the Applicant, were hidden in the SDC [Supreme Defence Council] documents.
62. On the other hand, the Applicant’s accusation that the redacted sections of the SDC documents conceal the position of the Yugoslav Government with respect to Srebrenica or Markale massacres (CR 2006/30, p. 20, para. 19 van den Biesen)) is contradicted by the evidence brought before this Court by the Applicant itself. Namely, the British General Sir Dannatt testified in this case as an expert proposed by the Applicant. General Dannatt was also an expert of the ICTY Prosecutor in the Srebrenica case. He said that his testimony before this Court had been based on “an extensive number of documents” (CR 2006/23, p. 15). His examination was conducted by Ms Joanna Korner, a former principal trial attorney of the ICTY Prosecution Office, who is therefore most likely to know the contents of the redacted SDC documents much better than any of us. [...]”

indirect 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.”<sup>58</sup>

Much has been written about the Court’s treatment of evidence in the *Corfu Channel* case.<sup>59</sup> One of the case’s most notable characteristics is that the Court not only set forth a method of drawing inferences, but in addition, it stated very clearly what the standard of proof had to be for taking those inferences into consideration, namely, a “no room for reasonable doubt” standard.<sup>60</sup>

Deciding which party has exclusive control, or even advantageous control, over territory may be at the heart of the dispute between the parties before the Court, particularly in cases involving armed conflict. Therefore the Court, before it can decide how to shift the burden of proof onto the party with an advantage due to territorial control, must first establish which party actually has or had territorial control. It appears in some of the Court’s recent judgments that, rather than address issues of territorial control and the burden of proof, the Court has avoided drawing a line for shifting the burden of proof and has likewise avoided drawing inferences by virtue of a party’s territorial control.

The notion that a State exercising control over a territory has an advantage in terms of collecting direct proof was difficult to apply in the *Congo v. Uganda* case, in view of the fact that control over Congolese territory was a core part of the dispute between the parties. For example, the Congo stated that since the territory in which Uganda exploited the Congo’s resources was under Ugandan control, the Congo was not in a position to carry out investigations in that region. It therefore relied on independent experts who had direct access to that region.<sup>61</sup>

Uganda alleged that Congolese rebel groups had been allowed to operate unimpeded in border areas due to the almost complete absence of central government presence or authority during President Mobutu’s 32-year term in office.<sup>62</sup> In his dissenting opinion, Judge Kooijmans criticized the way in which the Court assessed the evidence regarding the question of whether the Congo had acted in conformity with its duty of vigilance in respect of rebel groups. He noted that while the Court admitted Uganda’s counter-claim that the rebel groups had been

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The above-mentioned situation also brings to light the fact that there is no international bar to determine questions concerning conflicts of interest between different tribunals. While there is an International Bar Association (IBA) which has published, inter alia, a Code of Ethics adopted in 1956, available at <[http://www.ibanet.org/images/downloads/International\\_Code\\_of\\_Ethics.pdf](http://www.ibanet.org/images/downloads/International_Code_of_Ethics.pdf)>, it is a voluntary bar association. Although the IBA may bring ethical duty violations to the attention of national bar associations and other organizations, it has no real enforcement mechanism.

<sup>58</sup> *Corfu Channel* case, Merits, supra note 42, p. 18.

<sup>59</sup> See Rosenne, supra note 12. See also, Malgosia A. Fitzmaurice, “The Corfu Channel Case and the Development of International Law,” *Liber Amicorum, Judge Shigeru Oda*, edited by Nisuke Ando (2002).

<sup>60</sup> *Corfu Channel* case, Merits, supra note 58.

<sup>61</sup> Congo’s Reply, paragraph 4.02.

<sup>62</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* supra note 5, para 301.



able to operate unimpeded in Congolese territory, it placed the burden of proof on Uganda to show that the Congo was in a position to exercise control over its borders. Judge Kooijmans indicated that the burden of proof should have been on the Congo to show what efforts it had made towards controlling the rebel groups.<sup>63</sup>

Judge Kooijmans's dissent highlights the fact that the Court was unwilling to draw inferences from the Congo's failure to provide evidence demonstrating efforts at controlling rebels. Whereas in the *Corfu Channel* case, the Court found that Albania's control over the territory and silence regarding mine-laying indicated knowledge on its part, the Court in the *Congo v. Uganda* case did not draw any inferences from silence as indicating knowledge, and whether such knowledge could have any weight in terms of responsibility for rebel forces.

In the *Oil Platforms* case, the United States, citing the *Corfu Channel* case, contended that, "[p]articularly in light of Iran's exclusive control of the territory in the Faw area from which the missile that hit Sea Isle City was fired, this evidence fully satisfies the burden of establishing that Iran is responsible for the attack on the Sea Isle City."<sup>64</sup> The Court did not take this view, and refused to shift the burden of the attack on Iran by virtue of the principle of territorial control. Rather, it placed the burden of proof on the United States, and found that the evidence submitted was unclear and failed to meet the burden of proof.<sup>65</sup>

Moreover, rather than make use of indirect evidence by drawing inferences, the Court at times seemed to practically require direct physical evidence. For example,

<sup>63</sup> "It is for the State under a duty of vigilance to show what efforts it has made to fulfil that duty and what difficulties it has met. In my view the DRC has only been successful in sufficiently substantiating an 'almost complete absence' of government presence or authority for the period from October 1996 to May 1997, the time of the first civil war. But I have found no evidence in the case file nor in relevant reports that the government in Kinshasa was not in a position to exercise its authority in the eastern part of the country for the whole of the relevant period and thus was unable to discharge its duty of vigilance before October 1996; the DRC has not even tried to provide such evidence. I therefore fail to understand the factual ground for the Court's conclusion that 'the part of Uganda's first counter-claim alleging Congolese responsibility for tolerating the rebel groups prior to May 1997 cannot be upheld' (Judgment, paragraph 301). In my view the logical conclusion would have been that the DRC has failed to provide evidence that it took credible measures to prevent rebel movements from carrying out transborder attacks or was unable to do so and that the first part of the counter-claim thus must be upheld." (para 83).

<sup>64</sup> Rejoinder of the United States, 23 March 2001, available on the Court's internet at <<http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm>>.

<sup>65</sup> *Oil Platforms*, (*Islamic Republic of Iran v. United States of America*), supra note 4, p. 189, para. 57. As noted in paragraph 38 of Judge Higgins' separate opinion in the *Oil Platforms* case, the Court did not make use of indirect evidence from which it could have possibly drawn inferences concerning knowledge and intent:

"It is also the case that the Court hardly deals at all with the evidence relating to the use of the platforms in the laying of mines. There was a huge amount of evidence presented to the Court. Some of it was direct and some of it indirect. Some of it was from several sources, some mere repetition from a single source. Some sources were partisan, some neutral. Some were reports of participants, others of those removed from the scene. Some were contemporaneous, some not. There is no attempt by the Court to sift or differentiate or otherwise examine this evidence. It merely says that it is "not sufficiently convinced" with it, without any further analysis or explanation (para. 76)."

the United States had claimed that the missile that struck the *Sea Isle City* was a ground-launched HY-2 anti-ship missile of the type known as the “Silkworm.” The United States was unable to produce physical evidence of this “Silkworm” missile, however, in the form of recovered fragments of the missile. The Court noted the absence of any direct physical evidence of a “Silkworm” missile, and indicated that despite its absence, it would examine the other evidence submitted by the United States on the hypothesis that the missile was of the Silkworm type claimed by the United States. In the end, however, the Court never did consider other evidence or attempt to draw inferences from indirect evidence.

In the *Genocide* case, Bosnia and Herzegovina contended that Serbia and Montenegro, due to its territorial control, “had a special duty of diligence in preventing genocide and the proof of its lack of diligence can be inferred from fact and circumstantial evidence.”<sup>66</sup> Bosnia and Herzegovina argued that the evidentiary standards of the *Corfu Channel* case and the *Nicaragua* case should apply and that that direct evidence was not necessary to discharge its burden of proof.<sup>67</sup>

While the Court in the *Genocide* judgment found that Serbia and Montenegro was responsible for a failure to prevent genocide that occurred at Srebrenica, the Court did not come to this conclusion by means of negative inferences or by the application of the concept of a duty of vigilance by virtue of territorial control. Rather, the Court’s reasoning shows that it clearly rejected the approach suggested by Bosnia and Herzegovina that Serbia and Montenegro’s responsibility could be established by patterns and inferences.<sup>68</sup> In respect of Serbia and Montenegro’s responsibility to prevent genocide at Srebrenica,<sup>69</sup> the Court seemed to be satisfied that it had clear evidence of “political, military and financial links” between the FRY and the Republika Srpska and the VRS.<sup>70</sup> The Court relied on UN documents

<sup>66</sup> Reply of Bosnia and Herzegovina, *supra* note 6, p. 839, para. 22. Also citing *Corfu Channel* Judgment of 9 April 1949, *supra* note 41. See also the Separate Opinion of Judge Lauterpacht of 13 September 1993 relating to the Further Requests for the Indication of Provisional Measures (*I.C.J. Reports 1993*, p. 325, pp. 416–442).

“As the bulk of the accessory conduct in question must necessarily have originated within the territory of the Respondent, it is obvious that it is beyond the power of the Applicant to obtain absolute proof of it.” (para. 45)

<sup>67</sup> See Bosnia’s Memorial, *supra* note 6, Section 5.3.5.2, page 223:

“Also relevant is this Memorial’s discussion of the appropriate civil evidentiary standard applicable to proof of “acts” under the [Genocide] Convention in general. It is impossible to conclude from this context that proof based on direct evidence of a genocidal master-plan could be expected as a necessary condition to the Convention’s being applied in circumstances such as those now prevailing in the territories of the former Yugoslavia.”

<sup>68</sup> While the Court in paragraph 242 of its decision stated that it would look at patterns of facts to see whether it could draw inferences (using language very similar to that of para. 205 of the *Congo v. Uganda* decision) in fact the Court never based its findings on inferences from patterns.

<sup>69</sup> *Genocide* judgment, *supra*, note 6, para 431.

<sup>70</sup> *Genocide* judgment, *supra*, note 6, para 434:



and ICTY testimony to support its findings of clear links and knowledge on the part of Belgrade authorities.<sup>71</sup> In fact, the Court had overwhelming influence in this regard, and the Court came close to saying as much in paragraph 438 of the judgment, in which it noted that the FRY authorities had “undeniable influence” and “information.” The Court’s refusal to find responsibility for genocide (as opposed to a duty to prevent genocide) on the part of Serbia and Montenegro is a result of its refusal to accept indirect evidence or to draw inferences in respect of this claim. Similar to its approach in the *Oil Platforms* case, the Court, in the absence of direct evidence such as a document from the authorities in Belgrade announcing the specific intent to commit genocide, found that indirect evidence failed to be probative. The Court noted in paragraph 272 of its judgment that it did not view the “Decision on Strategic Goals”<sup>72</sup> issued on 12 May 1992 by Momčilo Krajišnik as the President of the National Assembly of Republika Srpska, published in the *Official Gazette* of the Republika Srpska, as evidence of a specific intent to commit genocide. Nor did the Court link the genocide that occurred in Srebrenica, and the other atrocities that it noted as falling short of genocide that occurred in detention camps, to those Strategic Goals in order to infer intent on the part of the authorities at Belgrade.

## VI. Public Knowledge and Reports

One characteristic of some of the more factually complex disputes coming before the Court is that the conflicts in question have already been widely reported in the press, and in a manner that is more timely and vivid than ever before, due to the

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“The Court would first note that, during the period under consideration, the FRY was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska on the other, which, though somewhat weaker than in the preceding period, nonetheless remained very close.”

<sup>71</sup> Paragraphs 436–438 of the *Genocide* judgment, *supra* note 6.

<sup>72</sup> The English translation of the Strategic Goals presented by the Parties during the hearings, taken from the Report of Expert Witness Donia in the *Milošević* case before the ICTY, Exhibit No. 537, reads as follows:

“DECISION ON THE STRATEGIC GOALS OF THE SERBIAN PEOPLE IN BOSNIA AND HERZEGOVINA

The Strategic Goals, i.e., the priorities, of the Serbian people in Bosnia and Herzegovina are:

1. Separation as a state from the other two ethnic communities.
2. A corridor between Semberija and Krajina.
3. The establishment of a corridor in the Drina River valley, i.e., the elimination of the border between Serbian states.
4. The establishment of a border on the Una and Neretva rivers.
5. The division of the city of Sarajevo into a Serbian part and a Muslim part, and the establishment of effective state authorities within each part.
6. An outlet to the sea for the Republika Srpska.”

internet and due to the increase in NGO involvement in monitoring humanitarian affairs. The question of what constitutes public knowledge or common knowledge is therefore becoming increasingly relevant for the Court's assessment of facts.

It is not clear from the Court's jurisprudence what standard needs to be met before incidents reported in the press and other types of reports can constitute public knowledge for the Court's consideration, or which facts the Court may accept under the principle of judicial notice.<sup>73</sup> Although the Court has not set forth a definition of public knowledge, it has observed that press information may be useful as evidence when it is "wholly consistent and concordant as to the main facts and circumstances of the case".<sup>74</sup> In the case concerning *United States Diplomatic and Consular Staff in Tehran*,<sup>75</sup> Iran did not deny or question any of the information from various sources such as newspaper, television and radio reports presented by the United States, which made it easier for the Court to accept the information as public knowledge.

It appears from the Court's decision in the case concerning *United States Diplomatic and Consular Staff in Tehran* that the phrase "wholly consistent and concordant as to the main facts and circumstances of the case" would have to mean that the press reports in question would have to confirm the facts as alleged by both of the parties, or confirm facts that have not been denied or contested by the parties. This was certainly not the situation in the *Genocide* case, as Serbia and Montenegro contested much of what Bosnia and Herzegovina claimed to be common knowledge, alleging that the reports on which Bosnia and Herzegovina made its claim for public knowledge were biased, exaggerated and false.<sup>76</sup>

<sup>73</sup> According to Amerasinghe, "Judicial notice is . . . a measure through which international tribunals can rely on some facts in a pending case without requiring the party that relies on them to provide proof thereof." See C. F. Amerasinghe, *Evidence in International Litigation* 160–161 (2005). Cited during the oral proceedings of the *Genocide* case by Professor Thomas Franck, CR 2006/3, Public Sitting held on Tuesday 28 February 2006, p. 24.

<sup>74</sup> *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 10, para. 13. In the *Fisheries Case*, while the Court did not employ the term "judicial notice", it indicated that certain facts were notorious. *Fisheries Case (United Kingdom v. Norway) ICJ Reports 1951*, 138–139. See also *Nuclear Tests, I.C.J. Reports 1974*, p. 9, para. 17, cited by Professor Franck during oral proceedings, *supra*, p. 24.

<sup>75</sup> *I.C.J. Reports 1980*, *supra*, para. 13.

<sup>76</sup> In its Rejoinder, Serbia quoted portions of the Annex to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), the "Bassiouni's Commission." Serbia observed:

"[T]he Respondent does not consider these parts of the Annex to be relevant proofs. The Respondent quotes them for two reasons. First, to point to the partiality of Bassiouni's Commission in the presentation of information on camps under Muslim-Croat control. Bassiouni's Commission registered a large number of camps, but gave relatively scarce information about what was happening in them; in any case, it offers far less information about them compared to the description of developments in the camps in which Muslims and Croats were held."

Serbia and Montenegro's Rejoinder, 22 February 1999, *supra* note 6, para. 2.4.1.1.



In the *Nicaragua* case, the Court acknowledged that joint military manoeuvres with Honduras were a matter of public knowledge in the following terms:

... since there was no secrecy about the holding of the manoeuvres, the Court considers that it may treat the matter as one of public knowledge, and as such, sufficiently established.<sup>77</sup>

While in the *Oil Platforms* case, both the United States and Iran<sup>78</sup> alleged that certain factual matters were public knowledge, the Court in its decision never employed the term judicial notice or public knowledge. It did, however, acknowledge facts which were undisputed between the parties which it considered to form part of the historical record.<sup>79</sup> The Court also indicated that it would take note of circumstances related to the presence of mines without inquiring as to whether Iran or Iraq was responsible for mine-laying as a relevant circumstance for evaluating the United States' actions.<sup>80</sup>

<sup>77</sup> The *Nicaragua* decision, 1986 I.C.J. Reports, supra note 13, para 92.

<sup>78</sup> Iran alleged the following as public knowledge:

"[...] Officially, the United States announced that it was neutral in the conflict, and Security Council Resolutions concerning the conflict called on third States to exercise the utmost restraint and to avoid any act that might escalate hostilities. The United States also had special duties to Iran under the Treaty of Amity. Yet despite the existence of such obligations, it is public knowledge that during the conflict the United States actively supported Iraq militarily, politically and financially, and acted against the interests of Iran."

Memorial of Iran, supra note 4, Vol. I, June 8, 1993, p. 6, para 1.05.

The United States asked that the Court take judicial notice of what it considered to be public knowledge:

"In short, Iran's attacks on neutral shipping were widespread, well-documented, and of great concern within the international shipping community. Consistent with its past practice, the Court may take judicial notice of the extensive public record establishing Iran's responsibility for attacks on neutral shipping. Iran has not attempted to deny these facts in its pleadings before this Court. Its failure to do so should lead this Court to conclude that Iran's responsibility for attacks on neutral shipping has been proven."

Rejoinder of the United States, March 32, 2001, supra note 4, page 14, para 1.12.

<sup>79</sup> *Oil Platforms* judgment, supra note 4, paragraphs 23 and 24.

<sup>80</sup> *Oil Platforms* judgment, supra note 4, paragraph 44:

"In this connection, the Court notes that it is not disputed between the Parties that neutral shipping in the Persian Gulf was caused considerable inconvenience and loss, and grave damage, during the Iran-Iraq war. It notes also that this was to a great extent due to the presence of mines and minefields laid by both sides. The Court has no jurisdiction to enquire into the question of the extent to which Iran and Iraq complied with the international legal rules of maritime warfare. It can however take note of these circumstances, regarded by the United States as relevant to its decision to take action against Iran which it considered necessary to protect its essential security interests. Nevertheless, the legality of the action taken by the United States has to be judged by reference to Article XX, paragraph 1 (d), of the 1955 Treaty, in the light of international law on the use of force in self-defence."

The question of what constitutes public knowledge has a bearing on whether the Court will shift the burden of proof, and whether the Court will draw inferences in light of public knowledge. Although the Court in the *Oil Platforms* case stated that it would take note of the mine-laying as a relevant historical fact, as indicated by Judge Higgins' separate opinion, it did not draw inferences or shift the burden of proof to Iran in light of the mine-laying as an established historical fact. In particular the Court did not find reports such as *Lloyd's Maritime Information Service*, *the General Council of British Shipping*, or *Jane's Intelligence Review* to be authoritative public sources, noting that "[t]hese 'public sources' are by definition secondary evidence; and the Court has no indication of what was the original source, or sources, or evidence on which the public sources relied. In this respect the Court would recall the caveat it included in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, that '[w]idespread reports of a fact may prove on closer examination to derive from a single source, and such reports, however numerous, will in such case have no greater value as evidence than the original source.'"<sup>81</sup>

While the Court in the *Oil Platforms* case noted the *Nicaragua* Court's caveat regarding press sources, it failed to acknowledge the fact that the *Nicaragua* Court, despite its caveat, made use of a great deal of secondary evidence such as press reports. For example, the Court accepted Nicaraguan newspaper reports in regard to the allegations of joint military manoeuvres with Honduras.<sup>82</sup>

In the *Congo v. Uganda* case, the Congo alleged that most of the facts on which it relied were matters of public knowledge, noting that, "[i]n addition to the specific and consistent evidence referred to above from a range of sources, these facts are reported on a daily basis by all the news agencies, radio and television stations around the world."<sup>83</sup> In this regard the Congo asserted that the case presented similarities with *United States Diplomatic and Consular Staff in Tehran* (ICJ Reports 1980).<sup>84</sup> The Court did not give a great deal of weight to much of the secondary evidence offered in the *Congo v. Uganda* case. The Court often found press and radio reports submitted by the parties in the *Congo v. Uganda* to be unreliable sources of secondary evidence. In paragraph 159 of its decision, for example, it noted that it had not relied on evidence submitted by the Congo such

<sup>81</sup> *Oil Platforms* judgment, supra note 4, para. 60.

<sup>82</sup> The *Nicaragua* judgment, supra note 13, para 92.

<sup>83</sup> Congo's Memorial, supra note 5, p. 66, para 2.174.

<sup>84</sup> Uganda, in its Counter-Memorial, supra note 5, p. 66, para 157, p. 66, did not attempt to contest the Congo's assertion that the facts Congo presented were matters of public knowledge. Rather, Uganda citing the *Nicaragua* case (paras 62–63), noted the following:

"Evidence of public knowledge may not always provide safe evidence of imputability and of actual political relationships. In the *Nicaragua* case the Court was in practice reluctant to rely upon this type of evidence in relation to questions of imputability of covert actions. In any case, a high proportion of the Court's determinations of fact were based upon admissions contained in official documents."



as the Human Rights Watch Report of March 2001, passages from the Secretary-General's report on MONUC of 4 September 2000 (noting that it would not consider passages where reliance on second-hand reports was acknowledged), articles in the *IRIN* bulletin and *Jeune Afrique*. The Court did not find that the press reports mentioned above constituted matters of public knowledge, nor did it attempt to find some sort of cumulative effect on the basis of these reports.<sup>85</sup>

Similarly, in the Genocide case, the Court referred to the *Nicaragua* caveat with respect to secondary evidence.<sup>86</sup> It also expressed its skepticism towards a World Health Organization/European Union study that was reported in the French daily *Le Monde*. This study referred to a statement by the President of an NGO called Medical Centre for Human Rights which claimed that approximately 5,000 non-Serb men were the victims of sexual violence. The Court noted that the article in *Le Monde* was “only a secondary source” and there was no indication of how the NGO arrived at the figure of 5,000 men.<sup>87</sup>

The Court's repetition of its caveat regarding secondary evidence is an unsatisfactory response to a party's efforts to demonstrate a pattern of evidence. The Court's application of the test that it created in *United States Diplomatic and Consular Staff in Tehran*,<sup>88</sup> one that basically says that the Court will accept facts from reports as long as the parties do not contest those facts, highlights its unwillingness to

<sup>85</sup> John Crook noted the Court's resistance to the examination of evidence on a cumulative basis in a briefing held at ASIL on 13 March 2006. See Crook, *supra* note 2.

