International Law FORUM du droit international

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Aims and Scope

The International Law FORUM covers all aspects of public and private international law with an unmatched interdisciplinary approach. Its authors include both distinguished practitioners and scholars as well as fresh, new voices in international law. The objective editorial policy allows readers to form their own opinions based on the balanced coverage and diversity of news presented.

Each issue contains: *Editorial*, *In the News*, *Recurring Themes*, a *Profile*, *Work in Progress*, *Conference Scene*, and the *Bookshelf* of a distinguished guest. Pocket-sized and affordably priced, the FORUM provides an accessible way for academics and practitioners to stay current in the field.

Thought-provoking and controversial, it is also up-to-date and truly international.

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La revue FORUM du droit international privilégie une approche inter-disciplinaire sans précédent pour couvrir tous les aspects du droit international public et privé. Parmi les auteurs qui y contribuent figurent d'éminents praticiens, professeurs et chercheurs ainsi que de nouveaux auteurs en droit international. La politique objective de la rédaction permet aux lecteurs de se forger leur propre opinion basée sur la diversité des informations présentées couvrant de manière équilibrée l'actualité.

Chaque numéro comporte les rubriques suivantes: *Editorial*, *Actualité*, *Thèmes récurrents*, *Profil*, *Travaux en cours*, *Le tour des conférences* et *La bibliothèque* d'un éminent invité. De petite taille et pour un prix raisonnable, FORUM constitue un outil accessible pour les universitaires et les praticiens qui souhaitent suivre l'actualité du droit international.

C'est une revue à jour et réellement internationale qui pousse à la réflexion et à la discussion.

International Law FORUM du droit international

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Editorial

Volume 1, No. 4

Avec ce numéro 4, FORUM boucle sa première année d'existence, si l'on exclut le numéro de lancement qui n'était qu'une "mise en jambe". Le Comité de rédaction a vu arriver cette échéance avec plaisir et un peu d'appréhension.

Le plaisir nous a été procuré par tous les auteurs qui ont accepté d'écrire pour FORUM ainsi que tous ceux qui, de près ou de loin, se sont associés à nos travaux. Qu'ils en soient tous remerciés chaleureusement. Chacun des quatre numéros de ce premier volume a été préparé comme une gageure: donner à nos lecteurs une information aussi large et pluridisciplinaire que possible sur une variété de sujets, certains d'une actualité alarmante, d'autres plus sereins.

Le présent numéro ne fait pas exception. Quel est celui ou celle d'entre vous qui peut dire avoir assister avec joie aux cours de droit de la preuve durant ses années estudiantines ? Fort peu, vraisemblablement. Et pourtant, sous la direction conjointe de Mojtaba Kazazi et de Bette Shifman, FORUM vous offre quelques contributions éclairantes sur les développements de la pratique actuelle devant les tribunaux internationaux à la fois pour les litiges de droit public et les litiges de droit privé (surtout l'arbitrage).

Mais, plus encore, ces contributions permettent de s'interroger sur l'influence du privé sur le public notamment pour ce qui a trait à la Cour internationale de Justice. On ne peut qu'être frappé par la tendance mise en lumière selon laquelle la Cour voit sa pratique se transformer pour devenir un tribunal presque comme un autre, en ce qu'elle doit désormais de plus en plus souvent faire face à la détermination de preuves factuelles. Cette évolution ne va-t-elle pas immanquablement poser la question de la restructuration de la justice de droit international public et la création d'un tribunal de première instance pour laisser à la Cour son seul rôle de juge de cassation ? Rappelons-nous que cette restructuration a été opérée au début des années 90 au sein de l'Union européenne en créant le Tribunal de Première Instance auprès de la Cour de Justice des Communautés européennes.

L'influence du privé pourra également se faire sentir encore plus qu'aujourd'hui dans la gestion des litiges de masse. Depuis fort longtemps les systèmes judiciaires nationaux ont développé des mécanismes propres à permettre le traitement de ces litiges (actions de groupe, actions collectives, *class actions*) avec le développement de standards de procédure appropriés. Plus récemment, le commerce électronique nous oblige à repenser les modes de règlement des différends en raison du changement d'échelle des litiges qui peuvent surgir de ces nouvelles méthodes de commerce. Il sera nécessaire de développer, notamment, des modes de règlement des différends en ligne dont les principes fondamentaux pourraient être utiles pour les actions de masse dont il est

International Law FORUM du droit international **1**: 187–188, 1999.

question dans les contributions de ce numéro.

Le Comité de rédaction de FORUM réfléchit à la possibilité de consacrer un numéro à ces divers aspects de l'influence du privé sur le public et souhaiterait recevoir des contributions de ses lecteurs pour alimenter sa réflexion.

Mais si la première année de FORUM nous a donné bien du plaisir, celui-ci s'accompagne d'un peu d'appréhension. La deuxième année doit venir confirmer les promesses de la première. Nous souhaitons donner à nos lecteurs encore plus de *food for thought* comme disent si joliment les anglophones. Pour cela, nous avons besoin de vos suggestions. Dîtes-nous quels sujets vous préoccupent sur lesquels vous souhaiteriez lire des contributions dans FORUM. Parlez-nous des jeunes chercheurs qui travaillent avec vous et envoyez-nous des informations sur leurs travaux. Encouragez-les à nous contacter directement. Trop souvent, leurs voix ne sont pas entendues. Sans vous, FORUM ne remplira pas la mission qu'il s'est fixée. Au début de cet éditorial, nous parlions de gageure. La deuxième année en présente une immense pour le Comité de rédaction. Elle se gagnera avec et grâce à vous.

A tous, merci de votre soutien.

In the News / Actualité

Second session of the Preparatory Commission for the International Criminal Court

VLADIMIR TOCHILOVSKY*

The Second session of the Preparatory Commission for the International Criminal Court (ICC) took place on 26 July – 13 August 1999. At the session, the Commission focused on two instruments: the Rules of Procedure and Evidence, and the Elements of Crimes. With respect to the Rules of Procedure and Evidence, the Preparatory Commission concentrated on rules pertaining to the following parts of the Rome Statute of the ICC: Part 4 (Composition and Administration of the Court); Part 5 (Investigation and Prosecution); Part 6 (The Trial); and Part 8 (Appeal and Revision). With regard to the Elements of Crimes, the Preparatory Commission concentrated on the elements of war crimes. On 30 July 1999, Judge Gabrielle Kirk McDonald, President of the International Tribunal for the Former Yugoslavia, addressed the Preparatory Commission.

Participation of victims in the proceedings was discussed in the working group on Rules of Procedure and Evidence related to Part 6 of the Statute. Discussion started with the "Report on the international seminar on victims' access to the International Criminal Court". The delegates concurred that victims' participation in the proceedings through their legal representative should be balanced with some "safeguards" for the parties. It was suggested that victims' written applications to present their views and concerns to a Chamber should be communicated to the Prosecutor and the defence, who should at all times be entitled to reply. The Chamber should specify the proceedings and the appropriate manner for participation. Where there are a number of victims, the Chamber might request the victims or particular groups of victims to choose a common legal representative or representatives. When a hearing is in progress, the Prosecutor and the Defence must be able to reply to the oral interventions of the victim's legal representative. When a legal representative attends and participates and wishes to question a witness, expert or the accused, the legal representative must make application to the Chamber. The ruling on the application may include directions on the manner and order of the questions. The Chamber would, if it considered it appropriate, be able to put the question to the witness, expert or accused on behalf of the victim's legal representative.

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International Law FORUM du droit international **1**: 189–190, 1999.

The same working group discussed draft rules on reparations to victims. In particular, the delegates discussed rules related to the assessment of reparation, a Trust Fund, evidence and the standard of proof for reparations. Some delegates suggested that while a conviction requires a proof beyond reasonable doubt, the standard of proof for reparation could be lower since it is a civil remedy.

The draft proposal on the establishment of the Defence Unit was discussed in the working group on Rules of Procedure and Evidence related to Part 4 of the Statute. Some delegates doubted if the Rome Statute authorises the establishment of the Unit. Others opined that the Registry would have the inherent power to create various units to ensure the effective functioning of the Court. It was recalled that despite the absence of any references to such units as finance, public relations, or defence in the ad-hoc Tribunals' Statutes, these units had been established in the Tribunals. Even if the ICC's Rules do not address the issue, the Registrar will start creating various units, including a defence unit. For this reason, the proposed rules are necessary to provide the Registrar with guidance if it is decided to create the Defence Unit. It was suggested that the Unit's responsibility would be to facilitate the work of defence counsel.

The working group also considered inclusion of the rule on alternate and substitute judges. In particular, it was proposed that if an alternate judge was not assigned to a Chamber pursuant to article 74 of the Statute, the Presidency could, where a judge of that Chamber was unable to continue attending a case, assign another judge as a substitute judge to the case and order either a rehearing or a continuation of the proceedings from that point. The proposal provided that, where the need for substitution arises after the beginning of the presentation of evidence, the continuation of the proceedings might only be ordered with the written consent of the accused. Some took the view that, in accordance with the principle of equality, the consent of the Prosecutor should also be required in such situations. For instance, the defence might easily consent to continue the hearing of the case with a new judge, after the Prosecution had presented most of its evidence.