<sup>86</sup> *Genocide* judgment, *supra* note 6. In paragraph 213, the Court state the following:

“The assessment made by the Court of the weight to be given to a particular item of evidence may lead to the Court rejecting the item as unreliable, or finding it probative, as appears from the practice followed for instance in the case concerning *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, pp. 9–10, paras. 11–13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, pp. 39–41, paras. 59–73; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, pp. 200–201, paras. 57–61. In the most recent case the Court said this: The Court will treat with caution evidentiary materials specially prepared for this 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, *I.C.J. 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.” (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 35, para. 61. See also paras. 78–79, 114 and 237–242.)”

<sup>87</sup> *Genocide* judgment, para 357, citing Reply, para 171, Annex 89, *supra* note 6.

<sup>88</sup> *Supra* note 74.

take its own initiatives and to judge for itself the extent to which secondary evidence may be flawed. There is nothing in the Court's Statute or Rules to preclude secondary evidence from being admitted as a credible source. When the Court is unsure about the figures cited in a report, it would rather simply reject it altogether (citing its own jurisprudence in support thereof) than call either on the author of the report, the party producing the report to produce more information concerning its source of the report, or the party challenging the report to prove that the report is not credible.

The question of public knowledge and judicial notice has been an important issue before international criminal tribunals. The Rules Charter of the Nuremberg Tribunal, the Rules of Procedure for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) specifically address the question of judicial notice and matters of common knowledge.<sup>89</sup> The ICTR Appeals Chamber, in its recent decision, *Prosecutor v. Karemera, Ngirumpatse, Nzirorera*, Case No. ICTR-98-44-AR73(C), emphasized the fact that Rule 94(A) concerning judicial notice is *not* discretionary:

Thus, the Appeals Chamber has already held that the existence of widespread or systematic attacks against a civilian population based on Tutsi ethnic identification, as well as the existence of a non-international armed conflict, are notorious facts not subject to reasonable dispute. Therefore, the Trial Chamber was obliged to take judicial notice of them, since judicial notice under Rule 94(A) is not discretionary.<sup>90</sup>

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<sup>89</sup> Article 21 of the Charter of the Nuremberg Tribunal states:

“The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and of records and findings of military or other Tribunals of any of the United Nations.” UNTS 279; 59 Stat. 1544; 3 Bevens 1238; 39 AJIL 258 (1945).

Rule 94 of the ICTY's Rules of Procedure and Evidence, adopted in February 1994 and amended (in section B) in July 1998, sets forth a similar provision regarding Judicial Notice:

- (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.
- (B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

IT/32/Rev. 38, 13 June 2006, Extraordinary Plenary Session, The Hague Netherlands available at <<http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf>>.

Rule 94 also applies to the ICTR.

<sup>90</sup> *Prosecutor v. Karemera, Ngirumpatse, Nzirorera*, Case No. ICTR-98-44-AR73(C), Para. 29. Available on the ICTR web site at <<http://69.94.11.53/>>.



Even more significant is that the ICTR Appeals Chamber concluded that the Trial Chamber erred for having refused to take judicial notice of genocide:

35. The Appeals Chamber agrees with the Prosecution: the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber as a fact of common knowledge. Genocide consists of certain acts, including killing, undertaken with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. There is no reasonable basis for anyone to dispute that, during 1994, there was a campaign of mass killing intended to destroy, in whole or at least in very large part, Rwanda's Tutsi population, which (as judicially noticed by the Trial Chamber) was a protected group. That campaign was, to a terrible degree, successful; although exact numbers may never be known, the great majority of Tutsis were murdered, and many others were raped or otherwise harmed. These basic facts were broadly known even at the time of the Tribunal's establishment; indeed, reports indicating that genocide occurred in Rwanda were a key impetus for its establishment, as reflected in the Security Council resolution establishing it and even the name of the Tribunal. During its early history, it was valuable for the purpose of the historical record for Trial Chambers to gather evidence documenting the overall course of the genocide and to enter findings of fact on the basis of that evidence. Trial and Appeal Judgments thereby produced (while varying as to the responsibility of particular accused) have unanimously and decisively confirmed the occurrence of genocide in Rwanda, which has also been documented by countless books, scholarly articles, media reports, U.N. reports and resolutions, national court decisions, and government and NGO reports. At this stage, the Tribunal need not demand further documentation. The fact of the Rwandan genocide is a part of world history, a fact as certain as any other, a classic instance of a 'fact of common knowledge.'

In the *Genocide* judgment, the Court never stated that genocide occurred as a matter of public knowledge, although it came close to saying as much in respect of the massacre at Srebrenica. The Court relied on the report, "The Fall of Srebrenica" submitted by the United Nations Secretary-General to the General Assembly in November 1999 (United Nations Doc., A/54/549).<sup>91</sup> It also came close to acknowledging that certain facts highlighted by Security Council Resolutions also constituted public knowledge. In this regard the Court noted that widespread and systematic rape had occurred, and referred to Security Council Resolutions 798 (1992), Preamble, para. 4; Resolution 820 (1993), para. 6; 827; Preamble, para.3 and Resolution 1034 (1995),<sup>92</sup> in addition to the ICTY Trial Chamber judgments in the *Krstić*<sup>93</sup> and *Blagojević*<sup>94</sup> cases. However, the Court never stated that the very creation of the ICTY was an acknowledgment that genocide had occurred in the Former Yugoslavia.

It seems that the Court could have helped the parties focus their written and oral pleadings on the question of whether Serbia and Montenegro exercised

<sup>91</sup> Paras. 228–230 of the *Genocide* judgment, supra note 6.

<sup>92</sup> Paragraph 302 of the *Genocide* judgment, supra note 6.

<sup>93</sup> IT-98-33-T, Judgment of Trial Chamber I, 2 August 2001, paras. 426–427. Available on the ICTY website at <<http://www.un.org/icty/cases-e/index-e.htm>>.

<sup>94</sup> IT-02-60-T, Judgment of Trial Chamber I, 17 January 2005, para. 643. Available on the ICTY website at <<http://www.un.org/icty/cases-e/index-e.htm>>.

authority over those who committed genocide or not by first determining, as a preliminary matter, and perhaps after the first round of written pleadings, whether genocide had occurred as a matter of public knowledge.

## VII. Fact-Finding Based on UN Reports

A related aspect of public knowledge is the Court's reliance on UN Reports, Security Council Resolutions and other UN documents for making factual assessments. As illustrated by the *Congo v. Uganda* and *Genocide* judgments, the Court normally lends greater weight to UN Reports than to other types of secondary evidence such as press reports, given that UN reports appear to be based on more solid, objective fact-finding than press reports. However, the fact-finding underlying certain UN documents relied upon by the Court may be flawed, based on selective or biased witness accounts, and lacking transparency.

Judge Van den Wyngaert of the ICTY has observed that UN documents should be subject to much more rigorous examination by the ICJ, and in her criticism of the ICJ, has stated that “[i]t would be interesting to see what the result in the DRC/Uganda case would have been had the ICJ applied the same test [as applied by the ICTY] to the MONUC [United Nations Mission in the Democratic Republic of the Congo] report and other documentary evidence on which (some of) its holdings were based.”<sup>95</sup>

In the *Congo v. Uganda* case, the Congo relied on several UN Reports in support of its allegations regarding the exploitation of natural resources, in particular, the April 2001 *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*<sup>96</sup> the “First UN Panel Report.” The Security Council then created a second UN Panel, in order to correct some of the errors of the First UN Panel. This Second UN Panel issued an Addendum to the Report of the Panel of Experts on the Illegal Exploitation of Natural Resources. In this addendum, it was admitted that the Panel was unable to solve the errors of the First Report. A Third Report was then issued.

Uganda claimed the following:

[t]he UN Panel Reports, and in particular the First Report on which the DRC primarily rests her claims, are inadequate even when their limited purpose is considered. The DRC herself has admitted that the UN Panel Reports are not credible, for they make accusations without any evidentiary basis, fail to understand the context of the events, and fail to comprehend when conduct is illegal. Other States have so widely and correctly criticized the Reports for the cavalier manner in which

<sup>95</sup> See Christine Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts be Avoided?* 100 ASIL Proceedings 63 (2006).

<sup>96</sup> Reply of the Congo, Annex 69, supra note 5.



they fail to provide evidentiary support for serious allegations. The Panel Reports rest on unidentified “sources” and “information” rather than on sworn testimony, documents, and corroborated evidence.<sup>97</sup>

Uganda further contended that Report of the Special Rapporteur in the Situation of Human Rights in the DRC, dated 17 September 1999, made no “appropriate legal assessments of responsibility and, when individual States are implicated, no evidence is presented.”<sup>98</sup>

The *Congo v. Uganda* judgment in paragraph 207 noted that the Court had generally established facts based on “the coincidence of reports from credible sources” many of which were UN Reports and other UN documents. Nevertheless, the Court indicated that not all UN sources were credible. In paragraph 205 of the *Congo v. Uganda* decision, the Court notes some hesitation in regard to the evidentiary weight it should give to UN documents:

The Court will now examine the allegations by the DRC concerning violations by Uganda of its obligations under international human rights law and international humanitarian law during its military intervention in the DRC. For these purposes, the Court will take into consideration evidence contained in certain United Nations documents *to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.*

It is not clear from the above passage which UN documents had to be corroborated by other credible sources by the Court, and which UN documents were of value on their face. The Court in paragraph 159 of its decision observed that “passages from the Secretary-General’s report on MONUC of 4 September 2000 (where reliance on second-hand reports is acknowledged)” were not found to be reliable. That the MONUC Report mentioned its reliance on second-hand reports does not mean that other UN documents did not rely on second-hand reports, it could be that all of the UN Reports relied on by the Court involved second-hand reports as opposed to direct, eye-witness testimony.

In the *Genocide* judgment, the Court spelled out more clearly its method of weighing the credibility of the various reports submitted to it, in a way that was more elaborate than the *Congo v. Uganda* judgment. In paragraph 227 of the judgment, the Court stated that the value of reports “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).”

<sup>97</sup> Uganda’s Rejoinder, p. 137, para. 324, supra note 5.

<sup>98</sup> Uganda Counter Memorial, p. 80, para. 111, supra note 5.

The Court gave great weight to the report, “The Fall of Srebrenica”, submitted by the United Nations Secretary-General to the General Assembly in November 1999,<sup>99</sup> and observed that this report was both comprehensive and based on solid methodology.<sup>100</sup>

The *Genocide* case also presented the issue of the amount of weight the Court was to give to reports the accuracy of which was contested by the parties. For example, in respect of the detention camp at Bathović, Serbia and Montenegro had emphasized the report of the United Nations Special Rapporteur, which had stated that “[t]he prisoners did not complain of ill-treatment and, in general, appeared to be in good health.”<sup>101</sup> Bosnia and Herzegovina contested that assessment of the camp, arguing that the Special Rapporteur was doubtlessly shown a “model camp.”<sup>102</sup>

The Court, without its own fact-finding commission or group of experts that could have attempted the formidable task of sorting through the contested UN reports, had to rely on the facts alleged by Bosnia and Herzegovina that had not been contested by Serbia and Montenegro.<sup>103</sup>

In this regard the Court noted that “while the Respondent contested the veracity of certain allegations and the number of victims, or the motives of the perpetrators, as well as the circumstances of the killings and their legal qualification, it never contested, as a matter of fact, that members of the protected group were indeed killed in Bosnia and Herzegovina.”<sup>104</sup>

### VIII. Security Council and General Assembly Resolutions

In addition to UN Reports, General Assembly and Security Council Resolutions play a significant role in the Court’s assessment of facts. The Court in the *Congo v. Uganda* case seemed to consider some Security Council Resolutions as providing

<sup>99</sup>) United Nations Doc. A/54/549.

<sup>100</sup>) Paragraph 228 of the *Genocide* judgment, supra note 6.

<sup>101</sup>) *United Nations Report of the Special Rapporteur*, 17 November 1992, para. 29. Cited in the *Genocide* judgment, para. 256, supra note 6.

<sup>102</sup>) Paragraph 256 of the *Genocide* judgment, supra note 6.

<sup>103</sup>) According to Rosenne, one of the traditional characteristics of the Court’s evidentiary assessment tools is its reliance on undisputed facts:

“The Court’s function in establishing the facts consists in its assessing the weight of the evidence produced in so far as it is necessary for the determination of the concrete issue which it finds to be the one which it has to decide. For this reason, there is little to be found in the way of rules of evidence, and a striking feature of the jurisprudence is the ability of the Court frequently to base its decision on undisputed facts and in reducing voluminous evidence to manageable proportions.”

See Rosenne, *The Law and Practice of the International Court* 580, (1965), Also cited in Sandifer, supra note 7, 15.

<sup>104</sup>) Paragraph 276 of the *Genocide* judgment, supra note 6.



a factual basis from which the Court could draw legal conclusions, almost as if Security Council Resolutions constituted fact-findings of a lower court.

One problem with the Court's reliance on Security Council Resolutions is that the findings of the Security Council cannot be characterized as judicial.<sup>105</sup> In regard to documents such as Security Council resolutions, summary records of the Security Council and Reports of the UN Secretary-General, Uganda observed that "with certain exceptions, the preponderance of these documents are in general terms and make no reference to the involvement of individual States."<sup>106</sup>

While some authors have noted that within a cooperative system such as the United Nations, once a United Nations organ pronounces on a point of law, it constrains the other organs even if the pronouncement is non-binding,<sup>107</sup> the *Genocide* judgment indicates that the Court was not constrained by the General Assembly's statement that "ethnic cleansing" was a form of genocide. Rather, the Court noted that the ICTY had properly determined that "ethnic cleansing" did not necessarily amount to genocide.<sup>108</sup> For the purposes of this article, the question is whether it is also true that once a United Nations body such as the Security Council or General Assembly makes a factual assessment, the Court must be held by that assessment.<sup>109</sup>

Once a dispute is submitted to the Court concerning the specifics of situations involving "continued fighting and presence of foreign forces in the DRC" to what extent should the Court base its fact-finding, make observations of public knowledge, and even draw inferences, from the general statements of the Security Council? It would seem that at times, references to the Security Council and

<sup>105</sup> Sir Elihu Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge, 1991, pp. 42–43 (cited in Uganda's Counter-Memorial, p. 112, para. 191).

<sup>106</sup> Uganda Counter Memorial, p. 78, para. 108, *supra* note 5.

<sup>107</sup> Jose E. Alvarez, "Judging the Security Council," 90 *American Journal of International Law* 1, 6 (1966). See also, Kathleen Renee Cronin-Furman, "The International Court of Justice and the United Nations Security Council: Rethinking a Complicated Relationship," 106 *Columbia Law Review*, 447 (2006). See also, Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ," *European Journal of International Law* Vol. 16 no. 5 (2006), 879, 891. Öberg observes that "[l]ooking to establish the relevant facts in the 1986 *Nicaragua* case, the Court found that 'in its quest for truth, it may take note of... resolutions adopted or discussed by [international] organizations, in so far as factually relevant.'" He further notes that "[t]his could be read to imply that factual determinations in GA and SC resolutions do not impose themselves on the Court."

<sup>108</sup> Paragraph 190 of the *Genocide* judgment, *supra* note 6.

<sup>109</sup> The question of the extent to which the Security Council may consider prior illegalities in determining responsibility is a problem raised long ago by the current president of the Court, Rosalyn Higgins:

"There are equally those who believe that the Security Council views "justice" as synonymous with the *status quo ante*, but that the *status quo ante* is not necessarily the *status juris*, even under established international law. [...] The Security Council has consistently chosen to deal, so far as mandatory decisions are concerned, with only the immediately prior illegality. For the settlement of the underlying issues by the establishment of an acceptable *status juris*, it has preferred to recommend that the parties resort to negotiation or mediation, though the Council has often offered its own good offices."

General Assembly Resolutions would simply beg the questions facing the Court. At other times, reliance on these Resolutions may help the Court filter out questions that are already a matter of public knowledge, in order to focus on the more specific questions that only the Court should answer.

There has been criticism of the *Wall* advisory opinion<sup>110</sup> concerning the extent to which the Court simply re-framed statements of the General Assembly and the Security Council rather than face the more complex factual questions.<sup>111</sup> The Court did not see any fact-finding role for it in respect of the *Wall* Advisory opinion; its view was that it already had before it “a given factual situation” as provided by the UN dossier.<sup>112</sup> It may be said that in the *Congo v. Uganda* case, the Court has similarly taken UN Security Council Resolutions and other UN Reports as the “given factual situation.”

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See Rosalyn Higgins, “Settlement of Disputes by the Security Council,” 64 *American Journal of International Law* (1970) 11–12.

See also Thomas M. Franck, “The Security Council and Threats to the Peace: Some Remarks on Remarkable Recent Developments,” *ASIL Proceedings*, 1993, p. 83; see also, Alain Pellet, “Strengthening the Role of the ICJ,” *Law and Practice of International Courts and Tribunals* Vol. 3 (2004), 173–180.

<sup>110</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 136. Also available on the Court’s web site at <<http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>>.

<sup>111</sup> See paragraph 3 of Judge Buergenthal’s Declaration:

“It may well be, and I am prepared to assume it, that on a thorough by Israel on the Occupied Palestinian Territory violate international law (see para. 10 below). But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right of self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law. The nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject. I am not suggesting that such an examination would relieve Israel of the charge that the wall it is building violates international law, either in whole or in part, only that without this examination the findings made are not legally well founded. In my view, the humanitarian needs of the Palestinian people would have been better served had the Court taken these considerations into account, for that would have given the Opinion the credibility I believe it lacks.”

For a general discussion of the *Wall* Advisory Opinion, See the *American Journal of International Law* Agora, Volume 99 (2005). See also “The Wall Symposium,” *European Journal of International Law*, Vol. 16 (2005) No. 5.

<sup>112</sup> Paragraph 37 of the advisory opinion states:

“As regards the alleged lack of clarity of the terms of the General Assembly’s request and its effect on the “legal nature” of the question referred to the Court, the Court observes that this question is directed to the legal consequences arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter the “Fourth Geneva Convention”) and relevant Security Council and General Assembly resolutions. The question submitted by the



Another question related to the Court's reliance on UN documents is the extent to which the Court can draw inferences from the parties' actions before the UN Security Council.

The Court found in the *Nicaragua* case that the United States could not have believed that it was the subject of an armed attack which would have given rise to the collective right of self-defence, given that the United States had not complied with the requirements of Article 51 of the UN Charter governing that right.<sup>113</sup> In the *Oil Platforms* case, the United States invoked Article 51 of the Charter before the UN Security Council, however the Court refused to accept that its invocation of Article 51 gave any weight to the notion that the United States believed that it was the subject of an armed attack.<sup>114</sup> In the *Congo v. Uganda* case, the Court, when analyzing whether Uganda was entitled to resort to self-defence, decided not to ask whether each individual action was carried out on the basis of self-defence, but rather, whether Uganda was generally entitled to act based on self-defence.<sup>115</sup> The Court then concluded that the Security Council had adopted several resolutions, which, according to the Congo, were "demonstrably incompatible with Uganda's right to unilateral use of force, whether on the basis of alleged self-defence or some other ground."<sup>116</sup>

In the *Genocide* case, the Court seemed to draw factual conclusions more from what UN documents did not say rather than from what they did say. While the Court referred to Security Council Resolutions<sup>117</sup> in which the Security Council called on the Former Republic of Yugoslavia to end its participation and military operations with Bosnian Serb armed forces prior to the massacres at Srebrenica, the Court seemed to conclude that the absence of direct blame on the Serbian authorities in those Resolutions supported the principle that Serbia and Montenegro was not directly responsible.

In regard to the question of whether Serbian authorities were responsible for genocide, the Court found it significant that the report of the United Nations Secretary-General did not establish any direct involvement by President Milošević with the massacre.<sup>118</sup> But why *would* the Secretary-General of the United Nations have blamed Milošević directly or the authorities of Belgrade for genocide, when

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General Assembly has thus, to use the Court's phrase in its Advisory Opinion on *Western Sahara*, "been framed in terms of law and raise[s] problems of international law"; it is by its very nature susceptible of a reply based on law; indeed it is scarcely susceptible of a reply otherwise than on the basis of law. In the view of the Court, it is indeed a question of a legal character (see *Western Sahara, Advisory Opinion*, *I.C.J. Reports 1975*, p. 18, para. 15).

<sup>113</sup>) *Highet*, supra note 1, 12. *Nicaragua* judgment on the merits, supra note 13, para 235.

<sup>114</sup>) *Oil Platforms*, supra note 4, para. 51.

<sup>115</sup>) *Congo v. Uganda*, supra note 5, paras. 118 and 145.

<sup>116</sup>) Congo's Reply, supra note 5, Vol. I, para. 3.18, Security Council Resolutions 1234 (1999), 1304 (2000).

<sup>117</sup>) Security Council Resolutions 752 (1992), 757 (1992), 762 (1992), 819 (1993), 838 (1993).

<sup>118</sup>) *Genocide* judgment, supra note 6, para. 408.

such a complicated and weighty decision belonged to a court in the first place? This is an instance in which the Court, when faced with facts that it could not establish by direct evidence, and, in its resistance to inferences, fell back on the comfortable cushion of UN Documents such as a Report of the Secretary-General, which have often made only vague pronouncements precisely because that is all that they can do.

The use of the Security Council's Resolutions and UN Reports, as general assessments of a current crisis, worded within the framework of international law, should be a point of departure for States to resolve their disputes before the Court, rather than as a substitute for the Court's fact-finding.<sup>119</sup>

While UN documents and reports may be helpful in establishing facts, as the Court deals more and more with controversial and sensitive issues such as those underlying the *Genocide* case and the *Congo v. Uganda* case, it will also have to deal with parties' challenges to the fact-finding underlying UN documents. The Court has the option of deciding, as a preliminary matter, that certain findings in a UN document are matters of public knowledge or of historical record. It may also call on experts and the very authors of the UN documents to decide for itself whether the fact-finding upon which UN documents are based is sound. As the Court's docket becomes more up-to-date, it will be interesting to see whether in the future the Court attempts to carry out additional fact-finding by calling on experts or even by establishing its own fact-finding commission. Any such commissions will no doubt face tremendous obstacles<sup>120</sup> and perhaps criticism regarding their legitimacy; nevertheless, if fact-finding is indeed "a basic part of the original purpose for an international court,"<sup>121</sup> the Court should risk such criticism.

## IX. Reliance on Fact-Finding from Commissions and other Courts

In the *Congo v. Uganda* case, the Court noted that it would give special consideration to the Report of the Porter Commission, which had gathered evidence through examination of persons directly involved who were subsequently cross examined. The Court further observed that, since the publication of the Porter Commission Report, neither party had challenged the report's credibility.<sup>122</sup>

Given the Porter Commission's own admission of the serious flaws and constraints involved in its fact-finding process, however, it is surprising that the Court would have given the report so much weight.