International Tribunal for the Law of the Sea

Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*): Requests for provisional measures

On August 27, 1999 the Tribunal for the Law of the Sea (hereinafter "Tribunal") prescribed provisional measures in the *Southern Bluefin Tuna Cases*,[1] brought by Australia and New Zealand against Japan. The applicants allege that the unilateral experimental fishing program undertaken by Japan is contrary to the 1982 United Nations Convention on the Law of the Sea (hereinafter "LOS Convention"), the 1993 Convention for the Conservation of Southern Bluefin Tuna (hereinafter "SBT Convention") and customary international law. The applicants submitted the dispute to arbitration under articles 286 and 287 and Annex VII of the LOS Convention and simultaneously filed requests for provisional measures with the Tribunal under article 290(5) of the LOS Convention.

The provisional measures requested by the applicants were as follows: that Japan cease its unilateral experimental fishing program; that Japan restrict its commercial catches to its national allocation agreed on under the SBT Convention minus its catches under the experimental program; that parties act consistently with the precautionary principle pending a final settlement of the dispute; that parties ensure that no action is taken that might aggravate the dispute or render more difficult the arbitral procedure instituted; and that parties take no action that may prejudice their rights in respect of the arbitral procedure. Japan submitted that the application for provisional measures should be denied, or alternatively, that Australia and New Zealand should be ordered to resume negotiations with Japan.

The Tribunal essentially prescribed the provisional measures as requested by the applicants, albeit in more cautious terms than requested by them. For example, it did not prohibit the current Japanese experimental fishing program, but determined that such a program could only be conducted with the consent of the other parties, unless catches are counted against its national allocation. Although it did not explicitly endorse the precautionary principle, the Tribunal did consider that the parties should act with prudence and caution in light of the depleted state of the stock, the scientific uncertainty regarding appropriate measures and the level of exploitation of the stock. It found that 'measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock' (para. 80). It is precisely on the point as to whether the urgency of the situation required

[1] Available at www.un.org/Depts/los/ITLOS.

International Law FORUM du droit international **1**: 191–192, 1999.

provisional measures and whether environmental considerations should have played a role in the considerations that diverging views among the members of the Tribunal were greatest (see the various declarations and separate and dissenting opinions appended to decision). Urgency of the situation is one of the two cumulative requirements for the prescription of provisional measures under article 290(5) of the LOS Convention, the other requirement being *prima facie* jurisdiction of the tribunal that is to consider the merits of the case. The prevention of serious harm to the marine environment is one of the two independent reasons why provisional measures may be prescribed under the LOS Convention (art. 290(1)), the preservation of the rights of the parties to the dispute being the other reason.

The ruling represents a landmark decision on the relationship between international fisheries law and international environmental law and could have far-reaching consequences for other international fisheries and natural resource regimes in which similar considerations play a role. Examples of such regimes are the whaling regime and the regimes applicable to the use of international watercourses and the protection of biological diversity. The ruling also continues the trend set in recent decisions by other international dispute settlement forums, such as the International Court of Justice and the Appellate Body of the World Trade Organization. In, respectively, the *Case Concerning the Gabcikovo-Nagymaros Project* (1997) and the *United States – Import Prohibition of Certain Shrimp and Shrimp Products Case* (1998) these forums also endorsed the need to interpret existing agreements in the light of recent developments in international environmental law, even if in the latter case that interpretation could not be applied due to other relevant rules in the GATT system.

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Recurring Themes / Thèmes récurrents

Evidence before International Tribunals – Introduction

MOJTABA KAZAZI and BETTE E. SHIFMAN*

In 1935, as part of the introduction to his seminal work on the practice of the Mexican Claims Commission, A.H. Feller wrote that:

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

Sixty-four years later, at the awakening of the third millennium, the subject is still not free from problems and complications. In the meantime, however, much progress has been made in the development, codification and harmonization of international 1aw in this respect. It would not, in fact, be an exaggeration to say that a complete map has already been drawn in this area. There now exists a well-developed body of jurisprudence from the practice of numerous international courts and tribunals, and various international rules of procedure and evidence that define the framework of international judicial and arbitral proceedings. The system of international procedure in place, while varying to some extent from one international court or tribunal to the other, is harmonious to a large extent in its principles and fundaments. It is characterized by its flexibility, its freedom from the technical rules of evidence normally applied in municipal law, and by the freedom in evaluation of evidence in an effort to ascertain the truth.

These general features are confirmed by the papers contributed to this issue of the FORUM, by renowned experts, on evidence before a number of major international dispute settlement bodies in the world today and on international arbitration. The papers are diverse and fairly representative of various types of dispute settlement bodies, covering international judicial bodies, international

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[1] A.H. Feller, The Mexican Claims Commission 1923–1934, (New York, 1935), p.vii

International Law FORUM du droit international **1**: 193–196, 1999.

arbitration, international criminal tribunals, and quasi judicial fact-finding fora.

In addition, the papers reflect a number of other striking trends and features of international procedure, and in particular evidence, including the following:

1. The recent developments in the practice of the International Court of Justice with respect to site visits and the possible hearing of a large number of witnesses in the two pending cases before the Court under the Genocide Convention, referred to in the paper on the ICJ, as well as the speculation that in these cases the Court may have to "make difficult and delicate evidentiary rulings on the subject of witness testimony" indicate a potential change in the Court's approach to resolving cases. Traditionally, the Court focused primarily in its judgments on the law, and based its determinations mainly on undisputed facts rather than providing an extensive or detailed treatment of disputed facts and evidence. In recent years, however, along with the increase in the docket of the Court, it seems that some of the new cases have prompted the Court to concentrate on the examination of the facts of the case as well, and to pronounce its views on disputed factual issues. The fact that the Court has more explicitly addressed issues of evidence in a number of decisions, including, for example the Nicaragua case, is a positive development for the law of evidence before international tribunals.

2. With globalization, and the desire of the international community to redress, where possible, losses suffered by the victims of armed conflicts and violations of human rights, the phenomenon of mass claims processing has become a necessity and a reality in international claims resolution. Mass claims processing is well-known in some municipal law systems, especially in tort cases. Until recently, however, there was little experience in this area in international law. Mass claims processing has the advantages of being faster and less expensive than traditional methods of reviewing claims. At the same time, it is not an exact science; in the case of small homogenous claims, for example, it may to one degree or another involve sampling, averaging techniques and generalizations. In recent years, the creation and experience of institutions such as the United Nations Compensation Commission, Swiss Claims Resolution Tribunal for Dormant Accounts, and the Commission for Real Property Claims in Bosnia and Herzegovina has brought mass claim processing, with all its advantages and disadvantages, to the forefront of the international domain, and mass claims processing has become a feature of international procedure in dealing with a large number of claims arising from armed conflict.

3. As an important common feature, the papers contributed to this issue of the FORUM confirm that there is generally no restriction in the admissibility of evidence before various types of international tribunals and fact-finding

bodies.[2] The authenticity of a document could be questioned in both civil and criminal cases, but normally it is a question of the weight to be given to a piece of evidence rather than its admissibility. There is also no restriction based on the form of the evidence or the medium on which the evidence is presented, i.e. documentary, video, film, etc. Hearsay evidence is generally admissible but it is either accorded less weight than the evidence of a witness heard under oath and cross-examined, as is the practice of the ICTY, or it is disregarded, as is the practice of the Iran – United States Claims Tribunal, and, in certain cases, the practice of the ICJ. As seen from Mr. Veeder's paper, it is also important to note that there is a trend in some municipal laws in favour of simplifying the rules on admissibility of evidence and reducing the scope of application of strict evidentiary rules.

4. The work of the International Criminal Tribunal for former Yugoslavia and Rwanda has added a new flavour to the issue of evidence before international tribunals. While international civil tribunals are generally more influenced by civil law systems, it seems that international criminal tribunals are more influenced by common law systems, particularly in questions relating to the taking of evidence from witnesses. Compare, for example, the practice of the Iran-United States Claims Tribunal, involving as it does one common law country and one civil law country, and the practice of the ICTY. As explained by Judge Aghahosseini, the Iran-United States Claims Tribunal "has consistently made distinction between what it has termed a party and a non-party witness." In contrast, Judge May explains that the ICTY essentially follows a common law model as regards examination, cross-examination and re-examination of witnesses. The impact of this increasing influence of the common law system in international criminal tribunals on the international procedure as a whole remains to be seen.

5. With respect to the standard of proof, it is generally accepted that the preponderance of evidence is predominantly applicable in international procedure. However, the practice of the CTR and the UNCC shows that a trend is discernible in international mass claims processing situations, according to which more lenient standards of proof are applied in cases where the claimants are individuals and humanitarian considerations are important. This can be seen for instance, in the case of the migrant workers who fled Kuwait and Iraq as a result of the invasion and occupation of Kuwait by Iraq or the successors of dormant account holders in Swiss

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[2] For a discussion on the admissibility of evidence, including instances of inadmissibility, in international procedure, see M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer, 1996), pp. 180-212

banks. In addition, fora such as the CTR or the UNCC are faced (to a greater extent than the traditional international tribunals) with situations where they have to take into account the difficulties of proving a claim under unusual circumstances, or where the documents are destroyed, or primary documentation does not exist. With respect to international criminal tribunals, while the Rules of the ICTY, (similar to many other international tribunals following the civil law system tradition) are silent on the standard of proof, the operation of the presumption of innocence in favour of the accused has been taken to mean that "the Prosecution must prove the case beyond reasonable doubt and if there is such a doubt the accused is entitled to the benefit of it."