<sup>119)</sup> See Higgins, *supra* note 109 at 3.

<sup>120)</sup> For an illustrative discussion of the obstacles facing fact-finding commissions, see Thomas Buergenthal, "The United Nations Truth Commission for El Salvador," *supra* note 19, 513.

<sup>121)</sup> See Hight, *supra* note 1 at 6.

<sup>122)</sup> *Congo v. Uganda* Judgment, *supra* note 5, para. 60.



In its report, the Porter Commission noted:

The Commission has experienced various constraints in its task. One of the major snags was the lack of sources of information. Although the original Panel was prepared to accept unsworn, and often hearsay evidence in private, this Commission is forced by the Commissions of Inquiry Act to work only with sworn evidence, given in public.

The Commission had hoped for the original [UN] Panel's assistance in providing some of the sources it had not included in its report, but disappointingly from the outset, this was not the case. In initially refusing to share with this Commission their sources of information, the original Panel made it clear that it was the policy of [the] UN not to disclose such sources in its reports. However, later on during further visits by members of the reconstituted Panel to this Commission, some documents were availed which have assisted enquiries to a certain extent. Further documents were provided from time to time, although some of them turned out to be impossible to rely upon, while others were translations from French into English. The reconstituted Panel availed one witness, together with facilities to hear him in Nairobi, which was of great assistance. All in all, however, this Commission has been left with the impression that the reconstituted Panel could have done a great deal more to assist, and could have done it earlier in the investigations.<sup>123</sup>

Whereas the Court gave more weight to the fact that the testimony presented before the Porter Commission was sworn testimony, the Porter Commission itself observed that the very fact that the witnesses had to provide sworn testimony in public made the testimony less reliable at times:

For this Commission, bound as it is to hear sworn evidence in public, it would seem that the majority of evidence likely to be obtained by such a methodology would be either hearsay, biased, or pure gossip, all untested.<sup>124</sup>

[...]

As this Commission has already shown in its Interim Report and repeats here in Paragraph 16.1 below, that investigation [the Dara Foret investigation] was in many areas one sided, biased, and completely wrong, because the original Panel did not do what it said it was going to do, that is, to interview those accused, or ask to do so.<sup>125</sup>

The Court made no mention of some of the flaws in the findings of the Porter Commission, flaws that the Porter Commission itself described in its report. Rather, it relied on the Porter Commission's conclusions much in the way an appellate body would rely on the fact findings of a trial court.<sup>126</sup> It appears that when a fact alleged by one of the parties was confirmed by one of the findings of the Porter Commission, the Court accepted the evidence as having met a clear and convincing standard of proof.

<sup>123</sup> *Report of the Judicial Commission of Inquiry into Allegations of Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001*, 3. See Uganda's Annex to Rejoinder, 20 (October 2003), supra note 5.

<sup>124</sup> *Id.* at 7.

<sup>125</sup> *Id.*

<sup>126</sup> Paragraphs 114 and 115 of the judgment refer to the examination by Justice Porter in much the same way an appellate court would refer to the findings of a trial court:

The Court seems to have developed a new test for considering secondary evidence based on the standard it applied to the Report of the Porter Commission in *Congo v. Uganda*. In paragraph 214 of the *Genocide* judgment, the Court noted 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.”<sup>127</sup>

On the one hand, it would seem that in the ICJ *Genocide* case, relying on ICTY decisions which involved the examination and cross examination of hundreds of witnesses would be a suitable solution to the daunting task facing the ICJ in respect of fact-finding, as it would allow the work of the ICTY to take on the role similar to a lower trial court entrusted with fact-finding,<sup>128</sup> leaving the more abstract legal questions to the Court.<sup>129</sup>

On the other hand, it is important to recall that the ICTY has been looking at facts through a different lens, or, in the words of ICJ Judge *ad hoc* Mahiou, “sous un angle particulier.”<sup>130</sup> Whereas the ICTY has been filtering facts according to their probative value under international criminal law, the ICJ had the task of examining those facts under a civil law standard, based on the principles of international State responsibility.<sup>131</sup>

The Court admits in paragraph 167 of the *Genocide* judgment that the international responsibility of States is not the same as individual criminal responsibility, and that the Court it is not operating under the rules of criminal law:

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[...] General Kazini was asked by Justice Porter what was the objective of this joint offensive with the rebels. General Kazini replied “[t]o crush the bandits together with their FAC allies” and confirmed that by “FAC” he meant the “Congolese Government Army” (CW/01/03 24/07/01, p. 129). It is thus clear to the Court that Uganda itself actually regarded the military events of August 1998 as part and parcel of operation “Safe Haven”, and not as falling within whatever “mutual understandings” there had previously been.”

<sup>127</sup> Referring to the *Congo v. Uganda* judgment, *supra* note 5, p. 35, para. 61. See also paras. 78–79, 114 and 237–242.)

<sup>128</sup> During the hearings of the *Genocide* case, counsel for Bosnia, Prof. Thomas Franck, argued that the fact-finding work in respect of genocide had already been accomplished by the rigorous adversarial process at the ICTY, it only remained for the ICJ to look at the pattern of decisions and point the finger at Serbia. See CR 2006/3, para. 24, Public sitting held on Tuesday, 28 February 2006. *Supra* note 6.

<sup>129</sup> According to Highet, the absence of a jury “is congruent with the nature of the subject matter of international law: not only does the Court deal with states and not individuals—and is thus not normally required to determine subjective and difficult issues, such as *scienter* and *mens rea*, it also deals with a sophisticated and relatively narrow series of rules and problems marked by a relatively high level of abstraction. Keith Highet, *supra* note 1, 14.

As noted by Franck, the ICJ must take on the role of both a trial court and a court of final appeal, see Thomas M. Franck, “Fact-Finding in the I.C.J.”, *supra* note 2 at 21.

<sup>130</sup> See the dissenting opinion of Judge *ad hoc* Mahiou, paragraph 53.

<sup>131</sup> See *A Dialogue at the Court, Proceedings of the ICJ/UNITAR Colloquium held on the occasion of the Sixtieth Anniversary of the International Court of Justice*, April 1996, 30. See also Christine Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts be Avoided?* 100 ASIL Proceedings 63 (2006).



... It is true that the concepts used in paragraphs (b) to (e) of Article III [of the Genocide Convention], and particularly that of “complicity”, refer to well known categories of criminal law and, as such, appear particularly well adapted to the exercise of penal sanctions against individuals. It would however not be in keeping with the object and purpose of the Convention to deny that the *international responsibility of a State – even though quite different in nature from criminal responsibility* – can be engaged through one of the acts, other than genocide itself, enumerated in Article III [Emphasis added].

While the Court acknowledged almost in passing that there was a distinction to be made between State responsibility for genocide and individual responsibility for genocide, it did not fully explain how that distinction played out in terms of the Court’s consideration of ICTY decisions.

The Court made clear in paragraphs 217–219 of the *Genocide* judgment that it would rely for the most part on final decisions of the ICTY, and would not take into consideration the facts alleged in indictments or other decisions that were less than definitive. This meant that the Court’s experiment with ICTY decisions involved distilling the basic ingredients, the facts, from a finished product, the law, a product that resulted from a complex recipe, several ingredients of which were of no relevance to the question of Serbia and Montenegro’s responsibility under international law.

Another problem, as noted by Judge *ad hoc* Kreća in his dissenting opinion, is that the legal reasoning of the ICTY has proved inconsistent from one decision to the next.<sup>132</sup> In particular, Judge *ad hoc* Kreća noted that the ICTY has set forth contradictory reasoning in respect of the question of whether genocidal intent could be inferred.<sup>133</sup> This observation regarding the ICTY’s treatment of inferences is particularly relevant in view of the ICJ’s rejection of the “pattern of inferences” approach sought by Bosnia and Herzegovina.

In the *Krstić* Appeals Chamber decision, the ICTY specifically stated that inferences could be drawn in respect of genocidal intent,<sup>134</sup> and the ICTY has repeatedly drawn inferences in respect of knowledge of the accused, although

<sup>132</sup> See para. 109 of his dissenting opinion, *supra* note 6.

<sup>133</sup> *Id.*, citing ICTY, *Prosecutor v. Krstić*, IT-98-33, Trial Chamber, ICTY, *Prosecutor v. Stakić*, IT-97-24, Trial Chamber, ICTY, *Prosecutor v. Brđanin*, IT-99-36 Trial Chamber. Available on the ICTY web site at: <<http://www.un.org/icty/cases-e/index-e.htm>>.

<sup>134</sup> See para. 34 of the Appeals Chamber decision, *supra*, as cited in the dissenting opinion of Vice-President Al-Khasawneh, in which the ICTY stated that, “[w]hen direct evidence of genocidal intent is absent, the intent may still be inferred from the factual circumstances of the crime.” (Judgment of 19 April 2004).

Paragraph 223 of the *Krstić* Appeals Chamber judgment states:

“The offence of extermination as a crime against humanity requires proof that the proscribed act formed a part of a widespread or systematic attack on the civilian population, and that the perpetrator knew of this relationship. These two requirements are not present in the legal elements of genocide. While a perpetrator’s knowing participation in an organized or extensive attack on civilians may support a finding of genocidal intent, it remains only the evidentiary basis from which the fact-finder may draw this inference. The offence of genocide, as defined in the Statute and in

such inferences have not always resulted in meeting a beyond a reasonable doubt standard of proof for the finding of criminal liability.<sup>135</sup> In some instances, however, the ICTY has refused to make links or draw inferences in respect of the intent of the accused.<sup>136</sup>

The Court's reliance on ICTY jurisprudence for its fact-finding was unavoidably tainted by the ICTY's own flaws and inconsistencies in its conclusions. It seems that the Court, perhaps not knowing how to weigh the ICTY's inconsistent approach to the drawing of inferences, simply avoided drawing inferences altogether.

A troublesome aspect of the Court's use of ICTY decisions was the way in which the Court selected ICTY decisions, and the justifications it offered in respect thereof. This was highlighted by the convoluted approach the Court took towards the *Tadić* Appeals Chamber decision.<sup>137</sup> The Court explained that one reason for not considering the *Tadić* Appeals Chamber decision was due to the ICTY's interpretation in *Tadić* of the ICJ's own control test in the *Nicaragua* case. Why the ICTY even applied the ICJ's control test from the *Nicaragua* case to an inapposite situation is unclear, as was observed in the dissenting opinion of Vice-President Al-Khasawneh.<sup>138</sup> Moreover, the "overall control" test applied by the ICTY in the *Tadić* case was well in-line with the Court's test in the *Congo v. Uganda* decision. In paragraph 205 of the Court's judgment in *Congo v. Uganda*, the Court stated that "[i]n order to rule on the DRC's claim, it is not necessary for the Court to make findings of fact with regard to each individual incident alleged." In the same manner, the ICTY in the *Tadić* Appeals Chamber decision

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international customary law, does not require proof that the perpetrator of genocide participated in a widespread and systematic attack against civilian population."

<sup>135</sup> See, eg, *Prosecutor v. Krstić*, Trial Chamber judgment, 2 August 2001, para. 383:

"The Chamber heard evidence that Bosnian Muslim prisoners were still being taken within the Drina Corps zone of responsibility throughout this period. This supports an inference that by "parcels" the VRS were referring to people, specifically Bosnian Muslim prisoners [...]"

See *ibid.*, para. 369: "The fact that General Krstic had been involved in issuing orders to Drina Corps units about securing this stretch of the road gives rise to an inference that he must have known the men were being taken off the buses at Tisca." (The Trial Chamber later states that it had not been established beyond reasonable doubt that he had direct knowledge).

<sup>136</sup> See paragraph 554 of the ICTY *Stakić* Trial Chamber Judgment, IT-97-24, 31 July 2003:

"Even though Dr. Stakić helped to wage an intense propaganda campaign against Muslims, there is no evidence of the use of hateful terminology by Dr. Stakić himself from which the *dolus specialis* could be inferred."

<sup>137</sup> IT-94-1-A, Judgment, 15 July 1999, available at <<http://www.un.org/icty/tadic/appeal/judgement/index.htm>>.

<sup>138</sup> In paragraph 36 of his dissenting opinion, he observes that "[t]he Court applied the effective-control test to a situation different from that presented in the *Nicaragua* case. In the present case, there was a unity of goals, unity of ethnicity and common ideology, such that effective control over non-State actors would not be necessary. [...]"



held that the acts committed by Bosnian Serbs could be attributed to the FRY on the basis of the overall control of the FRY over the Republika Srpska and the VRS, without having any need to prove that each and every operation was carried out pursuant to the FRY's instructions.<sup>139</sup>

In conclusion, it may be said that the Court demonstrated a tendency to use selective legal findings of the ICTY as a basis for its factual findings, and avoided crucial factual findings concerning control by the Belgrade authorities. While the *Nicaragua* decision was criticized for a selective treatment of press and other secondary reports,<sup>140</sup> the *Genocide* judgment may draw the same type of criticism for its selective use of ICTY jurisprudence.

## X. Conclusion

This article concludes that there is nothing inherent in the Court's legal framework that should prevent it from fulfilling its role under Article 36(2)(c) of its Statute. However, the Court should give, on a case-by-case basis, more guidance to the parties in terms of evidence. This guidance should be in the form of preliminary orders on questions such as burden of proof, the type of evidence admissible, the scope of public knowledge, and the weight the Court will give to fact-finding by outside commissions and judicial bodies. This in turn should help inspire counsel before the Court to present more focused and disciplined written and oral pleadings. As the claims coming before the Court are increasingly complex and may involve sensitive matters of human rights, it is important that the Court consider some measures to ensure that its procedures meet the demands of these cases.

It may be said that the Court has demonstrated an increasing resistance to the drawing of inferences from secondary evidence. Inferences are a tool that judges must use, even in the criminal law area, as noted earlier, and, on occasion, in respect of the most serious crimes. While the principle of equal treatment of the parties must constrain the Court to some degree, it should not overwhelm the Court to the extent that it can no longer make logical deductions from reasonable inferences.

<sup>139</sup> For a general discussion of some of the consequences resulting from the proliferation of international tribunals and the resulting overlap and/or conflicts between them, see Thomas Buergenthal, "Proliferation of International Tribunals: Is It Good or Bad?," 14 *Leiden Journal of International Law* 267–275 (2001).

<sup>140</sup> See dissenting opinion of Judge Schwebel, *supra* note 13, p. 328, para. 149:

"While I have no doubt that the Court has endeavoured to achieve a perfect equality between the Parties in its treatment of the evidence, I regret that I am forced to conclude that its reach has exceeded its grasp. To take another striking example, the Court, as noted, maintains that it has avoided "a selective approach" in treating press statements, including those of figures of the highest political rank. Yet the Court relies upon press statements of President Reagan, while it fails to give weight to President Ortega's admissions in press interviews in January 1985 and April 1986 that Nicaragua is willing to suspend its material aid to insurgents in El Salvador on the condition that the United States ceases its material aid to the *contras*. [...]"

In addition, while the Court should approach secondary evidence such as press reports with caution, it is not without the tools to verify the accuracy of certain reports, and it should not turn a blind eye to patterns demonstrated by press reports based on the possibility that they may emanate from the same source. Repeating the caveat of the *Nicaragua* case is not a satisfactory approach to the complex and sometimes valuable information contained in secondary evidence such as press reports; it is incumbent upon the Court to test the evidence for its sufficiency, and when necessary, to call on the authors of reports or to shift the burden of proof to the party challenging a report to prove that it is inaccurate.

Finally, the Court should exercise caution when substituting the findings of UN reports and resolutions for its own assessment of the facts. First, UN documents may use the same secondary sources which the Court deems unreliable, and second, UN documents often merely frame the factual questions for the Court to determine, they do not necessarily sort out or weigh the facts in terms of international legal responsibility.

Given that the Court will most likely continue to be asked to establish facts arising from complex situations such as international military conflicts and humanitarian crises, the way in which the Court goes about examining evidence merits serious attention. As noted by former President of the Court, Judge Guillaume, weaknesses in the Court's fact-finding may result in serious consequences both for the credibility of international justice and for the relations between the State parties before the Court.<sup>141</sup>

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<sup>141</sup> Gilbert Guillaume, "Preuves et Mesures d'Instruction Devant Les Juridictions Internationales," *La Cour Internationale de Justice à l'Aube du XXI<sup>ème</sup> Siècle, Le regard d'un juge*, 1987, p. 1, citing Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 366.

Some might argue that the Court's decisions have an even greater impact on the relations between States than resolutions of the UN Security Council, which as will be discussed further infra, can be labeled a "quasi-judicial." As noted by Rosalyn Higgins:

"Thus when in 1947 the Security Council was debating whether the question of hostilities between Indonesia and The Netherlands should be put upon the agenda, China suggested: 'I think it would be dangerous to talk too much about legalities. . . . If we pay too much attention to legalities, we shall become involved. . . . Emphasis on legalities might have very serious and undesirable political consequences.'"

See Rosalyn Higgins, *supra* note 109 at 10, citing Security Council, 2nd Year, Official Records, 179th meeting, p. 1861.

### **Annex 30**

Christian Tomuschat, “Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law”, in **PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW, LIBER AMICORUM LUCIUS CAFLISCH** (M. Kohen ed., 2007)





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REPARATION IN FAVOUR OF INDIVIDUAL VICTIMS OF  
GROSS VIOLATIONS OF HUMAN RIGHTS AND  
INTERNATIONAL HUMANITARIAN LAW

*Christian Tomuschat\**

1 INTRODUCTION

After nearly 16 years of drafting efforts, the UN Commission on Human Rights adopted the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (BPG) on 19 April 2005.<sup>1</sup> This was one of the most ambitious projects the human rights bodies of the United Nations has ever handled and stands obviously in parallel to the “classic” Articles on Responsibility of States for internationally wrongful acts (ILC Articles) drawn up by the International Law Commission (ILC), which were taken note of by the UN General Assembly in resolution 56/83 of 12 December 2001. It should be pointed out that the ILC could, to a large extent, rely on a widely settled State practice in many respects. In contrast, notwithstanding the innovative elements, in particular concerning the right to respond to a breach of an international obligation, the Commission on Human Rights could not even be sure that the individual “rights” to a remedy and reparation dealt with in the BPG did actually exist. Thus, questions remain open as to the legal nature of the BPG, and it will be the principal objective of this study to examine what legal quality is attached to the propositions enunciated therein.

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<sup>1</sup> UN doc. E/CN.4/L.48.13 April 2005. Vote of 40 to none, with thirteen abstentions, among them Australia, Germany, United States, but also Sudan.

The concept took form in 1989 when the Sub-Commission on Prevention of Discrimination and Protection of Minorities<sup>2</sup> entrusted Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.<sup>3</sup> The rapporteur submitted what he considered, his final report in 1993.<sup>4</sup> In section IX, it contained “Proposed Basic Principles and Guidelines” on the topic. After an extensive exchange of views essentially within the Sub-Commission, the Rapporteur eventually submitted a revised version of the BPG in January 1997.<sup>5</sup> The next year, on the basis of Commission on Human Rights resolution 1998/43,<sup>6</sup> a new independent expert (Mr. M. Cherif Bassiouni) was appointed in order to review and complete the work carried out by Van Boven. The drafting process then evolved in two stages. In his first report,<sup>7</sup> the new rapporteur gave an outline of the orientations and necessities of the project as visualized by him. He still refrained from presenting a body of rules, being under the impression that he needed substantial input from all the actors involved before being able to set out any proposals. His final report, containing a revised version of the Basic Principles and Guidelines (Bassiouni draft), was issued in January 2000.<sup>8</sup> It was a far more comprehensive document than the drafts provided by Van Boven, above all, due to the fact that Bassiouni integrated large parts of the work done by Mr. Louis Joinet on the topic of “Question of the impunity of perpetrators of human rights violations (civil and political)”<sup>9</sup> in his own text. The importance of this document was clearly recognized by the Commission on Human Rights. By two resolutions,<sup>10</sup> it called for the holding of special consultative meetings in which all interested governments, intergovernmental organizations and non-governmental organizations in consultative status with ECOSOC could participate. The first of these meetings was held on 30 September and 1 October 2002,<sup>11</sup> the second one on 20, 21 and 23 October 2003<sup>12</sup> and the last one from 29 September to 1 October 2004,<sup>13</sup> all of them in Geneva. These consultative meetings

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2 Today: Sub-Commission for the Promotion and Protection of Human Rights.

3 Res. 1989/13, 31 August 1989.

4 UN doc. E/CN.4/Sub.2/1993/8, 2 July 1993.

5 Note annexed to UN doc. E/CN.4/1997/104, 16 January 1997.

6 17 April 1998.

7 E/CN.4/1999/65, 8 February 1999.

8 UN doc. E/CN.4/2000/62, 18 January 2000.

9 Final report: UN doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

10 Res. 2000/41, 20 April 2000, para. 3; 2002/44, 23 April 2002, para. 3.

11 Report: E/CN.4/2003/63, 27 December 2002.

12 Report: E/CN.4/2004/57, 10 November 2003.

13 Report: E/CN.4/2005/59, 21 December 2004.

permitted an in-depth study of all the difficult issues related to the draft instrument. It was on the basis of these fertile antecedents that eventually the text, as it stood after the third consultative meeting,<sup>14</sup> was adopted.

## 2 THE LEGAL SIGNIFICANCE OF THE TEXT

It is obvious at first glance that the adoption of the BPG could not, as such, produce binding international law. The Commission on Human Rights enjoys no decision-making power. But the legal significance of the text could be greatly increased by contending that all of the 27 Principles could be characterized as codifying positive international law; the source of which was to be found either in treaty stipulations or in rules of customary law. This was and is one of the controversial features of the BPG. The Preamble states (para. 7) that the BPG “do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations”. However, this affirmation is neither true and nor does it provide a conclusive answer to the question raised. It is not true because the BPG are not limited to procedural issues, setting forth, instead, propositions which, in their great majority, are of a genuinely substantive nature. On the other hand, an attempt had been made to make clear, through the choice of language, the Principles that were deemed to be mandatory and those, by contrast, that had to be characterized as being purely recommendatory.<sup>15</sup> Progressively, in the course of the many rounds of the deliberation process, many formulations were changed from “shall” to “should” or other language formulations that replaced former pretorian-style assertions. In his two drafts, under the heading of “Forms of reparation”, Van Boven had generally suggested wording according to which restitution, compensation, rehabilitation as well as satisfaction and guarantees of non-satisfaction “shall be provided”; Bassiouni abandoned that position, preferring to use “should be provided”. This formulation found its consecration in the text as adopted on 18 April 2005. Principles 18 to 24, which deal with the four categories of reparation recognized in the BPG, consistently use the phrase: “should be provided”. On the other hand, in some other places, the former entitlement of the victim has been replaced by references to unspecified measures of care in favour of the victims. Thus, while Bassiouni spoke of “Victims’ right to access justice” (section VIII.) and “Victims’ right to reparation” (section IX.), the text

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<sup>14</sup> Of 1 October 2004, *ibid.*, Annex 1.

<sup>15</sup> Report on the third consultative meeting, *supra* (note 12), para. 11.

now reads: “Access to justice” (section VIII.) and “Reparation for harm suffered” (section IX.). On the whole, only the general title has remained untouched, focusing on “the right to a remedy and reparation”. However, the many changes that the text suffered – or by which it has been improved – unequivocally convey the idea that the drafters, at the last stage the collective body of the Commission on Human Rights, were not guided by the aim of drawing up a comprehensive legal framework of the rules governing the commission of gross violations of human rights and serious breaches of IHL. Rather, they were aware of the fact that while from a systemic viewpoint, the BPG constituted a consistent whole, from a legal perspective, they were nothing more than a patchwork given the many political elements as accurately reflected in the title: Principles and Guidelines. It is, therefore, necessary to carefully handle the BPG. Principles and rules of positive international law stand side by side with propositions of a purely hortatory character. In the future, the dividing line between the two classes of norms may be easily blurred if the awareness of these juridical differences is lost or deliberately brushed aside by activists who could portray the entire set of the BPG as pertaining to the body of positive international law.

During the drafting process, the question of whether the future instrument was to cover any violations of human rights and international humanitarian law (IHL) was raised on many occasions.<sup>16</sup> Wisely, however, the prevailing view withstood the temptation to proceed to an all-inclusive codification. In general, only the first two sections deal with human rights law and IHL regarding the (primary) obligation to ensure respect for and implement the relevant legal rules and principles. In respect of the legal consequences attached to wrongful conduct, the BPG are confined to “gross” or “serious” breaches. Indeed, minor violations of human rights standards occur inevitably on a daily basis. The modalities of their reparation can be left to the discretion of individual States. Guidance from international sources is required only where the relevant occurrences have had a disruptive influence on individual lives or even on the existence of an entire nation. To underline this limitation, the BPG have resorted to the terms “gross” violations of human rights and “serious” violations of IHL. Neither term is a specific term of art.<sup>17</sup> However, most observers would easily be

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16 Bassiouni was in favour of such a broad approach. For his draft, he chose the title: Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, confining the suggested propositions to crime under international law only with regard to penal sanctions. See also the report on the second consultative meeting, *supra* (note 11), para. 70.

17 We do not agree with the view to the contrary affirmed in the report on the third consultative meeting. *Supra* (note 12), para. 12.



able to agree on the scope *ratione materiae* of gross violations which include, as a minimum, all international crimes as well as any situation which “appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms” in accordance with ECSOC resolution 1503 (XLVIII).<sup>18</sup> Under the Geneva Conventions on humanitarian law, the legal position is more difficult, in that the notion of “grave breaches” has been used to identify infringements of particular seriousness. Apparently, here the intention was to go beyond the realm delineated in those conventional clauses.

### 3 CRIMINAL AND CIVIL LAW TOGETHER – THE COMPREHENSIVE CHARACTER OF THE TEXT

The BPG attempt to regulate all the consequences that may flow from the commission of grave violations of human rights and IHL, without drawing any distinctions between criminal law aspects and other aspects which one might call “civil aspects” inasmuch as they affect the status of individuals victims of such violations. However, this was certainly not the starting point of where the journey began. Resolution 1989/13 of the Sub-Commission confined itself to referring to the rights that may accrue to an individual victim of gross injustices (right to restitution, compensation and rehabilitation). It was a limitation which was perfectly in line with the general scope of competence of the Sub-Commission, which is not a specialized body for dealing with criminal law matters. Consequently, Van Boven mainly emphasized the responsibility of States vis-à-vis aggrieved individuals although he also included some propositions of great relevance regarding penal sanctions. Thus, he stated that there existed a duty to prosecute perpetrators of crimes under international law<sup>19</sup> and he additionally suggested that universal jurisdiction should be introduced for such crimes.<sup>20</sup> A fuller articulation of these criminal-law aspects, now clearly set apart from the propositions describing the relevant civil law regime, can now be found in section III of the GPG (“Gross violations of international human rights law and serious violations of international humanitarian law that constitute crimes under international law”).

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18 Of 27 May 1970.

19 BPG, First report, *supra* (note 3), paras. 2, 5; BPG, Final report, *supra* (note 4), para. 2.

20 BPG, First report, *ibid.*, para. 12; Final report, para. 5.

A. *Criminal-law aspects*

► *The duty to prosecute*

Van Boven had no doubts that with regard to crimes under international law there existed “a duty to prosecute and punish perpetrators”.<sup>21</sup> The same opinion was echoed by Bassiouni.<sup>22</sup> The BPG have softened the rather categorical formulations employed by the two rapporteurs. Borrowing a formulation from Art. 7 (2) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the relevant sentence (Principle 4, first sentence) now reads:

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her.

This proposition does not differentiate between instances where a treaty clause provides for the prosecution of alleged offenders, and situations that are governed only by customary law. Concerning the latter category, one can certainly conclude that any State is under an obligation to commence criminal proceedings if, allegedly, crimes of such gravity have been committed in its territory, bound under international law to ensure peace and security within its borders.<sup>23</sup> But the problems arise as soon as an alleged offence has been committed abroad, in particular, by non-nationals.

► *Universal jurisdiction*

This second issue is addressed by the BPG in Principle 7. The two rapporteurs were unanimously of the opinion that universal jurisdiction did indeed exist for the offences coming within the scope of their projects. This issue has been distanced from the BPG as it now stands. States have been admonished to act on the basis of universal jurisdiction “where so provided in an applicable treaty or under other international law obligations”. Thus, the text openly acknowledges that no general rule of customary international law providing for universal jurisdiction regarding each and every case of a

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21 See *supra* (note 18).

22 Final Report, *supra* (note 7), para. 4.

23 For a more detailed study of the issue see C. Tomuschat, “The Duty to Prosecute International Crimes Committed by Individuals”, in: H.J. Cremer *et al.* (eds), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (Berlin *et al.*, Springer, 2002), pp. 315-349.

crime encompassed by the BPG can be identified. It is not possible, in the present context, to deal with the complex issue of universal jurisdiction extensively. However, one of the most enlightening occurrences of the recent past has been that Belgium repealed its former legislation based on that principle due to the pressure from the United States.<sup>24</sup> Germany which had, following the example of Spain, enshrined universal jurisdiction in its Code of crimes against international law<sup>25</sup> has now along with Spain, modified the “purity” of the principle with strong elements of subsidiarity or necessity to protect themselves against encountering United States opposition with the same acuity as Belgium did.<sup>26</sup> At the most, apart from the well-known clauses in the Geneva Conventions of 1949 and the Anti-Torture Convention (Art. 5), international consensus seems to have been reached with regard to allegations of genocide notwithstanding the ominous provision regarding jurisdiction in the Genocide Convention (Art. VI). On the whole, the summary treatment of jurisdiction in Principles 6 and 7 is not very helpful. It does not do justice to the complexities of the different titles of jurisdiction and their conjunction in criminal cases. Thus, Principles 6 and 7 can only serve as a reminder that criminal prosecution is indeed one of the consequences entailed by grave breaches of international law to the detriment of individual human beings.

► *The duty to investigate*

The duty to investigate any violations effectively, promptly, thoroughly and impartially (Principle 3. (b)) is probably the most precious asset of the BPG. It has reliable foundations in the jurisprudence of both, the Inter-American and the European Court of Human Rights.<sup>27</sup> Failing such investigation, no prosecution can be successful, nor can victims have any chance to obtain reparation for harm suffered. Additionally, in cases of gross or serious violations of the applicable legal standards, an investigation satisfies the need for a national community to know the truth.

24 Laws of 23 April 2003, 42 *ILM*, 2003, 758; 7 August 2003, *ibid.*, at 1270.

25 Of 26 June 2002, 42 *ILM*, 2003, 998.

26 In Germany, Article 153f(2) of the Code of criminal procedure, *ibid.*, at 1008, confers a large measure of discretion to the prosecutorial authorities on which they relied in order to refuse opening a criminal investigation against U.S. military officers resident in Germany on account of the occurrences in the Abu Ghraib prison in Iraq; see *decision of the Federal Prosecutor*, 10 February 2005, provided on the internet by the U.S. Center for constitutional rights. In Spain, the Supreme Court holds that universal jurisdiction as contemplated by Article 23(4) of the Ley Orgánica del Poder Judicial becomes operational only in case of “necessity of judicial intervention” by Spain, judgment of 20 May 2003, 42 *ILM*, 2003, 1206.

27 For references see C. Tomuschat, *Human Rights. Between Idealism and Realism*, (Oxford, Oxford University Press, 2003), p. 271.

*B. Civil-law aspects*

► *The State as the author of violations of human rights and IHL*

In the field of reparation proper, the key issue is whether individuals have a true entitlement to reparation or whether the BPG establish no more than mere guidelines that may be implemented by States according to their capacities. It stands to reason that a distinction has to be drawn according to whether the alleged author of the injustice suffered by a victim is a State, acting through its officials, or a non-State actor like a rebel group. Only States are entities that can easily be perceived as debtors of a reparation claim as opposed to the non-State entities that lack any precise contours, and thus make them rather dubious debtors.

Pursuant to the classical logic of inter-State relations the obligations flowing from human rights and international humanitarian law standards, either as primary or as secondary law, constitute obligations as between States. This applies also to Art. 3 of 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land<sup>28</sup> (first sentence):

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.

Although it has been contended by a few authors<sup>29</sup> and also during the deliberations of the BPG by a representative of the International Committee of the Red Cross<sup>30</sup> that said Art. 3 was meant to give rise to individual claims, there are no clues whatsoever indicating that the provision was ever understood, at the time of drafting, in such a progressive and almost revolutionary sense. In addition, no subsequent practice can be found that would corroborate that contention.<sup>31</sup> The notion that individuals might derive direct claims from a violation of IHL is a child of our time and in any event does not go back beyond the emergence of the human rights movement.

Human rights obligations as well as obligations flowing from IHL pertain to the “regular” class of international law; the violation of which entails State responsibility according to the Articles codified by the ILC. In partic-

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28 Reprinted in: A. Roberts, R. Guelff (eds.), *Documents on the Laws of War*, 3rd ed. (Oxford, Clarendon Press, 2000), p. 69.

29 F. Kalshoven, *Belligerent Reprisals* (Leyden, A.W. Sijthoff, 1971), p. xx; see also E. David, *Principes de droit des conflits armés* (Bruxelles, Bruylant, 2002), pp. 633-634.

30 Report on the first consultative meeting, UN doc. E/CN.4/2003/63, 27 December 2002, Annex 1, para. 50.

31 The *Manual of the Law of Armed Conflict*, (Oxford, UK Ministry of Defence, 2004), mentions throughout its pages only international responsibility in the classical sense.



ular, the ILC has never felt the need to frame special rules for principles and rules setting forth human rights obligations. Nonetheless, it is obvious that the regime it has established does not fit such obligations in an ideal manner either. The ILC Articles follow the logic of relationships governed by the principle of reciprocity, which also underlies the legal system of IHL. However, in instances where a government oppresses its own people, other nations are normally not overtly interested in reacting to the relevant violations of the applicable standards as long as the internal repression does not produce negative extraterritorial repercussions. Legally, on the other hand, the ILC Articles (Art. 48) have paved the way for third States to act as guardians of international legality by “invoking” the responsibility of the offending State. This is rarely done since such invocation is never cost free, viewed in terms of political costs.

The question remains whether, in addition to States as the traditional and unchallenged right holders, the protected individuals have a true entitlement to reparation in case any principles and rules established in their favour have been breached. It is today almost uncontroversial that the rights of the so-called “first generation” set forth in human rights treaties or laid down in customary law encapsulate indeed subjective rights that qualify as true individual entitlements. However, this characterization of the primary norms does not automatically lead to a like characterization of the legal consequences engendered by a breach of the relevant primary norms. It will be shown in a following section that the legal position is not as clear-cut as portrayed by Van Boven in his impressive report. As far as IHL is concerned, elements susceptible of suggesting the existence of individual rights to compensation are even more difficult to identify since according to the prevailing doctrine the rights provided for by IHL – understood as a set of primary rules of conduct – have remained classic inter-State law, not being accompanied by parallel individual entitlements.

► *Non-State actors as offenders*

A discrepancy between primary and secondary norms can be observed in particular with regard to non-State actors. Under IHL, it is well established that rebel units fighting a government enjoy a certain status thus ensuring the obligation of other actors to respect the minimum standards set out in common Art. 3 of the four Geneva Conventions of 1949 as well as in Additional Protocol II of 1977. Violation of these standards can trigger criminal sanctions as has been established in the jurisprudence of the ICTY. But it is rather doubtful whether one can go a step further by claiming that rebel units may also have to face up to civil responsibility as a consequence of non-compliance with the commitments that are binding upon them. It is certainly a perfectly coherent idea to postulate that he who causes harm

unlawfully must shoulder the consequences of his actions. But rebel units, except in case they one day, acquire political power and rise to become the new government of the country concerned,<sup>32</sup> are essentially amorphous entities. It may well be that individual members are brought to trial, but there is, in general, no sufficiently stable factual basis for rendering the proposition that they are financially, responsibly, really meaningful.

Since the BPG have adopted a “victim-based perspective”, they had to face up to the eventuality that harm was caused not by governmental authorities or military forces, but by non-State actors, in particular rebel units. According to the ILC Articles, which reflect the applicable customary law, no State is responsible for guerrilla movements. Therefore, with regard to this particular configuration, a solution that did not proceed from the assumption of State responsibility or liability, but a different point of departure had to be framed. Principle 16 provides:

States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.

Rightly, this Principle refrains from mentioning a duty of States or a corresponding right of individuals. Only one justification can be found for this extension of reparation beyond the confines of the area of State responsibility, namely the principle of national solidarity that must be present in every people which conceives of itself as a nation. However, clearly, no elaboration of national solidarity can result in an individual entitlement before it has been enacted by the competent national legislature. *A fortiori*, there can be no such right directly under international law. Rightly, therefore, soft language which clarified that what the drafters had in mind was to set out a guideline that should be taken into account by national authorities desirous to cope with the sequels of internal unrest was chosen.

#### 4 INDIVIDUAL ENTITLEMENTS TO REPARATION?

Just recently, in its report, the Commission of Inquiry on Darfur maintained that in view of a long history of increasing importance of human rights it could be said by now that “there has now emerged in international law a right of victims of serious human rights abuses . . . to reparation (including

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<sup>32</sup> See Art. 10(1) of the ILC Articles.

compensation) for damage resulting from those abuses”.<sup>33</sup> But the overall picture remains fairly contradictory. There are international bodies that have embraced a doctrine of full and complete reparation, while others show a clear reluctance to subscribe to this proposition.

#### A. General considerations

One of the most fervent adherents of an individual right to reparation is the Inter-American Court of Human Rights. It has remained faithful to its first pronouncement in the famous *Velásquez-Rodríguez* case<sup>34</sup> where it stated:

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.<sup>35</sup>

On the other hand, the BPG do not endorse the doctrine of a true individual right to reparation – although, in a strange borrowing from the traditional *Hull* formula from the field of international protection of alien property, the formula “adequate, effective and prompt reparation for harm” is used (Principle 11 (b)). It is, first of all, highly significant that the title of section IX was changed from “Victims’ right to reparation” to “Reparation for harm suffered”. To be sure, in Principle 15, the introductory Principle of section IX, the third sentence speaks of a duty of States to provide reparation (“a State shall provide reparation to victims . . .”), but this proposition is decisively attenuated by the phrase: “In accordance with domestic laws and international legal obligations . . .”. This phrase amounts to a quantum leap. It clearly indicates that no general obligation is deemed to enjoin States to make reparation, but that such commitment can only be derived from additional sources, either from national law or from principles and rules of international law which need to be identified specifically in any case at hand. The same inferences are to be drawn with regard to Principle 11. On the one hand, it states that “[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s *right*<sup>36</sup> to . . . (b) Adequate, effective and prompt reparation for harm suffered”, but on the other hand it qualifies this assertion by the words: “as provided for under international law”. An even

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33 UN doc. E/CN.4/2005/3, 11 February 2005, para. 597.

34 Judgment, Ser. C, No. 4, 29 July 1988.

35 See also in the following section xxx.

36 Emphasis added.

weaker formulation can be found in Principle 18, the chapeau for the following Principles governing the forms of reparation. Here, the hortatory or aspirational quality of the BPG is even more clearly expressed through the key word “should”:

In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law *should*,<sup>37</sup> as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation . . .

By contrast, the Bassiouni draft (para. 16) had used straightforward language in setting forth that in such circumstances “a State *shall*<sup>38</sup> provide reparation to victims” – not only in case of gross violations of human rights and serious breaches of IHL, but generally whenever “violations of international human rights and humanitarian norms” had occurred. These modifications of the relevant text are due to opposition that forcefully emerged during the three consultative meetings. Quite a number of countries had serious misgivings about adopting even a recommendation providing for true individual entitlements.

Although pursuant to the well-established rules on sources, States are not required to justify their acceptance or rejection of a given proposition as a legal rule, their actual conduct constituting the determinative factor, an attempt will be made in the following to inquire into the reasons why – or why not – the classical rules on international responsibility of States are suitable for application also to legal relationships between States and individuals. Although a breach is a breach and does not change its quality depending on who is the aggrieved party, the general context has different features. Relations between States are generally based on reciprocity. If in the case of a treaty relationship of the traditional type (*traité-contrat*) one of the parties does not live up to its commitments, the consideration that motivated the other party to enter into the treaty relationship evaporates. The wrong-doing State is unjustly enriched. No nation can be expected to accept non-fulfilment of formal pledges it has received from its counterpart. The damage that it has sustained as a result of the non-performance must be repaired by the wrongdoer. Generally, no account is taken of the capacity to pay by the offender. To be sure, however, there must be some limits to what can be demanded of a nation led into disaster by a criminal lead-

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37 Emphasis added.

38 Emphasis added.



ership. But, at the international level, one can observe great reluctance to acknowledge such limits. Although valid precedents can be found for circumscribing the liability of a nation, since reparation payments are capable of curtailing in particular the elementary human rights of a younger generation, the ILC was not prepared to maintain in its Articles on State Responsibility the rule of the draft adopted on first reading in 1996 according to which (Art. 42 (3)) “[i]n no case shall reparation result in depriving the population of a State of its own means of subsistence”.<sup>39</sup>

The elements of harm or enrichment at an inter-State level are totally lacking in instances where a government infringes the rights of its own citizens. In such a situation, reflection on how to make reparation will also take, as its starting point, the harm caused. However, in the awareness that the entire national community will have to shoulder the ensuing burden, in particular the weight of pecuniary compensation. To what extent can taxpayers be subjected to charges that seek to make good the injuries suffered not only in some individual cases, but by a large group of the population? To answer this question, the strength of the principle of national solidarity has to be assessed. Moreover, it also has to be taken into account that with regard to a repressive regime, it is extremely difficult to distinguish between victims and non-victims. A dictatorship leaves no room for those under its control to breathe freely. Everyone, with the exception of its direct beneficiaries, is a victim even if he or she has not suffered any physical or otherwise economically assessable harm. Thus, the question of what amount of resources should be made available for financial compensation arises under totally different auspices if a settlement is to be achieved within a national community. Issues of equity, which would be irrelevant as a defence against claims raised by other nations, are a legitimate argument when a nation deals with its own matters internally.

#### *B. The practice of international bodies*

A summary look at the practice of some of the international bodies that have to deal with reparation claims shows that their jurisprudence is not free from inconsistencies that to some extent reflect the real problems that have to be resolved in trying to respond to such claims in consonance with a yardstick of fairness and justice.

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<sup>39</sup> *ILC Yearbook* 1996, Vol. II, Part Two, p. 63.

► *The Inter-American Court of Human Rights*

As already mentioned, the Inter-American Court of Human rights has developed through its jurisprudence, a doctrine according to which, any victim of a human rights violation has a right to full reparation. Yet the systemic foundations of this jurisprudence are not flawless. The basic objection against it stems from the fact that the Court invokes the principles affirmed in the seminal *Chorzow* judgment of the Permanent Court of International Justice,<sup>40</sup> now reflected in Art. 31 (1) of the ILC Articles. It does so without even posing the question whether a rule that has evolved with regard to inter-State relations fits likewise in relationships between States and individuals which more often than not involve thousands of cases,<sup>41</sup> thereby engendering a complexity which is totally different than the consequences of international responsibility at inter-State level. This disregard for the hiatus separating the two classes of cases has led to consequences that are hard to explain and justify.

Concerning Guatemala, it is a sad, but proven fact that during the “armed confrontation”<sup>42</sup> of more than 30 years, about 200,000 persons found their death, many of them killed in the most barbaric way. To this very day, no program of reparation has become operational, even though the national truth commission “Comisión para el Esclarecimiento Histórico” back in 1999, recommended to adopt and implement such a program<sup>43</sup> in favour of the most hard hit victims of the atrocities that had plagued the country for decades, making life almost unbearable in many rural areas. Yet, thus far, only nine cases have been adjudicated by the Court. The first case where financial compensation was granted concerned an American (sic!) journalist, *Nicholas Blake*, who had been murdered by members of the security forces of the State. The Court ruled that that the next of kin of the victim were entitled to receive compensation payments amounting to 151,000

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40 Of 13 September 1928, Ser. A No. 17, p. 29: “It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”

41 See, *inter alia*, the following judgments: *Aloeboetoe et al.*, 10 September 1993, Ser. C No. 15, para. 43; *Caballero-Delgado and Santana*, 29 January 1997, Ser. C No. 31, para.15; *Garrido and Baigorria*, 27 August 1998, Ser. C No. 39, para. 40; *Castillo Páez*, 27 November 1998, Ser. C No. 43, para. 50; *Suárez Rosero*, 20 January 1999, Ser. C No. 44, para. 40. For an attempt to justify this jurisprudence, see *Juan Humberto Sánchez v. Honduras*, 26 November 2003, Ser. C No. 102, paras. 53-56.

42 Generally, the Government of Guatemala preferred to speak of an “enfrentamiento armado” instead of a “conflicto armado” in order to avert the consequences of the applicability of international humanitarian law.