6. Finally, the proliferation and diversity of international tribunals are reflected in the papers contributed to this issue. It is noted that in spite of the difference in the nature of various types of tribunals and claims resolution facilities, the duty of each party in proving its claims or contentions, in principle, remains the same. The broad basic rule of the burden of proof, i.e., *actori incumbit probatio* applies in all of these *fora* in spite of their different nature, composition or purpose. That being said, the nature of a tribunal or a fact-finding body may affect the question of the standard of proof and the role of the tribunal in investigating the facts. In other words, the burden of proof remains on the claimant, in the sense that at the end of the process, if the claim is not proved to the satisfaction of the tribunal the claimant loses. However, depending on the nature of the tribunal or the fact-finding body, it may be required to assume a more active role in investigating the facts directly and to apply a more lenient standard of proof.

Evidence Before the International Criminal Tribunal for the Former Yugoslavia: An Overview

RICHARD MAY*

The purpose of this article is to give a brief overview of the practice of the International Criminal Tribunal for the Former Yugoslavia (ICTY or "the Tribunal") relating to evidence. Such an overview must necessarily be selective and cannot cover the entire topic. Accordingly, having discussed the general approach of the Tribunal to evidence, the article will concentrate on the rules relating to admissibility before dealing with the procedure for the presentation of evidence.

The General Approach to Evidence

The practice of the International Tribunal in relation to evidence is governed by its Statute and the Rules of Procedure and Evidence. The approach of the Statute is to lay down a framework in the broadest terms, providing that in the determination of the charges against him the accused shall be entitled to a fair and public hearing.[1] Trial Chambers must ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[2] It may be noted that by placing emphasis on the rights of victims and witnesses the Tribunal may be seen as breaking new ground.

It follows that the Tribunal is not hindered by technical rules in its search for the truth. In particular, it is not bound by national rules of evidence whether representing the common law or civil law. This led the Appeal Chamber in *Aleksovski*[3] to say: "There is no reason to import such rules into the practice of the Tribunal which is not bound by national rules of evidence". (Rule 89(A) expressly provides that Trial Chambers are not so bound). "The purpose of the Rules is to promote a fair and expeditious trial and Trial Chambers must have the flexibility to achieve this goal."

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[1] Art. 21.2.

[2] Art. 20.1. The Rules are contained in an official UN Document, IT/32/Rev.16.

[3] *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb. 1999, para. 19.

International Law FORUM du droit international **1**: 197–201, 1999.

The need for this flexibility has been explained, by Judge Shahabuddeen, as resulting from the "peculiarities and difficulties of unearthing and assembling material for war crimes prosecutions conducted in relation to the territories of the former Yugoslavia".[4]

However, this liberal approach must be seen against the background of the rules relating to the burden and standard of proof. The burden of proof is governed by Article 21.3 of the Tribunal's Statute which provides that the accused shall be presumed innocent until proved guilty according to the provisions of the Statute. This has been taken to mean that the general principle to be applied by Trial Chambers is that the Prosecution must prove the case beyond reasonable doubt and if there is such a doubt the accused is entitled to the benefit of it.[5]

Admissibility of Evidence

The most important rule in this connection is Rule 89, which contains the general evidentiary provision and provides that "in cases not otherwise provided for in the Rules, the Trial Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law".[6] The same rule permits the Chamber to admit any relevant evidence with probative value and exclude any if the probative value is substantially outweighed by the need to ensure a fair trial.[7] There are thus no technical rules for the admissibility of evidence; and the approach adopted by the Rules is one in favour of the admissibility of evidence provided that it is relevant and has probative value.[8] Irrelevant evidence must of course be excluded vigorously in the interests of a fair and expeditious trial. Accordingly, the Trial Chambers generally tend towards admitting evidence,

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[4] *Prosecutor v. Kovačević*, IT-97-24, Decision of Appeals Chamber, Separate Opinion of Judge Shahabuddeen, 2 July 1998, pp. 4-5.

[5] Judgement, *Prosecutor v. Delalić et al.*, IT-96-21-T, 16 Nov. 1998, para. 601.

[6] Rule 89(B). It is the responsibility of the Judges to amend the Rules as and when necessary. As a result some rules have been added, e.g. admitting affidavit evidence (Rule 94*ter*), or amended, e.g. Rule 95 on the Exclusion of Evidence which was amended in order to broaden the rights of suspects and accused persons. However, the basic approach to evidentiary matters in the Rules has been retained and has remained the same.

[7] Rule 89 (C) and (D).

[8] *Delalić et al.*, Decision on Motion of Prosecution for Admissibility of Evidence, 19 Jan. 1998. In this respect the general approach towards admissibility taken by the Nuremberg and Tokyo Tribunals has been followed. However, overall it appears that no particular effort was made to follow specific rules of procedure of the historical Tribunals. Instead, the Judges drafting the rules borrowed from national systems, both adversarial and inquisitorial.

leaving its weight to be assessed when all the evidence is being considered. Thus the common law rules relating to the exclusion of evidence are not followed. These rules were drawn up in the context of jury trials where the need is to protect lay jurors from hearing prejudicial material of little or no probative value which they may not be able to put out of their minds. ICTY proceedings, however, are conducted by professional judges who "by virtue of their training and experience are able to consider each piece of evidence which has been admitted and determine its appropriate weight",[9] and are further capable of disregarding purely prejudicial material.

Objection may be taken on grounds of authenticity but the practice has been to admit documents and video recordings and then decide what weight to give them, having seen them, there being no jury to protect from prejudicial matter or some other matter which in due course has to be ruled inadmissible.

It follows that hearsay evidence is admitted if the Trial Chamber determines that it is relevant, probative and reliable. In *Tadić*, the first trial and the first in which hearsay evidence was admitted, the Trial Chamber said that special attention should be paid to the requirement of reliability.[10] Thus, the Appeals Chamber in *Aleksovski* was able to say that it is now well-settled in the practice of the Tribunal that hearsay is admissible, but since such evidence is admitted to prove the truth of its contents a Trial Chamber must be satisfied that it is reliable.[11] The weight to be afforded to the evidence will usually be less than that given to the testimony of a witness under oath and subject to cross-examination, although even this will depend on the infinitely variable circumstances which surround hearsay evidence.[12]

This approach to admissibility may be contrasted with Rule 95 which provides for the exclusion of improperly obtained evidence and declares that no evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of, the proceedings. This rule is reinforced by Rule 42, which sets out the rights of suspects during investigation, and Rule 63, which deals with questioning of the accused by the Prosecutor, including the right to remain silent and to be assisted by counsel of his choice and not to be questioned without counsel being present during the interview. In *Delalić et al* one of the accused had been questioned by Austrian police under rules of procedure which prevented counsel being present during the interview. The Trial Chamber

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[9] *Delalić et al.*, 19 Jan. 1998, para. 20.

[10] *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motion on Hearsay, 5 Aug. 1996.

[11] *Aleksovski,* Decision on Prosecutor's Appeal on the Admissibility of Evidence, 16 Feb. 1999, para. 15.

[12] *Tadić*, 5 Aug, 1996, pp. 2-3 of Judge Stephen's Concurring Opinion.

excluded this interview, stating that there is no doubt that statements which are not voluntary but are obtained from suspects by oppressive conduct cannot pass the test under Rule 95, the burden being on the Prosecution to prove beyond a reasonable doubt that the statement was voluntary and not obtained by oppressive conduct. The Chamber said that it seemed extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95, which protects the integrity of the proceedings by the exclusion of evidence obtained by methods which cast substantial doubts on that integrity[13.]

Presentation of Evidence

In this instance an essentially common law model is followed. Article 21 of the Statute provides that the accused shall be entitled to minimum guarantees, including that of examining, or having examined, the witnesses against him and obtaining and attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him.[14] Against this background, the Rules provide for examination, cross-examination and re-examination of witnesses: the Prosecution to call its evidence first, followed by the Defence with the accused being entitled to give evidence if he wishes.[15] The Trial Chamber is required to exercise control over the examination, as is the practice in common law countries, in order to make it "effective for the ascertainment of truth" and to "avoid needless consumption of time".[16]

The evidence of witnesses is generally heard orally. However, there is provision in the Rules for the admission of deposition and affidavit evidence, although these provisions have been little used to date. Greater use has been made of the facility for hearing witnesses via video conference link.

Documents are freely admitted, together with video recordings, photographs and plans. The courtrooms are well equipped to deal with such evidence, by means of an overhead projector or computer monitor on each desk. Thus contemporary documents and reports feature in cases as does footage from television newscasts. While the Rules provide that witnesses shall, in principle, be heard directly by Chambers (Rule 90(A)), a recent decision of the Appeals Chamber held that nothing fetters the discretion of Trial Chambers to admit relevant and probative evidence. The Appeals Chamber ruled that the transcript of evidence given by a witness in other trial proceedings before the Tribunal was

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[13] *Delalić et al.*, Decision on Mucić's Motion for the Exclusion of Evidence, 2 Sept. 1997, paras. 41, 42 and 43.

[14] Art. 21.4(e).

[15] Rule 85(C).

[16] Rule 90(G)(i) and (ii).

admissible together with a video recording of the evidence and exhibits.[17]

Finally, it may be noted that the Trial Chambers have, and exercise, the power to call witnesses. At the time of writing Trial Chamber I has summoned a number of witnesses to appear in the *Blaskić* case.

Conclusion

The evidential practice of the Tribunal is still in its infancy and new developments may be anticipated as experience of these, often complex, cases grows.

[17] *Aleksovski*, 16 Feb. 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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International Law FORUM du droit international **1**: 202–207, 1999.

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,[1] 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".[2] 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."[3] 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."[4]

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.[5] Interestingly, the only guidance offered

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[1] Minquiers and Ecrehos (France/United Kingdom), 1953 ICJ Rep. 47 (Judgment of 17 November).

[2] *Id*. at 49.

[3] *Id*. at 52.

[4] *Id*. at 99.

[5] 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[6] and the use of models,[7] while the present Court has agreed to view films.[8] In more recent cases, a party has

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[6] See, e.g., Phosphates in Morocco (Italy v. France), 1936 P.C.I.J. (series C) No. 85, at 875.

[7] See, e.g., Diversion of Water from the Meuse *(Netherlands v. Belgium) 1936 P.C.I.J.*(series C) No. 81, at 215.

[8] See, e.g., Oral Arguments, Documents, 1959 I.C.J. Pleadings (II Temple of Preah Vihear, Cambodia v. hailand) 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.[9]

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"[10] 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".[11]

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."[12]

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 *Gabčikovo-Nagymaros Project (Hungary/Slovakia)* the Court visited, between the first and second rounds of oral pleadings, the Gabčikovo-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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[9] 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).

[10] United States Diplomatic and Consular Staff in Tehran (United States v. Iran) 1980 I.C.J. Rep. 9.

[11] *Id.* at 10.

[12] 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,[13] 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[14] 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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[13] 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.

[14] Although contemplated by the Rules, there has never been a case in which witnesses appeared before the Court at its own instance.

Evidence Before the Iran-United States Claims Tribunal

M. AGHAHOSSEINI*

1. Introduction

The Iran-United States Claims Tribunal (the "Tribunal") is required by its constituent instruments – the Algerian Declarations[1] – to

> conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that [the Claims Settlement Declaration] can be carried out . . .[2]

The necessary modifications to the UNCITRAL Arbitration Rules were made[3] at an early stage in the Tribunal's existence, leading to the present Tribunal Rules of Procedure (the "Tribunal Rules")[4] which entered into effect in 1983.

Article 15(1) of the UNCITRAL Rules, which has been adopted without modification, grants the Tribunal extensive freedom in conducting the arbitral proceedings and, hence, in dealing with the issue of evidence. It provides:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

Thus any point not specifically addressed by the Tribunal Rules falls within the Tribunal's discretion, subject only to the parties' right to receive equal treatment and to be heard. The Rules, like most modern arbitration rules, contain only a handful of evidence-related provisions, dealing with such matters as hearings, witnesses and experts, and inspection of goods or other property. With respect to other salient matters such as burden of proof and standard of proof, the Tribunal has, in its case law, exercised its broad procedural discretion, where necessary, to fill gaps in and interpret the Rules.

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[1] There are two main documents, cited in abbreviated form as the General Declaration and the Claims Settlement Declaration, both dated 19 January 1981 and reprinted in 1 Iran-U.S. CTR 3.

[2] Article III(2) of the Claims Settlement Declaration.

[3] By means of either modifying the text of, or adding Notes to, the UNCITRAL Rules.

[4] Reprinted in: 2 Iran-U.S. CTR 405.

International Law FORUM du droit international **1**: 208–214, 1999.

Relevant Provisions of the Tribunal Rules

The few express provisions of the Tribunal Rules that deal, to one degree or another, with matters of evidence, include the requirement that, if either party should so request at any stage of the proceedings, the Tribunal must hold hearings for the presentation of evidence by witnesses (including expert witnesses), or for oral argument. In the absence of such a request, the Tribunal may decide whether to hold hearings, or whether to determine the dispute solely on the basis of documents and other materials before it.[5] With regard to purely procedural matters, however, a Note to Article 15 provides that written requests or objections by the parties must be determined without hearing, unless the Tribunal, under special circumstances, grants or invites oral argument.

A further Note to the same Article envisages the holding of pre-hearing conferences, normally after the filing of the statement of defence, while yet another Note allows the Tribunal to receive oral or written statements from the Government of Iran or that of the United States – or, in special circumstances, from any other person – who is not a party to the case, if the Tribunal first satisfies itself that such statements are likely to assist the Tribunal in carrying out its task. This is the reminiscent of the practice, perhaps best known in common law jurisdictions, of permitting briefs by *amici curiae*, loosely translated as *friends of the court.*

The Tribunal may, with due regard to the circumstances of the case, hear witnesses at any place it deems appropriate.[6] It may, also, meet at any place it finds appropriate for the inspection of goods or other property or documents, provided only that the parties are given sufficient notice to be present at the inspection.[7]

Under Notes to Article 17, English and Farsi are recognized as the official languages to be used in the arbitration proceedings, and for oral hearings, decisions and awards. All the major pleadings – such as the statement of claim, the statement of defence, reply, and rejoinder – must be submitted in these two languages, unless otherwise agreed by the parties. The application of this requirement to other documents is left to the Tribunal's discretion.

Under Article 24(3), the Tribunal is vested with the power to require the parties, at any stage of the proceedings, to produce documents, exhibits or other evidence. The Tribunal has established a number of well-defined criteria under which an order for the production of documents may be issued. The requested documents must be relevant to the dispute and necessary for its resolution; they must be inaccessible to the requesting party despite his reasonable efforts; and

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[5] Article 15(2).

[6] Article 16(2).

[7] Article 16(3).

they must likely be at the disposal of the other party. Where the order is issued, the unjustified failure of the ordered party may result in an adverse inference.[8]

Hearings, of which adequate advance notice must be given by the Tribunal,[9] are held *in camera*, unless otherwise agreed by the parties.[10] The manner in which witnesses are to be examined, and whether or not they should retire during the testimony of other witnesses, is determined by the Tribunal.[11] A Note to Article 25,[12] however, stipulates that witnesses are required to make a solemn declaration and may be examined directly by the members of the Tribunal. Questioning of witnesses by the agents or counsel of the parties requires the Tribunal's permission, and is subject to the control of the presiding member. Under Article 25(5), witnesses may present their evidence in the form of signed written statements and, under Article 25(6), the determination of the admissibility, relevance, materiality and weight of witness evidence is left to the Tribunal's discretion.

In practice, the Tribunal has consistently distinguished between what it has termed a party and a non-party witness.[13] The former is one who is perceived to have an interest in the outcome of the proceedings, normally through an employment relationship or family connection with a party. In the Tribunal's practice, such a witness does not make the solemn declaration, his presence at the hearing is not limited to the period of his presentation, he is not normally subjected to cross-examination, and his statement is not given the weight accorded to independent testimony. This practice reflects a rule of law, applicable in many legal systems, that persons with a certain degree of affiliation with a party may not testify at all. As the Tribunal Rules leave the issues of admissibility and weight to the Tribunal's discretion, the Tribunal has fashioned the compromise solution of admitting the testimony, but treating it as a party representation.

The Tribunal may, on specific issues, appoint expert(s) to report to it, in writing. The parties are then required to provide the expert with any relevant information, or produce for his inspection any relevant documents or goods, that he may ask for.[14] Each party, having received and commented upon the expert's report, may request a hearing, at which the parties are entitled to be

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[8] See *William J. Levitt* v. *The Islamic Republic of Iran, et al.*, 27 Iran-U.S. CTR 145 at 164.

[9] Article 25(1).

[10] Article 25(4).

[11] *Ibid.*

[12] Note 6.

[13] See for instance, *Aryeh* v. *The Islamic Republic of Iran*, Award No. 581-842/843/844-1, (22 May 1997), para. 20.

[14] Article 27(2).

present, to interrogate the expert, and to present their own expert witnesses.[15]

Finally, under Article 28, any unjustified failure by a party to appear at a hearing, or to produce documentary evidence when ordered to do so, may result in the issuance of the award without hearing and on the basis of the documents already before the Tribunal.

Case-law Developments

Hearsay Evidence

The admissibility of hearsay evidence falls within the broad discretion afforded to the Tribunal by the Rules. The traditional common law exclusion of hearsay evidence is intended to protect lay juries from exposure to unreliable testimony. The Tribunal is composed of experienced jurists who can reasonably be expected to be capable of assessing the admissibility and weight of various forms of evidence, and are therefore expressly empowered by the Rules to do so. Nevertheless, the Tribunal's practice has been invariably to disregard hearsay evidence, although the basis often cited by the Tribunal for doing so is not precise. Thus, it ruled in the *Moin* Case[16,] for example, that: "The Tribunal considers this to be hearsay evidence, on which it cannot rely, unless the evidence is substantiated."[17] If this is intended to mean that hearsay evidence, though *admissible*, may not by itself prove a claim but will be given its due weight if supported by other evidence, then such evidence should be simply treated like any other insufficient evidence, and its characterization as *hearsay evidence on which [the Tribunal] cannot rely* is uncalled for. If, on the other hand, the Tribunal's intention is to regard the evidence as *inadmissible* unless further support is offered, the question arises how the admissibility of a piece of evidence can be determined on the basis not of its nature, but of whether or not it is associated with other pieces of evidence.

Burden and Standard of Proof

With respect to the burden of proof, Article 24(1) of the UNCITRAL Rules is maintained unchanged in the Tribunal Rules:

> Each Party shall have the burden of proving the facts relied on to support his claim or defence.

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[15] Article 27(4).

[16] *Jalal Moin* v. *The Islamic Republic of Iran*, Award No. 557-950-2, (24 May 1994), para. 19.

[17] See, for another example, *Kaysons International Corporation* v. *The Government of the Islamic Republic of Iran*, Award No. 548-367-2, (28 June 1993), para. 42: "[The] testimony, however, is hearsay and, in the absence of any contemporaneous evidence or supporting documentary proof, cannot be credited sufficiently to establish the Claim."