43 Informe de la Comisión para el Esclarecimiento Histórico, *Guatemala Memoria del Silencio*, t. V (Guatemala, 1999), paras. 7 *et seq.*

dollars.<sup>44</sup> In another judgment of 25 May 2001, the family members of the victims in the so-called “White Van” case were allotted high amounts for pecuniary and non pecuniary damage, 108,000 and 54,000 dollars in the case of the first victim, 78,000 and 40,000 dollars in the second case. Maybe, the apex of this generous jurisprudence was reached in the case of *Myrna Mack Chang*,<sup>45</sup> an anthropologist killed by an agent of the Presidential Staff in September 1990. To be sure, the sister of the killed woman, Helen Mack, who pursued the case for more than a decade with unheard of courage notwithstanding many threats to her life and physical integrity, had gone through an ordeal before being able to triumph before the Court. And yet, the sums allotted to the next of kin of the direct victim – 266,000 dollars for pecuniary damage and 350,000 for non-pecuniary damage – stand in stark contrast to the misery of all the other victims, in particular among the Mayan population, who are still waiting for at least a symbolic payment in recognition for their suffering.

Similar observations can be made with regard to Colombia. The most recent report of the High Commissioner for Human Rights on the situation of human rights in Colombia<sup>46</sup> reveals a disquieting picture of general lawlessness; a situation where the Government seems unable to bring under its control. Many thousands of persons were adversely affected by serious violations of human rights in 2004. Displacement of farmers from their rightfully owned land continues almost unabated. On the other hand, just three cases have reached the Court. In two of these three cases, the Court meticulously computed the amounts owed to the victims, taking into account their presumed income and the length of their professional activity, whereas in the third case, the amount granted as compensation only had a symbolic value since the identity of a man shot dead, allegedly a guerrilla fighter, had not been established at the time of delivering the judgment. Again, the sums in issue are quite remarkable, ranging from 55,000 dollars in the case of the *19 Comerciantes*<sup>47</sup> to 89,500 dollars in the *Caballero-Delgado and Santana* case<sup>48</sup> and still further to 100,000 dollars in the *Las Palmeras* case.<sup>49</sup>

It is recognizable at first glance that neither Guatemala nor Colombia would be able to grant amounts of a similar magnitude under a generalized reparation scheme to every victim of serious violations of human rights. The economic strength of the two countries would not sustain such a burden.

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44 Judgment of 22 January 1999, Ser. C No. 48.

45 Judgment of 25 November 2003, Ser. C No. 101.

46 UN doc. E/CN.4/2005/10, 28 February 2005.

47 Judgment of 5 July 2004, Ser. C No. 109.

48 Judgment of 29 January 1997, Series C No. 31.

49 Judgment of 26 November 2002, Ser. C No. 96, para. 12.

Hence, a generalized program of reparation would have to be tailored to take the financial realities into account. The gap between the jurisprudence of the Court and the situation on the ground of the two countries is so huge that reaching the Court with a complaint comes close to achieving a major win in a lottery. This means that the jurisprudence of the Court cannot be the determinative parameter for a framework of rules for the reparation of harm done in violation of human rights and humanitarian law. Legal norms need firm factual bases. They cannot be derived exclusively from general concepts of equity and justice. Above all, the law should be the same for everyone. Reparation schemes that bring considerable benefits to a small group of victims while not addressing the plight of all the others are not suited as a general orientation mark. Nor do pure guidelines escape this simple logic; in any event it must be understood that they need to be handled with great flexibility.

► *The Human Rights Committee*

The case law of the Human Rights Committee (HRCee) regarding individual communications under the [First] Optional Protocol shows a high degree of flexibility. Many cases that have been dealt with by the HRCee concern persons sentenced to death and awaiting death sentence complaining of irregularities in the proceedings. In general, the HRCee concludes in such circumstances, when the complaints appear to be well-founded, that the State concerned should release the person concerned or commute his sentence.<sup>50</sup> Yet, no compensation is awarded as reparation for non-pecuniary damage although the imposition of a death sentence on a person carries with it tremendous anguish and mental stress, factors that would justify the allocation of compensation for non-pecuniary damage. In a few death row cases, however, somewhat at random, the HRCee has expressed the view that in addition to releasing the victim, compensation should also be granted.<sup>51</sup> On the other hand, it is fully understandable that the HRCee reacted angrily in a case where, notwithstanding a provisional injunction not to take any measures during the course of the proceedings that would cause irreparable damage, the victim was executed: here, compensation was the only remedy that could still alleviate, to some extent, the suffering of the family mem-

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50 See views in the following cases: *Mulai v. Guayana*, 20 July 2004, case 811/1998; *Smartt v. Guayana*, 6 July 2004, case 867/1999; *Ramil Rayos v. Philippines*, 27 July 2004, case 1167/2003; *Pagdayawon v. Philippines*, 3 November 2004, case 1110/2002; *Deolall v. Guayana*, 1 November 2004, case 912/2000.

51 See views in the following cases: *Abdumalik Nazarov v. Uzbekistan*, 6 July 2004, case 911/2000; *Khomidov v. Tajikistan*, 29 July 2004, case 1117/2002.



bers.<sup>52</sup> Where a person was sentenced to long years of deprivation of freedom, the HRCee seems generally to be inclined to award compensation.<sup>53</sup> Likewise in many other cases, when a breach is found to exist, it is mostly said in a routine formula that the petitioner is entitled to an “effective remedy, including compensation”.<sup>54</sup> However, no care is taken to specify the amount of compensation. Obviously, this could be a minimal symbolic amount. It would also appear that States rarely heed such recommendations. Unfortunately, compliance with the views of the HRCee generally leaves much to be desired, the suggested “compensation” constituting the subject-matter where the Committee is least successful.<sup>55</sup>

On the whole, the precedents examined lead to the conclusion that the HRCee does not recognize any firm rule on reparation. It starts out on the premise that wrongdoing States owe reparation to the victims of their actions, but that a great variety of possible options exist from which it can choose at its discretion. In particular, compensation is not seen as an integral element of reparation. If it were otherwise, financial compensation, in addition to retrial or release, would have to be granted in each and every case where an accused was convicted and sentenced on the basis of a faulty proceeding.

► *The Committee against Racial Discrimination*

More flexibility and even vagueness can be encountered in the case law of the Committee against Racial Discrimination. The Committee is generally satisfied if the discriminations found by it are removed.<sup>56</sup> Only in some instances does it recommend that at the same time the petitioner should be provided with compensation (“economic reparation”).<sup>57</sup> In one of the few cases which have come to the cognizance of the Committee, a formula was employed which mentions “relief commensurate with the moral damage he [the petitioner] has suffered”. In sum, little can be gathered from this jurisprudence.

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52 *Saidova v. Tajikistan*, 8 July 2004, case 964/2001.

53 See views in the following cases: *Dugin v. Russia*, 5 July 2004, case 815/998; *Nallaratnam Singarasa v. Sri Lanka*, 21 July 2004, case 1033/2001.

54 See views in the following cases: *Svetik v. Belarus*, 8 July 2004, case 927/2000 (discrimination on account of exercise of freedom of expression); *Majuwana Kankanamge*, 27 July 2004, case 909/2000 (harassment of journalist through indictments); *Loubnar El Ghar v. Libya*, 29 March 2004, case 1107(2002 (denial of passport).

55 See Report of the HRCee on its 76th to 78th sessions (2002 and 2003), UN doc. A/58/40 (Vol. I), Chapter VI: Follow-up Activities under the Optional Protocol.

56 See the following opinions: *Koptova v. Slovakia*, 8 August 2000, case 13/98 (freedom of movement and residence of Romas); *Kashif Ahmad v. Denmark*, 13 March 2000, case 16/1999 (non-prosecution of insulting racist language).

57 See *B.J. v. Denmark*, 17 March 2000, case 17/1999 (refusal of admission to a public place).

The Committee against Racial Discrimination favours a pragmatic approach. Again, the premise is that anyone victim of a violation of the Convention should be provided with “some” remedy. But the Committee concedes wide room to the discretion of the respondent State.

► *The European Court of Human Rights*

The case law of the European Court of Human Rights (henceforth: ECHR) has specific characteristics in that, until a few years ago, the Court believed that its mandate was confined to awarding financial compensation. Only after the ruling in the case of *Papamichaloupoulos v. Greece*<sup>58</sup> did the Court progressively come to the conclusion that its reading of Art. 41 (formerly: Art. 50) was much too narrow. It now takes the view that it is entitled, at least, to recommend to the respondent State found guilty of the complaints brought against it to take specific measures.<sup>59</sup> Thus, in the many cases where the ECHR has declared that it was not convinced of the independence of the Turkish State Security Court, it has taken to stating in the body of its legal reasoning, its conviction that the best remedy is a retrial of a person convicted and sentenced under such dubious circumstances. Unfortunately, this “recommendation” does not appear in the *dispositif* of the relevant judgments.<sup>60</sup> By contrast, where the restoration of property is concerned, a true order is enunciated in the *dispositif* (“the respondent State is to return to the applicant”), but the State is accorded the freedom to perform its duty by paying a corresponding amount of money.<sup>61</sup> Thus, the fact that financial compensation has been awarded in numerous cases does not signify that the ECHR considers this form of reparation to be the best modality to make good the harm done in any case at hand. Such a conclusion would be even less plausible as the ECHR is extremely cautious with regard to financial compensation. First of all, in many cases, it deems a finding of a breach to constitute sufficient reparation.<sup>62</sup> Second, the amounts which it is prepared to award to applicants are mostly much lower than the

58 Of 31 October 1995, *Publications of the ECHR*, Series A, Vol. 330-B, p. 45 (64).

59 This was recommended by C. Tomuschat, “Just satisfaction under Article 50 of the European Convention on Human Rights”, in: P. Mahoney et al. (eds.), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Köln [etc.], C. Heymann, 2000), pp. 1409, 1429.

60 See *Biyan v. Turkey*, 3 February 2005, para. 59aa: “Lorsque la Cour conclut que la condamnation d’un requérant a été prononcée par un tribunal qui n’était pas indépendant et impartial au sens de l’article 6 § 1, elle estime qu’en principe le redressement le plus approprié serait de faire rejurer le requérant en temps utile par un tribunal indépendant et impartial.”

61 See *Brumarescu v. Romania*, 23 January 2001; *Buzatu v. Romania*, 27 January 2005.

62 See, for instance, the recent case of *Philippe Pause v. France*, 15 February 2005, where the guarantees of fair trial under Art. 6 (1) of the European Convention had not been respected.

amounts requested by the applicant parties. Thus, in the case of *Vargová v. Slovakia*, where civil proceedings seeking to secure the restitution of a house had lasted for twelve years, the respondent State was ordered to pay the modest sum of 4,000.00 Euros,<sup>63</sup> and in the *Chechen* cases, where the Court delivered judgment on 24 February 2005,<sup>64</sup> the amounts allotted for non-pecuniary damage appear to be rather modest, compared to the immense mental harm sustained by the applicants.

It is difficult to draw a general conclusion from this case law. No precise parameters can be identified. In any event, it would seem to the outside observer that the ECHR does not apply the principle of full reparation as the relevant yardstick, but that it rather seeks to provide some kind of moral encouragement to applicants, being aware that not everything can be made good *a posteriori*. At the same time, this cautious approach is successful in not overburdening States with reparation claims which, because of their financial consequences, they would not be able to shoulder.

This tentative interpretation of the jurisprudence of the ECHR has been corroborated by the recent judgment in the case of *Von Maltzan and Others*,<sup>65</sup> where the key issue was compliance or non-compliance by Germany with its obligations under Art. 1 of Protocol No. 1 on account of the confiscations in the territory of the former Soviet-occupied zone of Germany before the establishment of the German Democratic Republic (1945-1949). These confiscations were not repealed after German reunification. The former owners received financial compensation according to a federal law, but the respective amounts were far lower than the commercial value of the properties at today's prices. On the other hand, in respect of confiscations carried out at the hands of the GDR authorities after 1949, precedence was given to restitution. The basis of this discriminatory treatment, i.e., the establishment of the GDR, was an arrangement between the two German governments in June 1990 ("Joint Declaration"), a few months before the formal incorporation of the GDR into the (West-)German State. It is highly controversial whether this arrangement was motivated by a Soviet request as a precondition for its consent to reunification. In any event, it was clear from the very first day in the reunited Germany, that the former owners could not hope to recover their assets. Thus, when the European Convention of Human Rights was extended *ratione territorii* to the eastern part of Germany, they had no rights that could have enjoyed protection under Art. 1 of

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63 Judgment of 15 February 2005. The applicant had requested 18,000 Euros for non-pecuniary damage.

64 Judgments against Russia: *Khashiyev; Akayeva; Isayeva; Yusupova; Bazayeva; Zara Isayeva*.

65 Judgment of 30 March 2005.

Protocol No. 1. However, in addition to this somewhat formalistic reasoning, the ECHR added:

The enactment of laws providing for the restitution of confiscated property or the payment of indemnification or compensation or for the rehabilitation of persons who had been prosecuted in breach of the rule of law obviously involved consideration of many issues of a moral, legal, political and economic nature which are a matter of public concern and in respect of which the Contracting States have a wide margin of appreciation. In particular, the Court reiterates that the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused by a foreign occupying force or another State.<sup>66</sup>

Along similar lines, it continued this argument by holding:

In the instant case, by choosing to make good injustices or damage resulting from acts committed at the instigation of a foreign occupying force or by another sovereign State, the German legislature had to make certain choices in the light of the public interest. In that connection, by enacting legislation governing issues of property and rehabilitation after German reunification, it had regard, among other things, to the concepts of ‘socially acceptable balance between conflicting interests’, ‘legal certainty and clarity’, ‘right of ownership’ and ‘legal peace’ contained in the Joint Declaration. Similarly, in examining the compatibility of that legislation with the Basic Law, the Federal Constitutional Court referred to the principles of ‘social justice and the rule of law’ and that of the ‘prohibition of arbitrariness’.

As the Court has stated above (see paragraph 77), where a State elects to redress the consequences of certain acts that are incompatible with the principles of a democratic regime but for which it is not responsible, it has a wide margin of appreciation in the implementation of that policy.”<sup>67</sup>

It clearly emerges from these observations that the Court accepts the context-dependency of any reparation scheme. It rejects any rigidity in handling situations where a national community has to face up to the ruins left behind by a repressive regime. Quite obviously, the ECHR does not share the view that restitution must take place in any event. If it had embraced this doctrine, the former owners could have claimed the coverage of Art. 1 of Protocol No. 1 for their right to restitution. Yet, the Strasbourg judges have explicitly denied them this benefit.

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<sup>66</sup> *Ibid.*, para. 77.

<sup>67</sup> *Ibid.*, paras. 110-111.



## 5 REPARATION IN PROCESSES OF TRANSITIONAL JUSTICE

The *Von Maltzan* judgment sheds a sharp light on the BPG. Although the codification initiative, as shown by its title, had as its factual background “gross” human rights violations and “serious” violations of IHL, both phenomena which are related to internal armed conflict and hence violations on a massive scale, the BPG were drafted as if they were to apply in situations where specific individuals claim their right to reparation. Consequently, the structure follows the one underlying the ILC Articles, exactly in the same order. Restitution being the first followed by compensation and satisfaction, and only rehabilitation derogating from the established sequence. Satisfaction and guarantees of non-repetition complemented the pentagram as outlined in the 1996 draft of the ILC Articles.<sup>68</sup> One might even get the impression that the drafters deliberately shied away from taking note of the ongoing debate on transitional justice,<sup>69</sup> quite in the same way as the ILC not devoting any attention to the drafting efforts deployed by the Sub-Commission and the Commission on Human Rights on the BPG. Processes of transitional justice do not involve individual cases only, they concern nations as a whole that seek to gain new stability under conditions of peace and justice.

It is common knowledge today that for processes of transitional justice, reparation is one element only, albeit an important one.<sup>70</sup> Other elements are the punishment of the major criminals and the search for the truth inasmuch as societies need to know what led them into the abyss from which they are trying to rise again. All the elements of a passage to democracy and the rule of law are present in the BPG. Curiously enough, however, they are listed under “satisfaction” and “guarantees of non-repetition” as if individual reparation claims had to be satisfied. This amounts to a distorted vision of what

68 *ILC Yearbook* 1996, Vol. II, Part Two, p. 63. The 2001 version of the Articles relegated assurances and guarantees of non-repetition to Art. 30 which deals with the continuity of the duty of performance.

69 See, for instance, M. Abu-Nimer (ed.), *Reconciliation, Justice, and Coexistence. Theory & Practice* (Lanham MD, Lexington Books, 2001); D. Bloomfield, T. Barnes, L. Huyse (eds.), *Reconciliation after Violent Conflict. A Handbook* (Stockholm, International Institute for Democracy and Electoral Assistance, 2003); A.M. Gross, “The Constitution, Reconciliation and Transitional Justice”, 40 *Stan J Int'l L*, 2004, 47-104; L.H. Meyer (ed.), *Justice in Time. Responding to Historical Injustice* (Baden-Baden, Nomos, 2004); R.I. Rotberg, D. Thompson (eds.), *Truth v. Justice. The Morality of Truth Commissions* (Princeton & Oxford, Princeton University Press, 2000); R.G. Teitel, “Transitional Justice Genealogy” 16 *HHRJ*, 2003, 69-94. Recently, the UN Secretary-General has written an illuminating report: “The rule of law and transitional justice in conflict and post-conflict societies”, UN doc. S/2004/616, 23 August 2004.

70 In this regard, the proposals by Louis Joinet, *supra* (note 8), which start out with the “inalienable right” of every people “to know the truth”, were exemplary.

is necessary after a national cataclysm. When finally it has been possible to topple a repressive regime, the first task is indeed to restore law and order, in particular enjoyment of human rights, to the benefit of everyone. For that purpose, an efficient and independent judiciary is required *inter alia*. Law and order, understood in this sense, are a common good to be enjoyed by everyone in the community concerned.

At a second stage, collective reparation measures need be taken as they are almost exhaustively comprised in the BPG under “Satisfaction” and “Guarantees of non-repetition”. Much of that, however, has little to do with reparation: the two Principles (22. and 23.) contain an exhaustive program of strengthening good governance. With these ambitious objectives, the BPG leave quite definitely the realm of a reparation programme. They state broad policy objectives that, by their very nature, are simply incapable of ever rising to the status of hard law. Hence, one may conclude that the title of the BPG was well chosen. Yes, they do contain some legal principles, but very few ones, the bulk of the propositions compiled under their roof deserving indeed a classification as “guidelines” which are useful as a kind of “shopping list” when the way in which a process of transitional justice is to be set on its tracks is examined.

## 6 CONCLUDING OBSERVATIONS

The logical inference from the preceding considerations is that careful distinctions are necessary with regard to all of the measures designed to clear up the tragic rubble caused by public anarchy. Simple answers can never be given. Collective measures to restore public peace and security should generally enjoy priority. Likewise, for the sake of national harmony and stability, gestures recognizing the evils committed and acknowledging the plight of the victims are important with a view to preventing future tragedies arising on the same grounds. In the field of individual reparation, restitution is normally easier to effect than to pay compensation, however, this is only a thumb rule that does not apply automatically in all similar situations. In any event, the principle of “full reparation” is not a viable recipe when a societal battlefield must be transformed into a playground where civil society is able to accommodate its conflicts of interests under constitutional rules of democracy and human rights.

### **Annex 31**

Stephan Wittich, “Punitive Damages”, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* (J. Crawford et al. eds., 2010)





## Chapter 45

# PUNITIVE DAMAGES

STEPHAN WITTICH

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### 1 The notion of punitive damages

#### (a) Municipal law

The notion of 'punitive damages' derives from the common law: it involves the payment of damages in addition to actual (compensatory) damages when the defendant acted with recklessness, malice, deceit, or other reprehensible conduct (eg violence, oppression, fraud . . .). As the term indicates, punitive damages are intended to punish the defendant and thereby to deter blameworthy conduct. In addition, they may also be used to reduce or eliminate any profits the wrongdoer has gained from the tort. Accordingly, the difference between punitive or exemplary damages on the one hand, and substantial damages on the other, is that the former are meant to punish the individual wrongdoer and to deter the general public, while the latter are awarded to compensate for a significant loss or damage. Substantial damages mean any damages not purely nominal or symbolic, even if they are not very large. Various terms denoting this type of non-compensatory damages (in particular, 'punitive', 'penal', 'exemplary', 'aggravated', and 'multiple' damages) are often employed as synonyms.<sup>1</sup>

Despite this proliferation of terms, in several common law jurisdictions (in particular the United Kingdom, Canada, and Australia), a useful distinction is made between punitive damages proper and aggravated damages. The latter are a special form of compensatory damages, that is, damages on an increased scale awarded to the injured party over and

<sup>1</sup> Cf BA Garner, *Black's Law Dictionary* (abridged 8th edn, St Paul, Thomson/West, 2005), 335.

above the actual economic, financial or other material loss, where the wrong done was aggravated by reprehensible conduct on the part of the wrongdoing party. Although these aggravating circumstances may be the same as in the case of punitive damages, aggravated damages have no punitive function. Rather they focus on the injured party's feelings that were hurt due to the defendant's behaviour. Exemplary or punitive damages, on the other hand, are intended to punish the defendant, and thereby to serve one or more of the objects of punishment—moral retribution, individual and general deterrence. While the subtle distinction between aggravated and punitive damages is often not easy to maintain, it is a valuable one.

Punitive damages are known to practically all common law countries, albeit with variations. In the United States, for instance, punitive damages take a prominent position in the law of remedies, while judicial practice has severely restricted their availability in England. The most important field of application for punitive damages awards in municipal law are cases of injury to the person or to personal reputation. In contrast, civil law systems do not generally provide for damages in addition and unrelated to any actual damage caused. While there are, to be sure, several remedies of private law in civil law countries that have an afflictive character (eg contractual fines or the *astreinte* in French law), there is no unifying concept analogous to punitive damages.

#### (b) International law

In international law, the idea of punitive damages is disputed. Many reasons are advanced for the generally negative attitude towards this type of remedy. In the first place, it is argued that penal remedies against States would be contrary to the principle of sovereign equality. Furthermore, the imposition of penalties would require judicial machinery with compulsory jurisdiction, which does not exist in international law. Likewise, determining whether the criteria for punitive damages are met requires third party assessment. Yet the vast majority of disputes are settled at the diplomatic level, and punitive damages can hardly play a role unless they are considered as a 'self-inflicted penalty' which will rarely be relevant in practice. Another argument against punitive damages is that they simply are not part of positive international law, as there is no practice in support of them. In sum, punitive damages appear unacceptable in international law for a variety of theoretical and practical reasons.