In its case law, the Tribunal has properly distinguished between the initial duty of the proponent of a fact to adduce evidence sufficient to allow the case to go forward, and his burden of persuasion:

> Each party has the burden of setting out the facts upon which it wishes to base its case, and the heavier *burden of proving the facts relied on in support of his claim or defence,* . . . if the allegations are contested.[18]

The former is defined elsewhere by the Tribunal as evidence capable of inspiring *a minimally sufficient degree of confidence* in the alleged fact.[19] Until this degree of evidence is initially offered by the proponent, says the Tribunal, the allegation will be rejected irrespective of the opponent's possible rebutting evidence.[20] This much is sound enough. However, in a number of its awards the Tribunal has regrettably proceeded to state that once *prima facie* evidence is submitted by the alleging party, the burden of proof shifts to the defending party.[21] This is regrettable because, in law, the burden of proof never shifts.

Where the initial *burden of adducing evidence – prima facie* evidence in its first sense – is duly carried out by the proponent of a fact, the opponent will have the right to remain inactive, inviting in effect the proponent to meet its second burden, i.e., the burden of persuasion. Even where this latter degree of cogency – *prima facie* evidence in its second sense – is met by the proponent's evidence, the opponent is required, not to shoulder any burden of proof, but to adduce evidence sufficient to destroy the evidence submitted by the proponent. Indeed, the opponent will succeed by offering contrary evidence sufficient to reduce the proponent's evidence to below the level of preponderance, the required standard of proof in a civil dispute. This failure to realize that the opponent's duty is only to show the proponent's failure to meet its burden of persuasion has led to many legally flawed decisions by the Tribunal, of which *Rexnord Inc.* v. *The Islamic Republic of Iran, et al.*[22] is but one example. There, it is said that:

> "In view of [the Respondents' lack of simultaneous objection to a credit note] and of the inconclusive character of the evidence presented by the Respondents at the Hearing in support of their defence, the Tribunal finds no valid ground for not [upholding the claim]."

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[18] *Harris International Telecommunications, Inc.* v. *The Islamic Republic of Iran, et al.*, 17 Iran-U.S. CTR 31 at 47.

[19] *Abrahim Rahman Golshani* v. *The Government of the Islamic Republic of Iran*, Award No. 546-812-3, (12 March 1993), Para. 49.

[20] *Ibid.*

[21] See, for example, *Reza Said Malek* v. *The Government of the Islamic Republic of Iran*, Award No. 534-193-3, (11 Aug. 1993), paras. 111 and 121.

[22] 2 Iran-U.S. CTR 6 at 12.

Lack of simultaneous objection on the part of the Respondents was a factor, with a given weight, in support of the claim. All that the Respondents were then required to do was to adduce evidence sufficient to challenge the weight of the Claimant's evidence. They had no duty to offer conclusive evidence in support of their challenge; a degree of cogency not required even from an alleging, let alone from the defending, party.

As is the case with the UNCITRAL Rules, the Tribunal Rules are silent with respect to the required standard of proof. In purely civil matters, the Tribunal has consistently imposed, as it should have, the standard of proof *on the preponderance of evidence*, alternatively described as *on the balance of probability*. Where, on the other hand, the allegations have had a criminal flavour, the Tribunal's pronouncements have been not only inconsistent, but legally flawed. Thus, in *Oil Field of Texas, Inc.* v. *The Islamic Republic of Iran, et al.*, it was held that:

> The burden is on the [Respondent] to establish its defence of alleged bribery in connection with the Lease Agreement. If reasonable doubts remain, such an allegation cannot be deemed to be established.[23]

But the standard of proof *beyond reasonable doubts* belongs to criminal prosecutions only, where the conventional policy holds that the evil of convicting an innocent person is by far greater than that of a guilty person escaping conviction. The standard of proving guilt is hence raised to a degree sufficient to meet this concern. There is no such consideration, and therefore no room for this standard, in civil proceedings. Here, on the contrary, the dispute must be resolved in favour of one or the other party and, because of the equality of the parties' rights, the requirement of any degree of proof other than the preponderance of evidence – 51% – will simply disturb that equality in favour of one and against the other.[24]

In *Dadras International, et al.* v. *The Islamic Republic of Iran*[25], yet another standard – identified as an "enhanced standard" – was held to be required in support of an allegation of forgery. The award does not give a precise definition of this standard, though it refers to "*clear and convincing evidence*" and "*a higher degree of probability*" than is usual in civil cases. This asserted standard is not only unsupported in law, it is vague and inexact.

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[23] 12 Iran-U.S. CTR 308 at 315. It is to be noted, of course, that the assertion of bribery here is not a defence proper, but an affirmative allegation, albeit made in defence; and it is for that reason alone that the Respondent is rightly held to be carrying the burden of proof.

[24] Thus, under Common Law, "[t]he allegation of criminal conduct, even of murder, need only be established on a preponderance of probability in a civil action". Cross on Evidence (4th ed.) at 116.

[25] Award No. 567-213/215-3, (7 Nov. 1995), para. 124.

Conclusion

An attempt has been made above to offer a brief overview of the evidentiary rules and practice of the Iran-United States Claims Tribunal, and to note certain shortcomings, particularly with respect to the burden and standard of proof. Others have suggested that the primary deficiency of the Tribunal Rules lies not with any particular provisions thereof, but with the fact that the UNCITRAL Arbitration Rules – which, despite the effected modifications, still form the main body of the Tribunal Rules – are far more appropriate for the purely commercial, ad-hoc international arbitrations for which they were drafted, than for a semi-permanent multiple-claim facility such as the Tribunal, and the type of disputes with which it is typically called upon to deal.

Issues of Evidence in the Practice of the Claims Resolution Tribunal for Dormant Accounts

JACOMIJN J. van HAERSOLTE-van HOF*

The Claims Resolution Tribunal for Dormant Accounts ("CRT") was created on the basis of agreements concluded between the Word Jewish Restitution Organisation, the Jewish World Congress and the Swiss Bankers' Association. These organisations appointed the "Volcker-Committee", which first initiated wide-scale accountants' audits and further recommended the publication of lists of dormant accounts held in Swiss banks as well as the institution of a tribunal that could deal with individual claims.

The CRT consists of a Swiss president, Prof. H.M. Riemer, and sixteen arbitrators from a variety of countries including Israel, the United States and Switzerland. It never sits as a full tribunal. Rather, the President appoints either sole arbitrators or tribunals of three members. References in this article to the "CRT" mean the institution as a whole, while "Tribunal" refers to the arbitrator or arbitrators dealing with an individual case.[1]

In 1997, lists were published of dormant accounts which included the names, and in many cases the domicile, of the account holders. The name of the relevant bank was not included in these publications. Claimants could submit claims through local offices of the accounting firm Ernst & Young, which compiled these claims and, through its Swiss offices, submitted all claims to the Tribunal. Altogether, approximately 9,500 claims have been submitted with respect to the 5,570 published accounts. The accounts published amount to a total of Sfr 72 million. This figure is based on the amounts reported by the banks not yet corrected for interest and fees.

Claims are first sent to the bank where the relevant account is held in order for the bank to take the initiative in disclosing both its identity and the amount held in the account. The bank will then sign an arbitration agreement and the

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[1] The Rules, which are, at present, unpublished, are not entirely consistent in this respect, and occasionally refer to "arbitrator" regardless of whether a sole arbitrator or a three-member tribunal is intended.

International Law FORUM du droit international **1**: 215–218, 1999.

claimant is requested to do the same.[2] In cases in which the bank is not willing to disclose this information unilaterally, an "initial screening" procedure is automatically commenced in which a Tribunal determines whether such disclosure is warranted despite the bank's refusal. If so, the Tribunal discloses the information and requests the parties to sign an arbitration agreement.

An important characteristic of the procedure is therefore the distinction between the initial screening procedure and the actual arbitration proceedings. The Rules of the CRT provide that the name of the bank and the amount held in the account be disclosed unless the arbitrator determines in the initial screening that

- the claimant has not submitted *any* information on his or her entitlement to the dormant account, or
- it is *apparent* that the claimant is not entitled to the dormant account (emphasis added).

Obviously, the threshold of evidence to be submitted at this stage is very limited: only if no information is provided at all or if the information provided shows that the claimant is clearly not entitled to the account will the claimant be prevented from actually entering into the arbitral proceedings.

The importance of overcoming this initial hurdle is that if the bank itself or the CRT discloses the identity of the bank, the claimant not only obtains the name and address of the bank but also receives all available bank documentation. In practice, the CRT will compare the facts and allegations contained in the claim and compare these with the available bank documents. If there appears to be a possible match, the CRT will grant disclosure. The CRT can also request further information from the Claimant.

In the actual arbitration proceedings, the standard of evidence is that laid down in Article 22 of the CRT Rules, which is headed "Relaxed Standard of Proof".[3] On the basis of this provision, a claimant need not submit

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[2] Although there is no obligation for the bank to do so, failure to sign will undoubtedly result in a disclosure decision by the CRT. Furthermore, although the Claimant is not obliged to participate, the procedure and the relaxed standard of proof provide the most attractive option for the Claimant.

[3] Article 22 provides:

"The claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account. The Sole Arbitrators or the Claims Panels shall assess all information submitted by the parties or otherwise available to them. They shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts.

A finding of plausibility requires, inter alia,

(i) that all documents and other information have been submitted by the claimant

comprehensive and compelling evidence. Rather, he or she must make his or her claim "plausible". In addition, the provision expressly requires the CRT to take into account the difficulties of proving a claim after the destructions of the Second World War and the Holocaust.

If, for example, the claimant submits a claim asserting that he or she is related to an account holder, but fails to provide any support for this statement, the Tribunal will probably reject the claim. However, if the claimant makes the same allegation, but explains why supporting documentation is missing, the claim stands a much better chance. An example of such an explanation may be that the house where the account holder and the claimant lived was destroyed during the war by bombing. If in addition to this mere statement, the claimant further submits documentation, such as a history book, evidencing the complete destruction of the houses in the street where the account holder and the claimant lived, this will further strengthen the claim.

The criterion of plausibility was agreed upon by the entities that created the CRT in order to provide sufficient flexibility to distinguish between cases in which claimants could reasonably be expected to submit documents and other information, and cases in which, as a consequence of the war and Nazi policies, most information has been destroyed.[4]

As mentioned above, it is important to note in this context that when a claimant obtains disclosure – either from the bank or in the initial screening stage – he or she is brought into a substantially improved situation as far as evidence is concerned. Initially, many claimants are aware only that "there was a Swiss account somewhere". When they learn the identity of the bank, they at least know whom to address. Furthermore, the actual bank documents help the claimant focus his or her claim and may provide corroboration of relevant issues. For example, the claimant may learn from the documents that the account holder had granted a power of attorney, or that the account was held in the name of more than one person.[5] This might enable the claimant to strengthen his case and credibility by demonstrating the existence of a certain family

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regarding the relationship between the claimant and the published account holder that can reasonably be expected to be produced in view of the particular circumstances, including, without limitation, the history of the claimant's family and whether or not the published account holder was a victim of Nazi persecution; and

(ii) that no reasonable basis exists to conclude that fraud or forgery affect the claim or evidence submitted; or that other persons may have an identical or better claim to the dormant account."

[4] P. Witmer, the Genesis of the Rules of Procedure for the Claims Resolution Process, ASA Conference of 22 January 1999 (to be published).

[5] In principle, the names of holders of powers of attorney and joint account holders have also been published but are not always fully correct or complete.

relationship between the account holder and the holder of the power of attorney or a joint account holder.

At present, the CRT is by necessity focussing on the initial screening cases. Only when all initial screening claims with respect to a given account have been processed can actual arbitration proceedings be initiated. Otherwise, there is always the risk that one of the claims submitted turns out to be better than those dealt with first. The level of evidence required in the initial screening procedure is of a very restrictive nature, as befits the purpose of the procedure, namely to distinguish, in broad terms, between legitimate claimants and truly meritless claims. It is also, to a large extent, a negative review: in addition to truly unsupported claims, a request for disclosure will be rejected if the claim contains facts and/or allegations contradictory to the information in the bank documents, or if no possible match can be made between the claimant and a dormant account.

How the CRT will develop the plausibility criterion in the actual arbitration proceedings remains to be seen.[6] It is to be hoped that the standard will indeed be flexible enough to dispense justice to legitimate claimants while discouraging frivolous or fraudulent claims. Perhaps this will encourage other tribunals and institutions addressing Holocaust claims to apply a similar standard.[7]

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[6] See also H.M. Holtzmann, The Relevance of the Experience of the Iran-United States Claims Tribunal for other Mass Claims Tribunals, ASA Conference (referring to the standard of Article 22 CRT Rules as "a highly innovative rule of evidence").

[7] The Dutch "Verbond van Verzekeraars" (Association of Insurers) has, for example, proposed guidelines to Dutch insurers concerning *ex gratia* payments to Holocaust victims suggesting a flexible approach to reasonably supported claims.

An Overview of Evidence before the United Nations Compensation Commission

MOJTABA KAZAZI*

Introduction

The United Nations Compensation Commission is a unique international claims commission created by the Security Council in May 1991, to resolve and pay claims of individuals, corporations and Governments against Iraq arising directly from Iraq's August 1990 invasion and occupation of Kuwait.[1] The Commission has received over 2.6 million claims through 96 Governments, with a total amount claimed of over US$300 billion. The Commission has already resolved all of the small individual claims and is in the process of reviewing the remaining large claims, including 6,000 corporate claims.

The Commission is located at the European headquarters of the United Nations in Geneva. It is run by a Governing Council composed of the members of the Security Council, assisted by a number of panels of Commissioners (currently 14) and a Secretariat. The Secretariat services the Commission at both policy making and functional levels.[2]

A. Nature of the Commission

While the UNCC is the largest claims commission in the history of international claims, it is not comparable to a court or tribunal before which the parties appear to present their claims.[3] Rather the UNCC is an administrative fact-finding body created by the United Nations at the end of the Persian Gulf War to decide and pay war reparations. While it is the Commission's aim to exert maximum objectivity, transparency and fairness in reviewing claims and providing compensation to claimants, the exigencies of processing such a large number of claims within a reasonable time period has imposed certain

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[1] See Security Council Resolutions 687 (1991) and 692 (1991).

[2] For more information on the Commission, as well as the texts of the relevant Security Council resolutions, all decisions of the Governing Council and Reports and Recommendations made by panels of Commissioners, see the Commission's website (http://www.uncc.ch).

[3] See paragraph 20 of the UN Secretary General's Report of 2 May 1991, UN Doc. S/22559 (1991).

International Law FORUM du droit international **1**: 219–224, 1999.

restrictions on the procedures applied by the Commission.

The Commission, which is a subsidiary organ of the Security Council, operates pursuant to its innovative "Provisional Rules for Claims Procedure"[4] (hereinafter "the Rules"). The law applied by the Commission is stated in the Rules as being: relevant Security Council resolutions, pertinent decisions of the Governing Council, and "where necessary other relevant rules of international law".[5] Proceedings before the Commission are not adversarial in nature and are usually conducted in writing. Unlike the situation, for instance, under the UNCITRAL Arbitration Rules, oral proceedings may only be held at the discretion of the panels.[6] Participation of both the claimants (individuals, corporations, or Governments) and Iraq in presenting or defending the claims before the Commission is limited. Under the Rules, the panels of Commissioners are required to complete the review of claims assigned to them within fixed time periods.[7] The panels' reports and recommendations on claims become final and public after approval by the Governing Council. There is no possibility of appeal or review against the decisions of the Council.[8]

The characteristics of the Commission outlined above have an impact on proceedings before the Commission. In particular, the limited participation of the parties and particularly Iraq has resulted in the Commissioners and the Secretariat assuming an active investigative and fact-finding role in reviewing claims, with the assistance of outside expert consultants including a number of accounting and loss adjusting firms. [9] This has become a distinctive feature of the UNCC procedure.

B. Burden of Proof

Article 35 of the Rules, consistent with the general principles on burden of

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[4] UN Doc. S/AC.26/1992/10.

[5] See Rules, article 31.

[6] See Rules, article 36(a).

[7] See Rules, articles 37 and 38, and Governing Council decision 35 (UN Doc. S/AC.26/Dec.35 (1995)).

[8] Rules, article 40.

[9] See, e.g. paragraph 89 of the report and recommendations concerning the Well Blowout Control Claim, S/AC.26/1996/5/Annex ("the panel has made every effort to ensure that the requirements of due process have been met. Given the time frames for the review of claims prescribed by the Rules and the volume of documentation underlying the WBC Claim, the panel has not relied solely on the Parties' contribution in order to verify the Claim. The panel has assumed, with the assistance and support of the secretariat and the consultancies retained by the secretariat, an investigative role that goes beyond using the adversarial method of verifying claims.") See also the first report by the category "D" Panel of Commissioners, UN. Doc. S/AC.26/1998/1, paragraph 76.

proof,[10] provides that each claimant is responsible for submitting evidence to prove that a particular claim is eligible for compensation. Article 35 also emphasizes the inherent authority of the panels in evaluating the evidence by stating that "[e]ach panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

The liability of Iraq under international law for the payment of compensation for any direct loss resulting from its invasion and occupation of Kuwait having been established by the Security Council,[11] claimants are relieved from the otherwise heavy burden of proving the liability of a sovereign state. Consequently, the claimants burden of proof has been simplified. Claimants are only required to prove the causal link between the loss and the invasion and occupation of Kuwait, and the value of the alleged loss. The Commissioners, in their turn, have to decide upon the question of causation and the valuation for each claim.

The unusual circumstances under which claimants had to leave Iraq or Kuwait and the difficulties, particularly for individuals, in providing primary evidence to prove their losses,[12] have been taken into account by the panels in evaluating the claims. However, the Governing Council has emphasized that in large claims "no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant."[13]

C. Standard of Proof

The Rules provide guidance on the level of evidence required to prove a claim by making distinctions among various categories of small and large claims processed by the Commission. Lenient standards were set with respect to small individual claims, due to the humanitarian nature of these claims, and the fact that such claims are for small amounts and have been filed to a significant degree by migrant workers who were victims of the Gulf War. Thus in small claims for departure from Iraq or Kuwait, serious personal injury, or death, simple documentation of the fact and date of departure, injury or death will suffice. Documentation of the actual amount of loss is not required since the above claims are for fixed amounts.[14]

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[10] See, e.g., M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Kluwer, 1996), pp. 53-117, and 378-380.

[11] See paragraph 16 of Security Council resolution 687 (1991).

[12] See, e.g. the report on the fourth instalment of E3 claims (UN Doc. S/AC.26/1999/14, paragraphs 43-60), and the first report by the category "D" panel (S/AC.26/1998/1).

[13] See S/AC.26/Dec. 46 (1998) and S/AC.26/1998/2.

[14] See the Rules, article 35(2).