However, it would appear that the real problem with punitive damages in international law is that the various approaches to the concept are incoherent, added to which the terminology on the matter is far from clear. One reason for this state of affairs is the uncertainty surrounding the concept of damage in general. For instance, it is sometimes said that punitive damages may in principle be awarded but are due only in case of 'moral' damage without however clarifying the term 'moral damage'. Another source of confusion certainly is the fact that authors in international law hardly ever have the same concept in mind when they refer to punitive damages. This is not surprising given the fact that—as already mentioned—punitive damages are generally unknown to many domestic legal systems, in particular those with a civil law tradition. It is almost inevitable that scholars not familiar with punitive damages take a different approach to this concept than those accustomed to it. For example, it is an unsettled question in international law whether damages may be awarded for purely non-material damage directly suffered by a State (without one of its nationals being involved); hence some international lawyers consider any award of

substantial, ie more than merely nominal or symbolic, damages in the absence of actual (pecuniary, economic, financial, or other material) loss as an award of punitive damages even if these substantial damages are designed to recover non-material damage and thus serve a purely compensatory function.

Consequently, while certain municipal laws distinguish between punitive and aggravated damages, it is difficult to apply that subtle distinction to international law. The matter is further complicated by the more general question of calculating and measuring damages, in particular in case of non-material injury which is not easily, if at all, assessable in monetary terms. Unless the award is specifically designated as one of compensatory, aggravated, or punitive damages, the particular purpose of the award can hardly be ascertained. Cases can readily be envisaged where moral damages, ie compensatory damages for non-material ('moral') injury to foreign nationals, overlap with aggravated or punitive damages. But the fact that an award of damages often involves a considerable discretionary element does not mean that it is punitive in character.<sup>2</sup>

## 2 International practice

### (a) Diplomatic practice

Incidents of diplomatic practice are often cited in support of punitive damages but this is highly uncertain.<sup>3</sup> In most cases, dispute settlement by diplomatic means fails to apply legal principles, and it is therefore doubtful whether diplomatic practice in the field of punitive damages may be considered as State practice that is accompanied by *opinio iuris*. Often it is unclear whether the payments of damages in these incidents had been preceded by a violation of international law at all. Furthermore, most cases of diplomatic practice with regard to punitive damages are outdated and concerned excessive claims of former colonial powers against weaker States. This practice is inappropriate and should not be considered as a reference point for the modern law of State responsibility.

### (b) Early cases

Early cases which are frequently taken as examples of punitive or aggravated damages concerned claims of diplomatic protection for injuries of nationals abroad, in particular for personal injuries. In such cases, international tribunals, in assessing the award of damages, have at times taken into account aggravating circumstances, for example, the seriousness of the responsible State's delinquency. A specific category of such cases concerned the failure of State organs to apprehend and prosecute individuals for criminal offences against aliens. Here the territorial State was not responsible for the initial offence itself (such as the murder of an alien) but only for the non-apprehension and non-prosecution of the alleged offenders. While the reparation due was thus confined to compensating the non-material damage suffered by the relatives of the murdered victim (eg grief caused by the non-prosecution of the culprit), some of these cases involved substantial awards of damages which appear to have gone far beyond the mere compensation

<sup>2</sup> N Jørgensen, *The Responsibility of States for International Crimes* (Oxford, OUP, 2000), 187–207.

<sup>3</sup> See S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *ARIEL* 101, 141–142.



of this non-material damage.<sup>4</sup> In other cases, substantial damages were awarded as an expression of regret for the indignity inflicted upon another State by mistreating one of its nationals.<sup>5</sup> Finally, in one case it was explicitly held that the injury to the alien and, more importantly, the failure to prosecute the alleged perpetrators amounted to a severe offence against the State of nationality which was awarded a substantial amount of damages for that indignity.<sup>6</sup>

It is certainly true that in many of these cases the tribunals considered the circumstances of the violation so aggravating as to justify awards of substantial damages and perhaps even intended some sort of retribution. Since the amount of damages awarded appear to be unrelated to the damage actually inflicted, some commentators regard these awards as penal in character.<sup>7</sup> However, without exception these early cases concerned injuries to aliens and the sum awarded accordingly was paid to the injured State in the interest of the individual rather than in its own right. In other words, these damages were designed to make up for personal injuries actually suffered by the foreign individuals concerned and may, at best, be considered as aggravated damages.

There is only one early case which appears to have endorsed a punitive function of damages, the well-known and often cited *I'm Alone* case.<sup>8</sup> There the Claims Commission awarded the sum of \$25,000 as a 'material amend' to Canada for the intentional unlawful sinking by the United States coast guard of a British ship of Canadian registry. Since the ship was controlled and managed and the cargo owned by United States nationals, the sum awarded could not have been intended to compensate for material loss: on this basis, some authors consider this award to be penal in nature. However, a closer analysis suggests that the award was indeed compensatory rather than punitive.<sup>9</sup> In particular, Canada claimed compensation for expenses in repatriating the crew as well as for legal expenses, the total amount exceeding the sum awarded. Thus the \$25,000 awarded can readily be regarded as compensation for actual loss suffered by the violation.

On the other hand, there is also early case law clearly denying the availability of punitive damages. Some of these cases rejected the claim for punitive damages because the circumstances of the case would not justify such an award.<sup>10</sup> In the main, this 'negative' practice concerns cases in which the tribunal held that it was not competent under its constituent treaty to award penal remedies. The best-known example are the *Lusitania* cases, where the umpire rejected a claim for punitive damages, holding that the arbitral commission was without the power to make such awards under the terms of its constituent treaty.<sup>11</sup> There are other decisions to the same effect.<sup>12</sup>

There is disagreement in the doctrine as to the interpretation of those cases in which the tribunal based its refusal to award punitive damages on its lack of competence under the *compromis*. Thus it is often argued that despite this rejection, none of these tribunals

<sup>4</sup> See eg *Laura MB Janes et al (USA) v United Mexican States*, 16 November 1925, 4 *RIAA* 82, 86–90.

<sup>5</sup> See eg *Maal*, 1903, 10 *RIAA* 730, 732–733.

<sup>6</sup> *Heirs of Jean Maninat*, 31 July 1905, 10 *RIAA* 55, 81–83.

<sup>7</sup> For example, R Jennings & A Watts, *Oppenheim's International Law* (9th edn, London, Longman, 1992), Vol 1, 533.

<sup>8</sup> *SS 'I'm Alone' (Canada, United States)*, 30 July 1933 & 5 January 1935, 3 *RIAA* 1609, 1618.

<sup>9</sup> See S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *ARIEL* 101, 121–122.

<sup>10</sup> *Ibid*, 131–133.

<sup>11</sup> *The Lusitania*, 1 November 1923, 7 *RIAA* 32, 41.

<sup>12</sup> See S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *ARIEL* 101, 135–137.



denied, as a matter of principle, the availability of punitive damages in international law.<sup>13</sup> However, in most cases the *compromis* contained no specific restriction as to the available remedies; rather this restriction was implied by the respective tribunals on the basis of general international law. The majority of writers, therefore, take the more convincing view that the lack of jurisdiction of courts and tribunals to award punitive damages followed from the widespread opinion that they are not a suitable remedy in international law.<sup>14</sup>

### (c) Modern cases

Similar considerations may be applied to the more recent case law. There is not a single case in contemporary practice in which an international court or tribunal has awarded punitive damages. Even where serious breaches of international obligations were involved, either due to the importance of the norm breached or because of aggravating circumstances—or both—punitive damages were not an issue. In the *Corfu Channel* case, for instance, the International Court of Justice emphasized the ‘grave omissions’ by Albania<sup>15</sup> but eventually treated the violation like any other wrongful act and awarded merely compensatory damages. Similarly, in *Armed Activities on the Territory of the Congo*, the Court considered Uganda’s unlawful military intervention in the Congo ‘to be a grave violation of the prohibition on the use of force’<sup>16</sup> but did not take this fact into consideration with regard to the consequences of this grave violation.

In the *M/V Saiga* case, the International Tribunal for the Law of the Sea held Guinea responsible for ‘excessive use of force’<sup>17</sup> but did not award any, let alone substantial, damages for this material breach of important provisions of the Law of the Sea Convention.<sup>18</sup> Likewise, the Eritrea-Ethiopia Claims Commission, after finding Eritrea responsible for a ‘serious’ violation of article 2(4) of the United Nations Charter which, in the view of the Commission, entailed ‘serious consequences’ confined itself to awarding compensation for the damage actually incurred.<sup>19</sup> In the *Velásquez Rodríguez* case, which involved very serious violations of human rights, the Inter-American Court of Human Rights outright refused to award punitive damages since ‘this principle is not applicable in international law at this time’.<sup>20</sup> Also, the European Court of Human Rights has consistently rejected the award of exemplary, punitive or even aggravated damages.<sup>21</sup> At the same time, however, the European Court seems prepared to award some kind of increased compensatory damages where the mere finding of a violation of the European Convention on Human Rights would not afford appropriate reparation. Thus, in the specific context of a breach of article 6(1) of the Convention, the Grand Chamber of the Court justified the deviation from the Court’s

<sup>13</sup> For example, C Eagleton, ‘Measure of Damages in International Law’ 39 (1929–1930) *Yale LJ* 52, 61–62.

<sup>14</sup> C Gray, *Judicial Remedies in International Law* (Oxford, OUP, 1987), 28.

<sup>15</sup> *Corfu Channel case (United Kingdom v Albania)*, *Merits*, ICJ Reports 1949, p 4, 23.

<sup>16</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ Reports 2005, p 168, 227 (para 165).

<sup>17</sup> *M/V ‘Saiga’ (No 2)* (1999) 38 *ILM* 1323, (para 159).

<sup>18</sup> *Ibid*, 1358 (para 176).

<sup>19</sup> Eritrea-Ethiopia Claims Commission, Final Award, Ethiopia’s Damages Claims, 17 August 2009.

<sup>20</sup> *Velásquez Rodríguez (Reparations and Costs)*, *Inter-Am Ct HR, Series C, No 7* (1989), para 38.

<sup>21</sup> *BB v United Kingdom* (App No 53760/00), Judgment of 10 February 2004, para 36: ‘The Court recalls that it does not award aggravated or punitive damages’. *Wainwright v United Kingdom* (App No 12350/04), Judgment of 26 September 2006, para 60: ‘The Court does not, as a matter of practice, make aggravated or exemplary damages awards’. See, however, *Ludischer v Austria* (App No 35019/97), Judgment of 20 December 2001, para 30, where the Court found ‘no basis, in the circumstances of the present cases, for accepting the applicant’s claim for punitive damages’ (emphasis added).

previous restrictive case law on damages by the need to standardize its judgments and decisions 'in order to arrive at equivalent results in similar cases'. It further stated:

All this has led the Court to award higher levels of compensation than those awarded by the Convention institutions prior to 1999, and which may differ from those applied in the event of a finding of other violations. This increase, far from being a punitive measure, was intended to serve two purposes. On the one hand it encouraged States to find their own, universally accessible, solution to the problem, and on the other hand it allowed applicants to avoid being penalised for the lack of domestic remedies.<sup>22</sup>

In the *Rainbow Warrior* case the Secretary-General of the United Nations, acting as a mediator, awarded substantial damages for grave violations of international law committed by France. Since the compensation awarded exceeded the value of the material loss suffered by New Zealand, it might be argued that this award was punitive in nature. On the other hand, the ruling of the Secretary-General on compensation was not accompanied by any reasons, hence it is impossible to determine the real nature of the award.<sup>23</sup> Furthermore, given the grave violation at issue, the significant sum awarded is not surprising in respect of the serious non-material damage suffered by New Zealand. Thus, the award by the Secretary-General can at best be regarded as one of aggravated damages, the amount of damages being measured according to the gravity of the breach without any intention to punish the responsible State.

In a 2008 decision, an investment tribunal awarded compensation for moral damages, described as a 'symbolic' amount and not as a punitive measure. In *Desert Line Projects LLC v Republic of Yemen*, the claimant requested a sum for moral damages, including loss of reputation and stress and anxiety caused to its executives as a result of the actions of the respondent in breach of the fair and equitable treatment standard in the Oman-Yemen BIT.<sup>24</sup> The Tribunal found that the violation of the treaty, and in particular the physical duress exerted on the executives, was malicious and therefore the respondent was liable to reparation for moral injury.<sup>25</sup> However the reparation was framed as compensation for moral injury rather than punitive damages.

### 3 The work of the ILC on the topic

#### (a) Treatment of punitive damages during the first reading

In the work of the ILC on the law of State responsibility, the idea of punitive damages was already raised by the first Special Rapporteur, García Amador. He took the view that international responsibility included criminal aspects and considered punitive damages as a justified form of reparation.<sup>26</sup> Pursuant to his overall approach, García Amador based his view concerning punitive damages on the cases mentioned above concerning injuries to aliens and involving substantial awards of damages.

<sup>22</sup> *Cocchiarella v Italy* (App No 64886/01) Judgment of 29 March 2006, para 67.

<sup>23</sup> See S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *ARIEL* 101, 127–128.

<sup>24</sup> *Desert Line Projects LLC v Republic of Yemen* (ICSID Case No ARB/05/17), Award of 6 February 2008, at paras 50, 58, 277, 284, and 286.

<sup>25</sup> *Ibid*, paras 289–290.

<sup>26</sup> FV García Amador, First Report on State Responsibility, *ILC Yearbook 1956*, Vol II(1), 173, 211–212 (paras 201–209); FV García Amador, Sixth Report on State Responsibility, *ILC Yearbook 1977*, Vol II(1), 3, 35–37 (paras 140–145).

Although Special Rapporteur Ago introduced the concept of 'international crimes' into the draft articles, he did not envisage any penal consequences, such as punitive damages. Likewise Special Rapporteur Riphagen did not address the issue of punitive damages: he considered both compensation and satisfaction strictly compensatory in nature.

In contrast, Special Rapporteur Arangio-Ruiz heavily emphasized punitive damages as a form of satisfaction which he considered afflictive rather than compensatory in nature.<sup>27</sup> He proposed the inclusion of punitive damages, ie the 'payment of a sum of money not in proportion to the size of the material loss'<sup>28</sup> in case of 'delicts of particular gravity'.<sup>29</sup> The relevant draft article 45(2)(c) of the first reading text envisaged 'in cases of gross infringement of the rights of the injured State [the payment of] damages reflecting the gravity of the infringement' as a form of satisfaction. It is, however, unclear whether Arangio-Ruiz really intended punitive damages in the true sense of the word, or rather aggravated damages, ie compensatory damages for a violation of an international obligation under aggravating circumstances. In any event, the ILC rejected the concept of punitive damages and considered such 'damages reflecting the gravity of the infringement' as 'exemplary' damages, obviously meaning aggravated damages.<sup>30</sup> The scope of this provision was, however, unclear, as these damages were just a form of satisfaction and therefore only applicable in case of non-material damage,<sup>31</sup> although they were, in principle, compensatory and hence a specific form of compensation.

It was a perplexing inconsistency of the Articles adopted on first reading that while an injured State could receive aggravated, ie substantial damages by way of satisfaction in former draft article 45, such damages, let alone punitive damages, were ruled out as a consequence of the definition of international crimes given in former draft article 19.

#### (b) The issue of punitive damages during the second reading

Special Rapporteur Crawford proposed to retain aggravated damages, that is, 'damages reflecting the gravity of the injury', as a form of satisfaction in case of non-material damage to the State.<sup>32</sup> He also proposed punitive damages as a consequence of a serious breach of an obligation to the international community as a whole. Alternatively, if aggravated damages were not retained by the Commission by way of satisfaction in the case of 'normal' breaches, Crawford suggested that they should be available as a consequence of serious breaches of an obligation to the international community as a whole.<sup>33</sup>

Although the Drafting Committee adopted Crawford's second alternative by deleting aggravated damages as a form of satisfaction but retaining them (instead of punitive damages) in case of serious breaches of *erga omnes* obligations, any reference to aggravated damages was eventually deleted from the final text. It would appear that the reason for this negative (even hostile) attitude towards substantial damages in the absence of actual, economic loss was the apparent equation by quite a few governments of aggravated with punitive damages, the latter being unacceptable to almost all States. In other words, substantial damages are considered punitive in character in the absence of actual pecuniary or economic loss, even if they are intended to compensate for non-material damage.

<sup>27</sup> G Arangio-Ruiz, Second Report on State Responsibility, *ILC Yearbook 1989*, Vol II(1), 1, 31–42 (paras 106–147).

<sup>28</sup> *Ibid*, 41 (para 139).

<sup>29</sup> *Ibid*, 42 (para 145).

<sup>30</sup> See *ILC Yearbook 1992*, Vol I, 221 (para 57).

<sup>31</sup> *Ibid*, 221 (para 56).

<sup>32</sup> J Crawford, Third Report on State Responsibility, 2000, A/CN.4/507 paras 191–192.

<sup>33</sup> *Ibid*, paras 380–381.



The result is that article 41 on particular consequences of a serious breach of an obligation arising under a peremptory norm of general international law does not envisage any form of substantial damages in addition to compensation. This question was deliberately left open. This is also indicated by article 41(3) which indicates that the consequences of a serious breach of a peremptory norm mentioned in paragraphs 1 and 2 are not exhaustive. The Commentary states:

that international law may recognise additional legal consequences flowing from the commission of a serious breach in the sense of article 40

and

[t]he fact that such further consequences are not expressly referred to in Chapter III does not prejudice their recognition in present-day international law, or their further development.<sup>34</sup>

Aggravated and even punitive damages are certainly a candidate for such further consequences, but it is an indication of their controversial status that they are not mentioned at all, even by way of example, in the Commentary.

#### 4 Conclusions

In conclusion it may be stated that, as practice reveals, there is no clear authority for punitive damages in international law, and this scarcity of practice evidences that, at present, punitive damages are certainly not a generally accepted remedy in international law. The few cases that may charitably be considered as substantial awards of damages (*Tim Alone*, *Rainbow Warrior*) involved violations of international law under aggravating circumstances that caused significant non-material damage to the injured State. These damages were apparently intended to compensate for damage suffered, not to punish the wrongdoer. In the practice of international law, damages serve purely compensatory functions.<sup>35</sup> Furthermore, these few cases do not indicate any pattern to the effect that aggravated or punitive damages are a specific consequence of violations of particular norms of international law, for instance within the meaning of article 41, or of violations causing specific types of injury, such as moral injury consisting in what is often called an affront to the dignity, honour, and prestige of a State. While this is sometimes argued for,<sup>36</sup> this argument is neither supported by practice nor convincing from a conceptual point of view.

On the other hand, this does not mean that punitive damages are *a priori* excluded as a specific remedy. It may well be the case that a secondary norm itself provides for punitive damages in case of breach of a particular primary norm (as is indicated by paragraph 14 of the Commentary to article 41). Likewise, there is no reason to rule out the possibility that punitive damages might be applied by an international court or tribunal on a consensual basis, for instance because the parties to judicial proceedings have agreed in advance on that remedy in the *compromis*. Both eventualities would also operate under the *lex specialis* rule (article 55).

As a matter of principle, aggravated damages are more feasible than punitive damages, as they have a generally compensatory function. It is of course highly uncertain

<sup>34</sup> Commentary to art 41, para 14.

<sup>35</sup> Commentary to art 36, para 4.

<sup>36</sup> See eg G Arangio-Ruiz, Second Report on State Responsibility, *ILC Yearbook 1989*, Vol II(1), 1, 31 (para 106).



that a court or tribunal will award even aggravated damages *eo nomine*. Yet, once it is acknowledged that this type of damages is compensatory because it is adapted to the gravity of the infringement, there is no sound reason in theory to discard them as a specific remedy in case of grave violations of international law, irrespective of the nature or importance of the norm breached. Nevertheless, given the scarcity of awards not only of aggravated or punitive damages but even of ordinary compensatory damages in general international law, and the doubts which still exist as to whether damages are available at all for non-material damage directly suffered by the State,<sup>37</sup> the answer to the question of aggravated or punitive damages must be left to the further development of international law by State practice.

### Further reading

- HW Briggs, 'The Punitive Nature of Damages in International Law and State Responsibility for Failure to Apprehend, Prosecute or Punish', in JM Matthews and J Hart (eds), *Essays in Political Science in Honor of Westel Woodbury Willoughby* (Baltimore, Johns Hopkins Press, 1937), 339
- G Carella, 'I Punitive Damages e la riparazione dello danno morale in diritto internazionale' (1983) 67 *Rivista di diritto internazionale* 751
- CC Hyde, 'Concerning Damages arising from Neglect to Prosecute' (1928) 22 *AJIL* 140
- NB Jørgensen, *The Responsibility of States for International Crimes* (Oxford, OUP, 2000), 187–207
- NB Jørgensen, 'A Reappraisal of Punitive Damages in International Law' (1997) 68 *BYIL* 247
- D Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford, OUP, 2005), 354–367
- S Wittich, 'Non-Material Damage and Monetary Reparation in International Law' (2004) 14 *FYIL* 321
- S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *ARIEL* 101
- S Wittich, 'Lusitania v. Rainbow Warrior: Punitive Damages im Rahmen der Staatenverantwortlichkeit', in HF Köck (ed), *Rechtsfragen an der Jahrtausendwende. Akten des 21. Österreichischen Völkerrechtstages* (Vienna, Linde, 1998), 247

<sup>37</sup> S Wittich, 'Non-Material Damage and Monetary Reparation in International Law' (2004) 14 *FYIL* 321, 355–363.