For claims up to US$100,000, claimants should provide "appropriate evidence of the circumstances and amount of the claimed loss." However "documents and other evidence required will be the reasonable minimum that is appropriate under the particular circumstances of the case."[15] The Rules establish a more lenient standard for smaller claims by providing that "a lesser degree of documentary evidence ordinarily will be sufficient for smaller claims such as those below US$ 20,000."[16]

Large claims, i.e., claims of individuals for more than US$100,000, claims of corporations, and claims of Governments and international organisations, "must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss."[17] The above standards, being subjective in nature, are open to the interpretation of the panels and vary according to the nature of the claims. However, the application of higher standards of proof by the panels beyond those stated in the Rules is excluded.[18]

In approving the recommendations of the panels, the Governing Council has been vigilant in the application of these standards. For example, where a panel dealing with corporate claims had referred to the requirement of "clear and convincing evidence" with respect to loss of profit claims, the Governing Council sought and received assurances from the concerned panel that, in spite of the language used in the panel's report, the standard actually applied was that established in Article 35 of the Rules.[19]

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[15] *Ibid.*

[16] *Ibid.*

[17] Rules, article 35(3). Paragraph 5 of Governing Council Decision 15 requires "detailed factual descriptions of the circumstances of the claimed loss, damage or injury".

[18] See, e.g., paragraph 72 of the first Report by the category "D" panel of Commissioners, UN Doc. S/AC.26/1998/1 ("considering the difficult circumstances of the invasion and occupation of Kuwait by Iraq . . . many claimants cannot, and cannot be expected to, document all aspects of a claim. In many cases, relevant documents do not exist, have been destroyed, or were left behind by claimants who fled Kuwait or Iraq. Accordingly, the level of proof the panel has considered appropriate is close to what has been called the "balance of probability" as distinguished from the concept of "beyond reasonable doubt" required in some jurisdictions to prove guilt in a criminal trial. Moreover, the test of "balance of probability" has to be applied having regard to the circumstances existing at the time of the invasion and loss.") For a discussion of the standard of proof in international procedure see M. Kazazi, *op. cit, supra,* note 10, pp. 323-365 and 376-377.

[19] For the type of evidence required by the panels in reviewing loss of profits claims see, e.g., the report on the fourth instalment of "E3" claims, UN. Doc. S/AC.26/1999/14, paragraphs 119-141.

D. Mass Claims Processing

A peculiarity of the Commission's claims processing that is reflected in its Rules and that impacts upon the burden of proof and questions of evidence is the great number of claims being processed and techniques applied for that purpose.

In connection with the small claims, approximately one million departure claims were filed with the Commission by nearly one hundred Governments on computer diskettes. These claims were verified to a large extent by means of the computerized matching of data from the claimants' claim forms against a vast volume of information and records gathered by the Secretariat on departures from Iraq or Kuwait (e.g., lists of residents in Kuwait and Iraq as of 2 August 1990, flight manifests, border post records, list of evacuees by international organisations, etc.)[20] Such claims that were not "matched", were reviewed using sampling techniques with the assistance of statisticians.[21] Over 420,000 claims for losses up to US$100,000 were verified using mainly sampling and various averaging techniques, providing recommended award amounts conditioned by the information provided by (i) all of the claimants who filed claims in a particular sub-category, (ii) all of the claimants with the same nationality as the claimant, and (iii) the characteristics of the claimants (e.g., age, profession, sex, etc.) "Outlier" claims for amounts much lower or higher than the average of a group of claims were reviewed separately. This method allowed the panel to determine compensation on a range of evidence and information submitted by claimants or acquired by the Secretariat with respect to groups of claims, rather than by taking into account only the information provided by claimants in one claim.[22]

For large claims, while the Rules require an individual review of each claim, each panel reviewing large groups of homogenous claims, with the assistance of the Secretariat and outside expert consultants, has established verification and valuation methodologies to be applied across the board to the population of claims assigned to the panel. A good example is the detailed and technical methodologies applied by the panel of Commissioners reviewing Kuwaiti private sector corporate claims.[23]

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[20] See, e.g., first report of category "A" panel UN. Doc. S/AC.26/1994/2, section IV, especially pages 39-42.

[21] See, e.g., the fourth report of the category "A" panel, S/AC.26/1995/4, paras 45-88.

[22] See, e.g., first report by the category "C" panel, UN. Doc. S/AC.26/1994/3, pp. 39-48. The subsequent reports by the panel reviewing these claims develop the methodology further. See UN Docs. S/AC.26/1996/1, S/AC.26/1996/2, S/AC.26/1996/4, S/AC.26/1997/1, S/AC.26/1998/6 and S/AC.26/1999/11.

[23] See first report of the category E4 panel, UN Doc. S/AC.26/1999/4, paragraphs 38-62. In general, each report by the panels of Commissioners outlines the methodologies used in the review process.

E. Use of Experts

Members of the panels of Commissioners are experts in law, accounting, insurance, environment, engineering and other fields.[24] In addition, the panels have the authority to acquire additional information through expert advice.[25] While the majority of the Commissioners reviewing other categories of claims are distinguished lawyers with long experience in international litigation and arbitration, the panels reviewing the corporate claims are often composed of a lawyer as the Chairman of the panel, with an accountant or insurance specialist and a loss adjuster as the other two members of the panel. Such a structure ensures that the panel itself possesses the necessary expertise to deal with legal and valuation issues. At the same time, it has become necessary for the panels to regularly make use of outside expert consultants for two main reasons. First, the range of expertise required to value losses claimed goes beyond the fields of law, accounting and loss adjusting. Second, the volume of work and the large number of claims assigned to each panel makes it impractical for the Commissioners to attend to all of the verification and valuation tasks personally. The expertise of the panels has been useful in guiding the outside expert consultants and in reviewing and analysing their reports.

Thus in small individual claims, the panels have sought and received advice from medical doctors, labour law experts, statisticians and other experts. In large claims, firms of accountants and loss adjusters have been recruited through the United Nations bidding process to verify records and value losses in each case in accordance with the instructions and methodologies set by the panels. These accounting and loss adjusting expert consultants have participated on a number of occasions in conducting on-site inspections to review and verify documents.

Conclusion

Over the past eight years, the UNCC has processed and reviewed over 2.5 million claims under the procedures envisaged by the Governing Council in the Commission's innovative Rules. While the success of the Commission should be viewed in the context of its special nature, its experience and practice, particularly in the field of mass claims processing, will be valuable for other fora.

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[24] Rules, article 19(2).

[25] Rules, article 36(b).

Evidence before the Commission for Real Property Claims in Bosnia and Herzegovina

HANS van HOUTTE*

The Commission for Real Property Claims (hereafter "CRPC") was created by the Dayton Peace Agreement, which ended the Bosnian war[1].

The devastating impact of the war, which ravaged Bosnia from 1992 until 1995, has left one-third of the housing stock destroyed or otherwise uninhabitable. Moreover, the systematic practice of ethnic cleansing forced more than two million Bosnians, Croats and Serbs to seek shelter in areas of Bosnia where their ethnic group was in the majority or to seek refuge abroad. The property of the victims of ethnic cleansing is now generally occupied by displaced persons who have, in turn, been chased from their own homes.

The parties to the Dayton Peace Agreement knew that no lasting peace could be achieved without the resolution of the real property issues of these displaced persons and refugees. They have mandated the CRPC to *"receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992*[2] *and where the claimant does not now enjoy possession of that property"*[3]. The Dayton Agreement intended the CRPC to order return of the property or just compensation. However, political reality often makes return very difficult and economic reality excludes the grant of compensation. Consequently, the CRPC considers that its prime responsibility is to confirm property rights. The market and the Bosnian administration and judiciary will then implement these property rights.

The CRPC has been discussed in greater detail elsewhere[4]. This paper will focus on how the CRPC handles evidence in deciding claims. It will discuss both evidentiary standards and the collection of evidence.

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[1] See Dayton Peace Agreement of November 21, 1995, Annex 7, 35 International Legal Materials (1996), 75 at 138.

[2] This is the date of the start of the war.

[3] Dayton Peace Agreement, Annex 7, Art. XI.

[4] See Hans van Houtte, Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina, I. C. L. Q. 1999, 625-638

International Law FORUM du droit international **1**: 225–227, 1999.

1. Evidentiary Standards

Mass claims resolution, such as the CRPC, where now some 7000 decisions a month are prepared by a legal department of some 50 lawyers and must be adopted by the Commission, requires detailed, strict and clear evidentiary standards. In its Book of Regulations, the CRPC has spelled out different types of evidence required.

A specific feature of Bosnian real property law is the distinction between full ownership and mere "lawful possession". Consequently, the Book of Regulations requires separate evidence for ownership and for "lawful possession":

- Ownership rights can be evidenced by a property book extract or by an extract of the property cadaster (which in a few places merges the land cadaster and the property book), confirming such ownership as of April 1, 1992. When no such property extracts exists, ownership may also be proven by a court decision, a valid contract of sale, an inheritance decision or relevant judicial or administrative decision.

- Lawful possession, on the other hand, is evidenced by a cadastral record, or, if no cadastral records are available, by a building permit, a contract of sale, a court decision on inheritance, payment of income tax from the real property or of tax on the property itself, etc.

Another particularity of Bosnian real property is the "occupancy right" of apartments (*stanarsko pravo*), which dates from the socialist area of workers participation. To confirm such occupancy right, specific evidence is also required, such as the registration of domicile at the apartments (e.g. in the 1991 census a contract of assignment of an apartment or the owner's register of the apartment occupants).