### **Annex 32**

P. Tomka & V.-J. Proulx, “The Evidentiary Practice of the World Court” in *LIBER AMICORUM GUDMUNDUR EIRIKSSON* (J. C. Sainz-Borgo ed., forthcoming 2016)





## THE EVIDENTIARY PRACTICE OF THE WORLD COURT

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### I. INTRODUCTION

The role and place of evidence in international legal proceedings are of fundamental importance for international justice and the rule of law. In many ways, the production and management of evidence constitute the most crucial building blocks in ensuring a just and well-reasoned judicial outcome in a dispute between sovereign States. Unsurprisingly, the subject of evidence before international courts and tribunals and surrounding issues have generated considerable scholarly output over the years, including in relation to specific international legal fields.<sup>1</sup> What is more, the academic literature has also devoted considerable time and space to discussing the various aspects of the evidentiary practice of the International Court of Justice ('Court', 'ICJ' or 'World Court'), be they related to the burden of proof, standard of proof or

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<sup>1</sup> See eg, Paul Reichler, 'Problems of Evidence before International Tribunals' in John Norton Moore (ed), *International Arbitration: Contemporary Issues and Innovations* (Leiden and Boston, Martinus Nijhoff, 2013) 47-52; Mary Ellen O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 *Proceedings of the Annual Meeting of the American Society of International Law* 44; Chittharanjan Felix Amerasinghe, *Evidence in International Litigation* (Leiden and Boston, Martinus Nijhoff, 2005); Chittharanjan Felix Amerasinghe, 'Principes en matière de preuve dans le procès international: Principles of Evidence in International Litigation: 15<sup>ème</sup> Commission' (2002-2003) 70 *Annuaire de l'Institut de Droit international* 139; Rodman Bundy, 'Evidence before International Tribunals in Maritime Delimitation Disputes' in Clive Schofield *et al* (eds), *The Razor's Edge. International Boundaries and Political Geography: Essays in Honour of Professor Gerald Blake* (London, Kluwer Law International, 2002) 173-83; Mojtaba Kazazi and Bette Shifman, 'Evidence before International Tribunals' (1999) 1 *International Law Forum* 193; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence* (The Hague, Kluwer Law International, 1996); Charles Bower, 'Evidence before International Tribunals: The Need for Some Standard Rules' (1994) 28 *The International Lawyer* 47; Durward Valdamer Sandifer, *Evidence before International Tribunals* (revised edn, Charlottesville, NY, University Press of Virginia, 1975); Jens Evensen, 'Evidence before International Courts' (1955) 25 *Acta Scandinavica Juris Gentium* 14; J.C. Witenberg, 'La théorie des preuves devant les juridictions internationales' (1936-II) 56 *Recueil des Cours* 1.

broader procedural questions.<sup>2</sup> Over the last decade, there has been renewed interest in the Court's approach to evidentiary issues, as it is increasingly confronted with fact-intensive and science-heavy cases. Evidentiary questions have also been central in some scholarly accounts addressing the role of the law of State responsibility in tackling modern security threats such as international terrorism, leading some publicists to formulate proposals for normative and policy reform or deliver critical assessments of the current evidentiary system on the international plane.<sup>3</sup> In any event, the principal judicial organ of the United Nations ('UN') remains paramount in applying and developing international legal principles; its many contributions on evidentiary matters warrant further consideration.

In this brief chapter, we canvass some key aspects of the evidentiary practice of the World Court, while placing some emphasis on recent developments on that front. While providing an exhaustive treatment of this subject is simply impossible in only a few pages, our ambition is nonetheless to provide insight into both the Court's jurisprudential pronouncements on important evidentiary matters, and its institutional culture and practice as regards the management and treatment of evidence. This chapter begins by mapping out the evidentiary framework governing the Court's work, with reference to relevant provisions, before turning to the admissibility of evidence before the Court. Ultimately, this contribution recalls and explores select substantive pronouncements of the Court on matters of evidence.

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<sup>2</sup> See eg, Luigi Fumagalli, 'Evidence before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom' in Nerina Boshiero *et al* (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague, Asser Press, 2013) 137-48; Jacques-Michel Grossen, 'A propos du degré de la preuve dans la pratique de la Cour internationale de Justice' in Marcelo Kohen *et al* (eds), *Perspectives of International Law in the 21<sup>st</sup> Century: Liber Amicorum Professor Christian Dominicé in Honour of his 80<sup>th</sup> Birthday* (Leiden and Boston, Martinus Nijhoff, 2012) 258-68; Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (London, British Institute of International and Comparative Law, 2009); Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice' (1999) 1 *International Law Forum* 202; Andrés Aguilar Mawdsley, 'Evidence before the International Court of Justice' in Ronald St. John Macdonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht, Boston and London, Martinus Nijhoff, 1994) 533-50; Manfred Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court' in Emmanuel Bello and Prince Bola Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias: Volume I: Contemporary International Law and Human Rights* (Dordrecht, Boston and London, Martinus Nijhoff, 1992) 265-76.

<sup>3</sup> See eg, Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, Hart Publishing, 2006) 146-51, 340-48; Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Oxford and Portland, Hart Publishing, 2012) 39-40, 220-26.

## II. THE EVIDENTIARY FRAMEWORK BEFORE THE COURT AND RELEVANT PROVISIONS

From a more traditionalist standpoint, the Court's pronouncements are not only a way to peacefully resolve disputes between States, but they also strive to establish an accurate historical record, be it of the negotiation history between two States in the context of a maritime delimitation case or boundary dispute, the drafting history of a particular international convention, or the background facts to an armed conflict relevant to a dispute before the Court. In that light, the role of evidence before the Court becomes central in establishing a faithful historical record, in addition to assisting the Court in ascertaining the facts relevant to its legal decision with a view to reaching a just and well-reasoned outcome. After all, it should be recalled – and stressed – that the principal judicial organ of the UN is not only a court of first instance but also of last instance. According to Article 60 of the Statute of the Court, '[t]he judgment is final and without appeal'.<sup>4</sup> Invariably, in each case brought to it, the Court is called upon to sift through vast evidentiary records, establish the factual complex related to the proceedings and, ultimately, reach well-supported and just conclusions both on the facts and the law, thereby peacefully settling the disputes of which it is seized.

At the outset, it must be emphasised that the Court 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. The Statute of the Court is correspondingly cursory in the wording of Article 48, simply providing that the Court shall 'make all arrangements connected with the taking of evidence'. 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.

In short, in deciding the cases submitted to it, the overarching objective of the Court is to obtain all relevant evidence pertaining to both facts and law that may assist it in ruling on issues of

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<sup>4</sup> The Statute of the Court is available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

substance, as opposed to providing a judicial outcome grounded primarily on technical and/or procedural rationales. The Court's predecessor institution, the Permanent Court of International Justice ('PCIJ'), had identified this as its dominant judicial philosophy as early as 1932 in the *Free Zones of Upper Savoy and the District of Gex* case. In that regard, it proclaimed that 'the decision of an international dispute of the present order should not mainly depend on a point of procedure'.<sup>5</sup>

Interestingly, the current Statute of the Court is modelled after the Statute of its predecessor, which saw the light of day in 1920. This explains why several of the statutory guidelines concerning evidence carried over from the previous institution to the new Court in 1946. Together, these institutions provide over 90 years of accumulated evidentiary practice, which is a testament to the foresight of the framers of the UN Charter with respect to institutional continuity. That said, it should be emphasised that despite the inspiration drawn from the PCIJ's Statute by the ICJ's Statute – supplemented by the Rules of Court – the genesis of the provisions on evidence in those instruments actually derives from the draft rules of procedure for international arbitration of the Institute of International Law of 1875, the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, and the accumulated evidentiary practice of international courts of arbitration.<sup>6</sup>

It goes without saying that the Court disposes of a wide margin of latitude not only in requesting evidentiary elements, but also in assessing the evidence in each dispute submitted to it, while considering both the relevant rules of international law and the specific facts and circumstances of each case.<sup>7</sup> While the resulting procedural and evidentiary model governing the Court's work is in many ways *sui generis* and tailored to the singular mission of the Court as the principal judicial organ of the UN, it nonetheless draws inspiration from both the Anglo-Saxon legal tradition and continental systems of civil law.

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<sup>5</sup> *Case of the Free Zones of Upper Savoy and the District of Gex*, 1932 PCIJ (ser A/B) No 46 (7 June) at 155.

<sup>6</sup> See Aguilar Mawdsley, above note 2 at 534 and 541; Lachs, above note 2 at 265.

<sup>7</sup> See, generally Maurice Kamto, 'Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle' (2006) 49 *German Yearbook of International Law* 259.



By way of example, the active search for evidence carried out by the Court is reminiscent of the continental judicial culture whereas the introduction of affidavit evidence finds its roots in the common law tradition, thereby resulting in the absence of any rigid hierarchy of different types of evidence before the Court.<sup>8</sup> Indeed, both the PCIJ and the ICJ have assessed affidavit evidence (i.e. sworn statements) in disputes brought before them, including in oft-cited cases such as *Mavrommatis* and *Corfu Channel*.<sup>9</sup> Equally important are the vast-ranging powers conferred upon the Court, enshrined in Article 62 of the Rules of Court, to call witnesses and direct the parties to provide evidence. In fact, the scope of powers generated by the wording of this provision is best illustrated by quoting the text itself:

[t]he 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.<sup>10</sup>

This includes – always with the aim of attaining the objective truth – the possibility of the Court arranging ‘for the attendance of a witness or expert to give evidence in the proceedings’.

The Rules of Court – particularly Articles 57 and 58 – lay down a fairly robust evidentiary framework with respect to the submission and admission of oral evidence. In contrast, the practical effect of these provisions is somewhat tempered by Article 60 of the Rules of Court, which prescribes succinctness and finiteness of oral statements, and by Article 61, which enables the Court to manage the administration of evidence and to question the parties. By virtue of Article 49 of the Court’s Statute, ‘[t]he 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’. In fact, the Court has availed itself of the power conferred upon it by this provision on several occasions.<sup>11</sup> Moreover, Article 50 of the Statute confers vast fact-finding powers upon the Court, which allows it

<sup>8</sup> See eg, Valencia-Ospina, above note 2 at 204.

<sup>9</sup> For further discussion, see Jean-Flavien Lalive, ‘Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice’ (1950) 7 *Annuaire suisse de droit international* 77, 79.

<sup>10</sup> The Rules of Court are available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

<sup>11</sup> See eg, case concerning *Rights of Nationals of the United States of America in Morocco*, I.C.J. Pleadings, vol II at 431; *Corfu Channel case*, I.C.J. Pleadings, vol IV at 428 and vol V at 255; *Case of the Monetary Gold Removed from Rome in 1943*, Order of November 3<sup>rd</sup>, 1953, I.C.J. Reports 1953, p 44; the *Ambatielos case*, I.C.J. Pleadings at 346 and 566. For further discussion, see Shabtai Rosenne and Yaël Ronen, *The Law and Practice of the International Court, 1920-2005* (vol III, 4th revised edn, Leiden, Martinus Nijhoff, 2006) 1120 and *ibid*, chapter 21, para III.324 n 129.

to entrust ‘any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion’.<sup>12</sup> It should also be mentioned that the statutory and procedural framework governing proceedings before the Court enables parties to call witnesses – including expert witnesses – which may in turn be cross-examined.

In fact, testimonial evidence – including in the form of expert witnesses – was very much a part of two recent oral proceedings before the Court: First, in the dispute concerning *Whaling in the Antarctic* opposing Australia and Japan, which was heard from late-June to mid-July 2013; and second, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, which was heard in March and early-April 2014. What is more, these two proceedings involved intricate factual complexes – in one case the consideration of highly scientific evidence and in the other alleged violations of the *Genocide Convention* during the conflict in the Balkans – along with important stakes for both the interpretation of the *Genocide Convention* and the protection of the environment and conservation of living resources. In many ways, the former case constituted an additional illustration of the Applicant’s willingness to submit a fact-intensive and science-heavy dispute to the Court for adjudication, thereby entrusting it with the assessment of sophisticated evidentiary records, much in the vein of the scientifically complex case concerning *Pulp Mills on the River Uruguay*.<sup>13</sup>

The dispute brought to the Court in 2008 concerning *Aerial Spraying (Ecuador v Colombia)* had similarly involved voluminous scientific and testimonial evidence (primarily in the form of highly complex scientific reports and witness statements), which the Court had begun to absorb and digest in preparation of the oral hearings up until the case was withdrawn by Ecuador, just a few weeks prior to the commencement of those hearings. In a welcome development, the Parties settled the case prior to the hearings, while also openly acknowledging the Court for its hard work and

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<sup>12</sup> For different views on the Court’s fact-finding function in different eras, see Ruth Teitelbaum, ‘Recent Fact-Finding Developments at the International Court of Justice’ (2007) 6 *The Law and Practice of International Courts and Tribunals: A Practitioner’s Journal* 119; Daniel Joyce, ‘Fact-Finding and Evidence at the International Court of Justice: Systemic Crisis, Change or More of the Same?’ (2007) 18 *Finnish Yearbook of International Law* 283; Neil Alford Jr, ‘Fact Finding by the World Court’ (1958) 4 *Villanova Law Review* 38.

<sup>13</sup> For further discussion on the Court’s treatment of scientific evidence, see Anna Riddell, ‘Scientific Evidence in the International Court of Justice – Problems and Possibilities’ (2009) 20 *Finnish Yearbook of International Law* 229; Juan Sandoval Coustasse and Emily Sweeney-Samuels, ‘Adjudicating Conflicts Over Resources: The ICJ’s Treatment of Technical Evidence in the *Pulp Mills Case*’ (2011) 3 *Goettingen Journal of International Law* 447.

dedication in the case, which they considered to have been indispensable in reaching their settlement.

The Court rendered its judgment on 31 March 2014 in the abovementioned case concerning *Whaling in the Antarctic*.<sup>14</sup> As the judgment demonstrates, this precedent constitutes further and incontrovertible proof that the Court can deal with vast amounts of highly technical and scientific evidence in a cogent and methodical fashion, invariably delivering judgments of exemplary rigour characterised by their analytical clarity. Similarly, on 3 February 2015 the Court delivered its judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Unsurprisingly, the voluminous testimonial evidence adduced in the context of the Parties' written and oral submissions, which included some *in camera* witness sessions during the oral hearings, again played an important role in establishing the factual record before the Court.

While parties appearing before the Court are afforded a wide margin of freedom as regards the submission of evidence, the Statute nonetheless requires that all evidentiary elements the parties intend on using to support their claims be presented in the course of the written proceedings, and according to the modalities prescribed by the Rules of Court. This essentially means that those documents must be annexed to the written pleadings. Thus, the overarching guideline – perhaps in an effort to replace or replicate some aspects of the 'discovery' process sometimes followed in domestic judicial settings – is that of full disclosure of the evidence at the written stage of the proceedings.<sup>15</sup> In some instances, a party may attempt to produce a new evidentiary element after the conclusion of the written proceedings, during the oral phase, or refer during its oral statement to the contents of a document that has not been produced during the written proceedings. The Court is increasingly confronted by this type of litigation strategy.

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<sup>14</sup> For the text of the judgment, see *Whaling in the Antarctic (Australia v Japan. New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p 226.

<sup>15</sup> For further discussion on the concept of 'discovery' in international legal proceedings, see generally: Ali Marossi, 'The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals' (2009) 26 *Journal of International Arbitration* 511; Martin Davies, 'Evidence, Documents and Preliminary Discovery in International Litigation' (1996) 26 *University of Western Australia Law Review* 286; David Robinson, 'Compelling Discovery and Evidence in International Litigation' (1984) 18 *The International Lawyer* 533.

In that regard, the Rules of Court are rather straightforward, at least in principle: ‘After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party’. Unsurprisingly, the Rules of Court enable the Court to authorise the production of such documents after hearing the parties. In the second scenario considered earlier, whereby reference is made by a party to the contents of a previously unproduced document, such evidentiary item may be admitted if it ‘is part of a publication readily available’.

This last *cas de figure* arose in one of the Court’s most recent judgments on sovereignty and maritime delimitation opposing Nicaragua and Colombia, dealing both with sovereignty over certain maritime features located in the Western Caribbean Sea and the delimitation of an international maritime boundary in that area. In its judgment of November 2012, the Court pointed out that the Parties had provided judges’ folders during the oral proceedings, as is customary in litigation before the World Court.<sup>16</sup> Referring to its Statute, the Court further noted that Nicaragua had included two documents in one of its judges’ folders which had not been annexed to the written pleadings and were not ‘part of a publication readily available’.<sup>17</sup> Consequently, the Court decided not to allow those documents to be produced or referred to during the hearings.<sup>18</sup>

It is also interesting to underscore that the Court recently adopted a new practice direction for States appearing before it in relation to this type of evidence, with a view to governing the introduction of new, or previously unproduced, audio-visual or photographic material at the oral proceedings stage.<sup>19</sup> Among other things, the new Practice Direction IXquater directs the requesting State – that is to say, the State intending on producing the new evidentiary item or referring to the previously unpublished material – to make its intention sufficiently known, and in advance of the date on which it wishes to present the material. The provision further requires the requesting State to provide reasons for the request and directs it to comply with other modalities spelled out in the new practice direction.

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<sup>16</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, I.C.J. Reports 2012, p 624 at 632, para 13.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> See the Court’s Press Release titled ‘The Court adopts Practice Direction IXquater for use by States’, dated 11 April 2013, available at <http://www.icj-cij.org/presscom/files/6/17296.pdf>.



### III. ADMISSIBILITY OF EVIDENCE – SELECT EXAMPLES

As regards admissibility of evidence, generally, the Statute and Rules of Court do not lay down any major restrictions. In principle, the permissive nature of the evidentiary framework governing proceedings before the Court allows parties to submit virtually any form or type of evidence they see fit, with the caveat that the Court enjoys unfettered freedom in weighing it against the circumstances of each case and by reference to relevant international legal rules.<sup>20</sup> Amongst limited exceptions of inadmissible evidence before the Court, unlawfully obtained proof may obviously be excluded from the purview of what is acceptable, as was emphasised by the Court in its seminal *Corfu Channel* decision.<sup>21</sup> In 1946, two British warships struck mines while passing through the Corfu Channel between Albania and Greece, resulting in the destruction of the ships and significant loss of life. The United Kingdom submitted the dispute to the Court against Albania and contended that Albania had incurred international responsibility for the mines laid in the strait, primarily because it had failed to warn the Applicant State of the presence of those mines. Subsequently, British minesweepers scoured the Corfu Channel without the assent of Albania, ultimately attempting to produce the mines it had collected in its sweeping operation before the World Court as evidence of Albania's responsibility. In this regard, the Court characterised the United Kingdom's justification for its own conduct as a 'special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task'.<sup>22</sup>

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<sup>20</sup> See eg, Aguilar Mawdsley, above note 2 at 539.

<sup>21</sup> On the practice of the Court and international tribunals – with some reference to the *Corfu Channel* case – as regards the question of admissibility of evidence unlawfully obtained, see eg, W. Michael Reisman and Eric Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication' (1982) 76 *AJIL* 737. For a more recent book-length treatment of fraudulent evidence before international tribunals, with special reference to four ICJ cases, see W. Michael Reisman and Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law* (Cambridge, Cambridge University Press, 2014). In particular, chapters 3, 4, 5 and 8 of this recent monograph address evidentiary issues related to the *Corfu Channel*, *Tunisia/Libya*, *Nicaragua v United States*, and *Qatar v Bahrain* cases. Interestingly, the parties' conduct as regards evidentiary matters in the case concerning *Military and Paramilitary Activities in and against Nicaragua* has been divisive in the literature. In one instance, it pitted an eminent former Member of the Court against a distinguished counsel over the production and presentation of evidence in that case. Both individuals were involved in the original proceedings related to that case. See Stephen Schwebel, 'Celebrating a Fraud on the Court' (2012) 106 *AJIL* 102; Paul Reichler, 'The *Nicaragua* Case: A Response to Judge Schwebel' (2012) 106 *AJIL* 316; Stephen Schwebel, 'The *Nicaragua* Case: A Response to Paul Richler' (2012) 106 *AJIL* 582; Paul Reichler, 'Paul Reichler's Rejoinder' (2012) 106 *AJIL* 583.

<sup>22</sup> *Corfu Channel Case, Judgment of April 9<sup>th</sup>, 1949, I.C.J. Reports 1949*, p 4 at 34.

The Court rejected this line of defence, thereby inevitably equating the ‘alleged right of intervention’ with the ‘manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses’, and ultimately expounding that this line of reasoning ‘cannot, whatever be the present defects in international organizations, find a place in international law’.<sup>23</sup> The Court went on to point out that ‘[i]ntervention [was] perhaps still less admissible in the particular form it would [have] take[n]’ in the case before it, revealing itself alive to the concern that ‘from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself’.<sup>24</sup> The Court remained equally unpersuaded by the United Kingdom’s attempts to classify its conduct as falling under the rubric of ‘self-protection or self-help’. In this regard, the Court emphasized that ‘[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations’.<sup>25</sup> While the Court acknowledged that Albania had completely failed in fulfilling its duties after the explosions and had engaged in dilatory tactics through its diplomatic notes, which both constituted extenuating circumstances as regards the United Kingdom’s conduct, the Court nonetheless deemed it necessary ‘to ensure respect for international law’ and ‘declare that the action of the British Navy constituted a violation of Albanian sovereignty’.<sup>26</sup> It should be recalled that, ultimately, the Court admitted the evidence obtained through conduct that violated international law given that, in the case at hand, Albania had failed to raise any objections as to the admissibility of the proof obtained.<sup>27</sup> However, as mentioned above, the Court did so while admonishing the United Kingdom for its unlawful actions. Understandably, this jurisprudential precedent has prompted some leading scholars to conclude that the Court did not purport to lay down an exclusionary rule as to the admissibility of evidence obtained unlawfully.<sup>28</sup>

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<sup>23</sup> *Ibid*, at 35.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

<sup>27</sup> For academic commentary on this aspect of the case, see eg, N.H. Shah, ‘Discovery by Intervention: The Right of a State to Seize Evidence Located within the Territory of the Respondent State’ (1959) 53 *AJIL* 595, 606; Thomas Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995) 336. For further discussion of possible reasons why the Court admitted the evidence, see Markus Benzing, ‘Evidentiary Issues’ in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice: A Commentary* (2<sup>nd</sup> ed, Oxford, Oxford University Press, 2012) 1234-75, 1243.

<sup>28</sup> See eg, Kazazi, *Burden of Proof*, above note 1 at 206. See also: Hugh Thirlway, ‘Dilemma or Chimera? – Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 *AJIL* 622, 641 (opining that the approach espoused by the Court in *Corfu Channel* was ‘both rational in itself and more in harmony with the fundamental nature and powers of international tribunals than any exclusionary rule would be’).

Thus, the Court does not operate on the basis of any preliminary evidentiary filter to weed out inadmissible evidence at the outset; rather, the Court possesses a wide margin of appreciation in ascribing different weight to different evidentiary elements originating from varied sources. This component of the Court's judicial function is set into motion once the evidence has been entered into the written record. As a result, the issues of the weight to be attributed to, and evaluation of, the evidence in any given case before the Court replaces the perhaps more familiar rules on the admissibility of evidence prevalent before most domestic tribunals.

It follows that forms of evidence typically excluded in domestic judicial proceedings, such as hearsay evidence (*preuve par ouï-dire*), are not inadmissible before the World Court although the Court ascribes little or no weight to such evidentiary elements. As regards hearsay evidence, for instance, the Court indicated in its oft-cited judgment in the *Military and Paramilitary Activities in and against Nicaragua* case that, '[n]or is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight'.<sup>29</sup> In the abovementioned *Corfu Channel* decision, the Court emphatically set aside hearsay evidence on the basis that it amounted to 'allegations falling short of conclusive evidence'.<sup>30</sup>

Similarly, the primary instruments governing the Court's treatment of evidence do not distinguish between public and private documents, nor do they impose a so-called 'best evidence rule' under which, where possible, original documents would have to be produced in lieu of photostats or certified copies.<sup>31</sup> It follows that no official hierarchy is established in the Court's evidentiary framework between different types of evidence. As a consequence, the submission of oral evidence is in no way excluded or limited by the documentary evidence, while the Court remains unfettered in its ability to determine the probative value of any type of evidence presented to it.

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<sup>29</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p 14 at 42, para 68. On the implications of the case concerning *Military and Paramilitary Activities in and against Nicaragua* for evidentiary practice in international law, see Paul Reichler, 'The Impact of the *Nicaragua* Case on Matters of Evidence and Fact-Finding' (2012) 25 *Leiden Journal of International Law* 149.

<sup>30</sup> *Corfu Channel*, above note 22 at 17. See also: Rosenne and Ronen, above note 11 at 558 (highlighting that the Court will typically exclude hearsay evidence, which they describe as 'evidence attributed by the witness or deponent to third parties of which the Court has received no personal and direct confirmation', and further adding that '[s]tatements of this kind will be regarded as "allegations" falling short of conclusive evidence').

<sup>31</sup> See eg, Aguilar Mawdsley, above note 2 at 540.

By way of example, the Court is often called upon to weigh the evidentiary value of reports prepared by official or independent bodies, which provide accounts of relevant events. This is particularly true in fact-intensive disputes, such as those taking root against the backdrop of armed conflict, as was the case in both the *Bosnian Genocide* case, opposing Bosnia Herzegovina and Serbia and Montenegro, and the *Armed Activities* case, opposing the Democratic Republic of the Congo ('DRC') and Uganda. In the *Bosnian Genocide* case, the Court indicated that the probative value of this type of evidence will hinge:

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).<sup>32</sup>

It is not unusual for the Court to attribute *prima facie* weight to factual statements made by the principal organs of the UN, although the actual weight afforded to such items may vary. As a result, such evidence may well be afforded '*prima facie* superior credibility' since it may originate in the statement(s) of what the Court has termed a 'disinterested witness' in the *Military and Paramilitary Activities in and against Nicaragua* case, that is to say 'one who is not a party to the proceedings and stands to gain or lose nothing from its outcome'.<sup>33</sup> What is more, those types of reports or factual statements emanating from UN organs are often produced by UN commissions of inquiry, peacekeeping missions or other subsidiary organs, and are inspired by direct knowledge and involvement with the situation on the field or stem from an international consensus of States regarding the occurrence of certain events. Those evidentiary items are sometimes instrumental in bolstering the Court's findings of fact.

For instance, factual statements made by the principal UN organs, particularly evidentiary items submitted to the Court by the UN Secretary-General, were afforded considerable weight in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

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<sup>32</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p 43 at 135, para 227.

<sup>33</sup> *Military and Paramilitary Activities in and against Nicaragua*, above note 29 at 43, para 69.



*Territory*.<sup>34</sup> Similar treatment was granted to comparable pieces of evidence in the abovementioned *Bosnian Genocide* case, with the Court drawing extensively from a report submitted to the General Assembly by the Secretary-General entitled ‘The Fall of Srebrenica’. Having noted the privileged vantage point of the Secretary-General in preparing a comprehensive report some time after the relevant events had transpired, the Court went on to declare that ‘[t]he care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it ... the Court has gained substantial assistance from this report’.<sup>35</sup>

By contrast, the *Armed Activities* case provided a more mixed precedent of evidence assessment by the Court. In bolstering its factual findings, especially the determination that there was ‘clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power’, the Court relied, among other documents, on the Sixth Report of the Secretary-General on the UN Mission in the DRC that confirmed that the Uganda People’s Defence Force (‘UPDF’) ‘was in effective control in Bunia (capital of Ituri district)’.<sup>36</sup> Along similar lines, the Court cited ‘reports from credible sources’, including the Third Report of the Secretary-General on the UN Mission in the DRC, to bolster its finding that ‘massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC’.<sup>37</sup> In other parts of its judgment, the Court also invoked Security Council pronouncements to support its findings as to the UPDF’s military operations and movements in the DRC, which it saw as violating both the sovereignty of that State and the prohibition on the use of force enshrined in the UN Charter.<sup>38</sup> This evidentiary practice by the Court – namely to refer to both preambular and operative paragraphs of Security Council resolutions – is somewhat common, having cemented the reasoning for its factual assertions in other portions of this judgment and in other decisions as well.

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<sup>34</sup> See generally: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p 136. For further scholarly discussion of the weight to be afforded by the Court to factual qualifications made by principal organs of the UN, see Katherine Del Mar, ‘Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice’ (2011) 2 *Journal of International Dispute Settlement* 393.

<sup>35</sup> *Bosnian Genocide* case, above note 32 at 137, para 230.

<sup>36</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, I.C.J. Reports 2005, p 168 at 230, paras 175-76.

<sup>37</sup> *Ibid* at 239, para 207.

<sup>38</sup> See eg, *Ibid* at paras 92-165.

Furthermore, relying again on the Sixth Report of the Secretary-General on the UN Mission in the DRC mentioned earlier among other evidence, the Court found that it was confronted with ‘persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district’.<sup>39</sup> On the basis of similar documents, the Court further considered that it was faced with ‘convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF’s failure to prevent the recruitment of child soldiers in areas under its control’.<sup>40</sup> However, in another portion of its judgment, the Court did not afford any weight to various evidentiary items, including a report generated by the Secretary-General on the UN Mission in the DRC in finding that the *Mouvement de libération du Congo* had not been instituted by Uganda, observing that document’s ‘reliance on second-hand reports’.<sup>41</sup>

In sum, various kinds of evidence may be introduced by parties appearing before the Court, subject to both the evidentiary parameters we have outlined earlier and the Court’s wide margin of appreciation in determining the probative value of each item of evidence. As such, maps, photographs, small scale models, *bas relief*, recordings, films, video tapes and, more generally, all audio-visual techniques of presentation are admissible in the evidentiary realm of the World Court. Interestingly, Norway presented a relatively large-scale *bas relief* of Norway during the oral proceedings in the *Anglo-Norwegian Fisheries* case; a similar piece of evidence was also introduced in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. In the abovementioned *Anglo-Norwegian Fisheries* case, Norway introduced a model of a trawler, fully equipped with a trawl and other fishing equipment; in the *Preah Vihear Temple* case – on which the Court heard the Parties again in April 2013, 52 years later, this time in the context of a request for interpretation – the judges that heard the original case in 1961 attended a private screening of a film about the dispute, as evidence, with representatives of the Parties; in the *Gabčíkovo–Nagymaros Project* case, the use of video cassette evidence was permitted by the Court; similarly, the use of aerial photographs and satellite-generated imagery as evidence is also very common in proceedings before the Court, as illustrated by

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<sup>39</sup> *Ibid* at 240, para 209.

<sup>40</sup> *Ibid* at 240, para 210.

<sup>41</sup> *Ibid* at 225, para 159.

the recent proceedings in the *Maritime Dispute* between Peru and Chile and in the *Territorial and Maritime Dispute* between Nicaragua and Colombia.<sup>42</sup>

Needless to say, maps play an important role in the evidentiary strategies put forward by parties appearing before the Court, especially in boundary disputes and maritime delimitation cases.<sup>43</sup> That said, such evidentiary items are typically insufficient, in and of themselves, to establish a party's claim as to sovereignty over a certain land territory or maritime feature(s). In its judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the Court recalled that according to its 'constant jurisprudence, maps generally have a limited scope as evidence of sovereign title'.<sup>44</sup> In bolstering its conclusion, the Court quoted from its 1986 decision in the *Frontier Dispute* between Burkina Faso and Mali, stressing that 'of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights'.<sup>45</sup>

#### IV. SELECT SUBSTANTIVE PRONOUNCEMENTS BY THE COURT ON EVIDENTIARY MATTERS

This last observation leads into the last section of our chapter, which shall devote some attention to select substantive pronouncements made by the Court on the subject of evidence. At the outset, we should point out that the rule of thumb with respect to the burden of proof before the Court – often reiterated in its jurisprudence – resembles that found in most domestic judicial proceedings on civil matters: A party alleging a fact typically bears the burden of proving it, while the usual standard of proof tends to align with 'proof by a preponderance of the evidence'.<sup>46</sup>

<sup>42</sup> See eg, Evensen, above note 1 at 53-54; Aguilar Mawdsley, above note 2 at 547 (also pointing out that the Netherlands introduced a *bas relief* and a model of lock-gate as evidence in the *Diversion of Water from the River Meuse* case before the PCIJ, and that aerial photographs were introduced by Nauru in its case against Australia concerning *Certain Phosphate Lands in Nauru*).

<sup>43</sup> For further scholarly discussion of the role of maps in frontier disputes, see Maurice Kamto, 'Le matériau cartographique dans les contentieux frontaliers et territoriaux internationaux' in Emile Yakpo and Tahar Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999) 371-98.

<sup>44</sup> *Nicaragua v Colombia*, above note 16 at 661, para 100.

<sup>45</sup> *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p 554 at 582, para 54.

<sup>46</sup> In its jurisprudence, the Court has often reiterated the general rule according to which a party that alleges a fact in support of its claims is expected to prove the existence of that fact. See eg, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p 639 at 660, para 54; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p 644 at 668, para 72; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p 14 at 71, para 162; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, I.C.J. Reports 2009, p 61 at 86, para 68. On the burden of proof and the evidentiary practice of the Court, see also Sir Arthur Watts, 'Burden of Proof, and Evidence before the

While this evidentiary principle was reaffirmed in the *Diallo* case, the Court nonetheless qualified its application by declaring that ‘it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances’.<sup>47</sup> The Court went on to clarify that the onus will vary based on the type of facts required to ensure the resolution of the case; in other words, the subject-matter and the nature of each dispute submitted to the Court will inform and ultimately dictate the determination of the burden of proof in any given case.<sup>48</sup> It should be recalled that in the *Diallo* case, the Republic of Guinea was arguing that Mr. Diallo – its national – had suffered several fundamental human rights violations while in the DRC. However, strict adherence to the abovementioned rule would have engendered significant evidentiary hurdles to the Republic of Guinea’s case in establishing these violations, which were equated with ‘negative facts’ given that they had occurred in the Respondent’s State, and the DRC was therefore better situated to adduce evidence about its compliance with the relevant obligations.

The Court provided further clarification as regards the modulated application of the burden of proof in situations involving the establishment of negative facts, while affording equal consideration to the corresponding implications for the case of the DRC. The Court declared that:

... where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting. 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 question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.<sup>49</sup>

This type of scenario was not completely novel for the Court. In the past, it had been confronted with similar situations where one of the parties appearing before it had exclusive access

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ICJ’ in Freidl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals* (London, Cameron May, 2000) 289-301.

<sup>47</sup> *Ahmadou Sadio Diallo*, above note 46 at 660-61, para 54.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* at 660-61, para 55.



to important evidentiary elements but refused to produce them in light of security concerns or other reasons. For instance, in the seminal *Corfu Channel* case, the Court resolved this dilemma by having recourse to flexible inferences of fact against the State which had refused to produce the evidence in question;<sup>50</sup> by contrast, in the *Bosnian Genocide* case the Court declined to do so, thereby confirming that its approach to circumstantial evidence and adverse inferences will vary depending on the subject-matter and circumstances of each dispute brought to it.<sup>51</sup>

When parties invoke domestic law before the Court, such item is typically equated with a fact to be proven by the party alleging its existence, notwithstanding the Court's ability to satisfy itself, of its own initiative, of the existence of such fact. This evidentiary practice is firmly rooted in the jurisprudence of the Court's predecessor institution, with the PCIJ having articulated several key aspects of procedural law which still govern the work of the present-day Court. Of particular importance was the PCIJ's pronouncement in the case concerning *Certain German Interests in Polish Upper Silesia*, when it underscored that '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.<sup>52</sup> Echoing these remarks three years later in the *Brazilian Loans* case, the PCIJ further pointed out that it was constrained to apply domestic law when the circumstances so warranted, but that it was not obliged to possess knowledge of the various municipal laws of States; rather, it would have to secure this knowledge when the circumstances of a case compelled it to apply municipal law. More importantly for our purposes, the PCIJ stressed that 'this it must do, either by means of evidence furnished to it

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<sup>50</sup> In that case, the Court underscored the following:

'[T]he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect 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.'

See *Corfu Channel*, above note 22 at 182.

<sup>51</sup> For a general discussion on this subject, see Michael Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13 *Chicago Journal of International Law* 123; Chittharanjan Felix Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (2004) 3 *The Law and Practice of International Courts and Tribunals* 395.

<sup>52</sup> *Case concerning Certain German Interests in Polish Upper Silesia, Merits*, 1926 PCIJ (ser A) No 7 (25 May) at 19.

by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken'.<sup>53</sup>

By contrast, there is a presumption – *jura novit curia* – that the Court knows international law and how to apply it, despite the usual efforts deployed by disputing parties appearing before the Court to demonstrate that relevant international legal principles support their own claims, or should be construed in a certain way. One manifestation of this principle was encapsulated aptly in the famous *Lotus* case, with the PCIJ observing:

that in 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.<sup>54</sup>

Needless to say, this principle – namely that the Court is expected to know international law – is equally applicable to proceedings instituted before it on a different jurisdictional basis than by way of special agreement (*compromis*).

Similarly, the Court may take judicial notice of well-established facts – *faits notoires* or ‘matters of public knowledge’ – thereby obviating the need for parties appearing before it to prove such types of facts. Such scenario presented itself in the *Tebran Hostages* case, where the Court was called upon to pronounce on the international responsibility of Iran after an American embassy in Iran was taken over, ransacked and its personnel sequestered by Iranian student militants. The Court declared 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 and in radio and television broadcasts from Iran and other countries’.<sup>55</sup> It went on to hold that ‘[t]he information available ... [was] wholly consistent and concordant as to the main facts and circumstances of the case’.<sup>56</sup> This exact passage

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<sup>53</sup> *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, 1926 PCIJ (ser A) No 21 (12 July) at 124.

<sup>54</sup> *The Case of the S.S. ‘Lotus’ (France v Turkey)*, 1927 PCIJ (ser A) No 10 (7 September) at 31.

<sup>55</sup> *United States Diplomatic and Consular Staff in Tebran, Judgment*, I.C.J. Reports 1980, p 3 at 9, para 12. After all, one must always bear in mind the conclusion reached by Max Huber in the *Island of Palmas* case, in which he considered that no evidence was required to establish the existence of the Treaty of Utrecht of 1714, which was of public notoriety. See *The Island of Palmas Arbitration*, 4 April 1928, 2 Reports of International Arbitral Awards 829, 842.

<sup>56</sup> *Tebran Hostages* case, above note 55 at 10, para 13.

was referenced again by the Court six years later in its judgment in the *Military and Paramilitary Activities in and against Nicaragua* case. However, in that instance the Court remained alive to the fact that this type of evidence should be approached with ‘particular caution’, pointing to the risk that ‘[w]idespread reports of a fact may prove on closer examination to derive from a single source’.<sup>57</sup> This observation echoed remarks formulated earlier by the Court in that same judgement to the effect that such evidence should be treated with ‘great caution’; in short, the Court construed such evidentiary items ‘not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact’.<sup>58</sup> It should be stressed that the Court’s conclusion on this front remained unaffected by the fact that such evidence might ‘seem to meet high standards of objectivity’.<sup>59</sup>

In the wake of increasingly fact-intensive cases, with particular focus on scientific evidence, there has been renewed interest in questions related to the burden of proof before the Court. Such an issue arose in the case concerning *Pulp Mills on the River Uruguay*. In that case, the Court was confronted with a considerable amount of contradictory factual allegations, which both Parties sought to support with particularly abundant information. Argentina contended that the relevant Statute adopted a precautionary approach according to which ‘the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment’.<sup>60</sup> Argentina argued further that the onus should be shared by both Parties as prescribed by the Statute under review, which divided the burden of persuasion amongst the parties; that is to say that one should prove that the plant is innocuous while the other should demonstrate that it is harmful. In response, the Court relied again on its *jurisprudence constante* and reaffirmed the importance of the principle of *onus probandi incumbit actori* in the following manner: ‘it is the duty of the party which asserts certain facts to establish the existence of such facts’.<sup>61</sup>

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<sup>57</sup> *Military and Paramilitary Activities in and against Nicaragua*, above note 29 at 41, para 63.

<sup>58</sup> *Ibid* at 40, para 62.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Pulp Mills*, above note 46 at 70, para 160.

<sup>61</sup> *Ibid* at 71, para 162. See also, above note 46-49 and accompanying text; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p 12 at 31, para 45; *Bosnian Genocide* case, above note 32 at 128, para 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p 392 at 437, para 101.

In short, this meant that the Applicant – Argentina in this specific case – was expected to first submit the relevant evidence to substantiate its claims. However, the Court continued, '[t]his [did] not ... mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute'.<sup>62</sup> The Court further expressed that, while a precautionary approach may deem a relevant prism through which one could contemplate the relevant statutory provisions, this legislative framework did not operate a reversal of the burden of proof, nor did it place it equally on both Parties.<sup>63</sup>

With respect to the expert evidence put forward, the Court stressed that it had 'given most careful attention to the material submitted to it by the Parties' before recalling that it was its 'responsibility ... after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate'.<sup>64</sup> In short, the Court's approach in that case aligned with its own evidentiary practice, which typically involves it making 'its own determination of the facts, on the basis of the evidence presented to it, and then' applying 'the relevant rules of international law to those facts which it has found to have existed'.<sup>65</sup> Consequently, the Court rejected those evidentiary items it found 'insufficient', for instance when deciding not to attribute 'the alleged increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill'.<sup>66</sup> Similarly, the Court remained unconvinced that there existed 'sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora', or that 'convincing evidence' had been adduced to establish that Uruguay had breached certain provisions of the relevant Statute, which embodied other substantive obligations.<sup>67</sup>

In the *Armed Activities* case discussed earlier, the Court provided further substantive guidance on the evidentiary parameters within which it carries out its judicial mandate. In particular, it

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<sup>62</sup> *Pulp Mills*, above note 46 at 71, para 163.

<sup>63</sup> *Ibid* at 71, para 164.

<sup>64</sup> *Ibid* at 72, para 167-68.

<sup>65</sup> *Ibid* at 72-3, para 168.

<sup>66</sup> *Ibid* at 97-8, para 254.

<sup>67</sup> *Ibid* at 91, para 228 and 100, para 262.



underscored that it ‘will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source’.<sup>68</sup> Moreover, the Court indicated that it ‘prefer[s] contemporaneous evidence from persons with direct knowledge’ of the facts or realities on the ground.<sup>69</sup> It similarly emphasised that it would ‘give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them’, thereby echoing the remarks it offered almost twenty years earlier in the *Military and Paramilitary Activities in and against Nicaragua* judgment.<sup>70</sup> Along similar lines, the Court in the *Armed Activities* case went on to say that it would ascribe weight to evidence ‘that ha[d] not, even before this litigation, been challenged by impartial persons for the correctness of what it contain[ed]’.<sup>71</sup> Finally, special attention should also be afforded, the Court continued, to ‘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’.<sup>72</sup>

## V. CONCLUSION

In this brief contribution, we have attempted to demonstrate that the Court’s evidentiary practice is rather flexible when compared to that espoused by most domestic courts and tribunals. That said, the World Court nonetheless applies a great degree of caution when handling certain evidentiary items, rigorously scrutinising all evidence put before it and balancing relevant evidentiary standards against the facts, circumstances and subject-matter of each case. The Court’s practice is equally forward-looking as regards the introduction of new modes of producing evidence, thereby embracing new technology and innovative ways of establishing factual records. A rich fact-finding judicial tradition emerges from its jurisprudence: While an applicant State appearing before the Court will typically be called upon to substantiate its claims with available evidence, the other party is by no means exempted from assisting the Court in fulfilling its judicial function. Rather, the idea

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<sup>68</sup> *Armed Activities* case, above note 36 at 201, para 61.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*; *Military and Paramilitary Activities in and against Nicaragua*, above note 29 at 41, para 64.

<sup>71</sup> *Armed Activities* case, above note 36 at 201, para 61.

<sup>72</sup> *Ibid.*

of evidentiary collaboration between the parties and the Court<sup>73</sup> – supplemented by a productive dialogue between the bench and the agents and counsel of the parties, sometimes actuated through the submission of testimonial evidence before the Court – ensures that the principal judicial organ of the UN can carry out its noble duties in the most effective and impartial way. That is to say, the search for objective truth, the peaceful settlement of disputes, and the promotion of the international rule of law.

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<sup>73</sup> See eg, Witenberg, above note 1 at 97; Lachs, above note 1 at 267 (both underscoring that parties to a dispute have the duty to prove their claims and a corresponding obligation to cooperate with the international judiciary in this regard).

### **Annex 33**

“Eighth Plenary Meeting Between the DR Congo Government and M23”, *International Conference on the Great Lakes Region* (11 Jan. 2013)





## Eighth plenary meeting between the DR Congo government and M23.

The delegations to the dialogue between the DRC government and the M23 have today 11th January 2013 resumed the talks and held their eighth plenary session since the dialogue started on 9th December 2012.

The two delegations returned to Kampala by the 4th of Jan 2013, thereby sending a strong signal to the world of their unwavering commitment to the dialogue and to ending the conflict through peaceful means. The four clusters that compose the agenda for the dialogue has been agreed as follows:

a. Review of the Peace Agreement of 23 March 2009; b. Security matters; c. Social, Political and Economie matters; d. Mechanisms for the Implementation - Monitoring and Evaluation of the Kampala Agreement.

Since the return of the delegations to Kampala, the Facilitator has been consulting with the two teams with a view to finding a way forward. Consequently, the plenary sessions have resumed.

The Facilitator has also been consulting with the leadership of the United Nations and USA with a view to ensuring that the recent sanctions slammed on M23 do not create negative implications for the dialogue. His understanding now is that these sanctions don't affect the dialogue.

The dialogue is being facilitated by Dr. Crispus Kiyonga, Minister of Defence of the Republic of Uganda. The DRC government delegation is led by H.E Raymond Tshibanda, Minister of Foreign Affairs, International Cooperation and Francophonie of DRC. The delegation of M23 is led by Mr. François Rucogoza, Executive Secretary of M23.

The Dialogue has so far attracted observers from Belgium, France, Norway, the United Kingdom of Great Britain and Northern Ireland, the United States of America, the African Union, the European Union and MONUSCO.

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