2. Collection of Evidence

A CRPC staff member informs claimants at one of the claim collection offices in advance about the evidence they are required to submit in order to sustain their claim. Moreover, the Book of Regulations with the evidentiary standards is published and can be consulted on the Internet[5].

When Claimant submits a claim at one of the claim collection offices, he or she is encouraged to submit the relevant evidence. This evidence is preliminarily screened and registered on the computer claim form by a CRPC staff member. The evidence submitted is then attached to the claim form and sent to the legal department to be examined at a later stage. However, up to one-third of the claimants are not in a position to submit adequate documents. In these cases,

[5] http://www.crpc.org.ba.

the claimant needs to give all possible information on the claimed property, so that the CRPC can search for the required evidence.

For that purpose, the CRPC has established an extensive database of its own, which includes the 1991 census, which reveals where people were actually living, and cadaster databases for approximately three-quarters of the territory (many records have disappeared or been tampered with). The legal department checks the evidence or information submitted against its own database. Moreover, it requests verification from the local property book courts or from the municipal administrations. Whenever necessary, its verification officers are sent to the relevant courts and administrations to obtain the necessary information. Under Article XII, paragraph 1 of the Dayton Agreements, Annex 7, the CRPC is entitled to have access to any property records in Bosnia.

After verification by the Legal Department a claim can be granted and the decision is rendered by the Commission.

At present, some 80,000 decisions for houses have thus been rendered. Moreover, the CRPC has adopted some 20,000 decisions concerning the occupancy rights of apartments. These great numbers could only be reached by relying on well-established standards for evidence and extensive computer databases.

Evidence: The Practitioner in International Commercial Arbitration

V.V. VEEDER*

In commercial arbitration, procedure matters. A party can be assuaged over an arbitrator's error of law or fact in the determination of an award's adverse result; but no practitioner can easily explain or even stomach an arbitrator's procedural error. Parties must of course take arbitrators as they find them, for better or worse on fact and law; but whilst accepting the risk of substantive injustice on the merits, no party willingly accepts the risk of procedural unfairness. Procedure really does matter in arbitration; and for long, one of the most troublesome areas has been the rules and procedures governing oral and documentary evidence. That is precisely why most modern arbitration rules expressly exclude the application of a state court's "strict rules of evidence". There is a basic assumption that rules of evidence can work unfairly to either or both parties; and it is an assumption based on experience, here meaning inevitably bad experience. In England, it was the risk of the court either setting aside the award for misconduct by the arbitration tribunal or reversing the result on the hearing of a special case, both remedies now precluded under the Arbitration Act 1996. Evidential rules theoretically designed to produce a fair result in practice meant that the finality of that result was jeopardised by further proceedings in the English court.

To the practitioner before a national court, this easy abolition of evidential rules is surprising. An advocate's natural task is to shape and influence the materials to be considered by a court, but always under the control of that court. A nation's history and religion have usually determined what materials are most and least useful for the state court, crystallised in fixed rules invoked by advocates as an essential part of their craft. It is true that even in Europe these national rules differ widely, certainly between England and France but even between civil law countries, such as Denmark and Switzerland. Evidential rules are a particular trap for the inexperienced lawyer, even if he or she is a specialist in the substantive law applicable in the state court. Not infrequently, these rules are highly technical, and several mask a difference between procedural and substantive law, such as the "parol evidence" rule at common law or the burden of proof for "*dol*". Recent national attempts to reform civil procedure to make it easier for parties, particularly consumers, to exercise their legal rights in state

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International Law FORUM du droit international **1**: 228–231, 1999.

courts have sought to simplify evidential rules. In England, for example, hearsay evidence is easily admissible under the Civil Evidence Act 1995; and the new Civil Procedure Rules 1998 expressly exclude the "strict rules of evidence" for Small Claims. For the most part, there is nothing so sacred or historically settled in civil procedure that it can never be changed.

Arbitration is, however, different from litigation. If a party wants the civil procedure of state courts, it should not agree to arbitration at all. International arbitration is especially different, distinct even from national or domestic arbitration. There is no room for purely historical or parochial traditions in its procedures. These have developed by pragmatic evolution, with no national allegiance. If a procedure worked fairly in practice, then it has been adopted regardless of its origin. Over the last 25 years, there has developed a remarkable amalgam of arbitration procedures taken from many different countries (and some from none). Today, for example, a document does not have to be formally proved as evidence, unless it is alleged to be a forgery; a party's officers can give evidence even if it is a party that could not give evidence in the state courts of the place of arbitration; and foreign law can be argued by legal specialists without translating themselves as expert witnesses, as is the practice in the English courts. To many, these will be meaningless examples, being self-evident common-sense; and yet the position is diametrically different in many state courts. It is as if legal history has produced for state courts a herd of different coloured camels whereas commercial arbitration, as a newcomer, acquired its own thorough-bred racehorse.

Moreover, international arbitration evolves continuously. It is still developing its procedures, including its practices on evidence as recently illustrated by the new 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration. This is a revised version of the 1983 IBA Rules, prepared under the same Italian chairman, Dr Giovanni Ughi. His new working party was comprised of a majority of non-common lawyers; and the result is a pragmatic, modest compromise of different procedural traditions in arbitration from Europe and the USA, providing practical guidance on how fairly to manage evidential procedures in an international commercial arbitration – particularly where the parties are represented by lawyers from different legal traditions. The New Rules are of course not a legal code; and indeed by themselves they lack any legal or contractual status; and they are not intended to be comprehensive. Compared to a state court's civil procedural code, their scope is relatively limited, extending only to documentary evidence, requests for document production, oral evidence from factual and expert witnesses, the use of tribunal-appointed experts, site inspections, evidentiary hearings and the admissibility or assessment of evidence. Their value can lie only in their usefulness, of which only time can tell. Already, their non-national origin is assured: certain civilian lawyers condemn the new IBA Rules as the product of wicked Anglo-Saxon

draftsmen subverting the purity of the civilian tradition; but simultaneously certain common lawyers have detected the devious drafting of civil lawyers determined to blunt the common law's strong sword of justice. Of course, neither is right, each proving the other wrong. Evidence, as with all aspects of procedure, is important for international arbitration; but strict rules of evidence are not themselves important. Perhaps the more accurate title for the IBA's document would have been "Non-Rules on the Taking of Evidence". But then, the common lawyer would have smelt a rat; or perhaps it would have been the civil lawyer – or probably both.

In the end, what matters most is the paramount objective of procedural fairness. Everything else is a means to that objective and not an end in itself when it risks injustice. In England, the Arbitration Act 1996's principal objective was stated shortly to be "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" (Section 1); but Rule 1.1 of the English Court's New Civil Procedural Rules 1998, made under the Civil Procedure Act 1997, contains a more elaborate goal developed from the same stable as the 1996 Act.

> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
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> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate -
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Apart from the last paragraph, this overriding objective is aptly stated for international commercial arbitration; but even that paragraph is not wholly inapt for arbitration institutions even if derived from court procedure. If an arbitration tribunal can meet this objective, why does it matter if it did not follow, or followed, a particular rule or practice of evidence; and that objective having been met, no-one could reasonably complain of procedural error. Substance should triumph over form.

As with so much in many walks of life, legal substance all comes down to legal culture. In Ireland, long ago as recorded in Megarry's Miscellany-at-Law, farming disputes were resolved by placing a hungry turkey at the end of a long table facing a line of corn leading to the far end where the stream of corn split

into two separate streams: one sharply left towards the respondent farmer and the other sharply right to the claimant farmer. As the turkey ate its way down the table, its eventual destination after the critical junction, left or right, determined the result of the arbitration. This private system of justice apparently worked successfully; but the sequel is perhaps not so well known. Specialist farmers eventually bred sweet-toothed turkeys and introduced Swiss chocolate covered corn beyond the junction which unfairly swayed the turkey. Matters grew worse when other specialists introduced "sex mercatoria" which materially clouded the good judgement of the turkey at the crucial junction. Still other specialists introduced the "truncated" turkey, whereby the length of the turkey's left leg was adjusted (genetically or otherwise – history does not tell us exactly how) with the result that its list to port inevitably favoured the recalcitrant respondent. These and other nefarious practices were effectively banned under the benevolent influence of the UNCITRAL Model Turkey. What then happened, however, was tragic. In order to ensure that the Model Turkey was blind to all blandishments (be it chocolate, sex mercatoria or worse), the turkey was completely blindfolded. Almost invariably, the blind turkey would now arrive at the junction and then plummet head-first over the table-end, ensuring injustice to both claimant and respondent farmers. Eminent scholars now believe that the blindfold was responsible for the death of Turkey Arbitration. As with turkeys, so with the application of strict rules of evidence to international commercial arbitration. Arbitrators should not be blind-folded arbitrarily by state court rules, being sufficiently strong and free-minded to avoid the influence of the modern equivalent of chocolate, sex mercatoria and worse. And, moreover, arbitrators are not turkeys.

Profile / Profil

Professor Krzysztof Skubiszewski

FRANCES MEADOWS

Krzysztof Skubiszewski serves me tea on a chilly autumn afternoon in The Hague. The man who, exactly ten years ago, was catapulted from the relative tranquility of academic life into a leading role in the successful re-emergence of democratic government across Eastern and Central Europe, is reserved, charming, even austere. One senses that he may always have felt more at ease away from the public gaze. It is no surprise that when I ask how he prefers to be addressed, he replies: "Professor". That title was first conferred on him in 1973 by the Institute of Legal Sciences of the Polish Academy of Sciences in Warsaw, a milestone in a career in the teaching of international law which spanned twenty-five years, first in his native Poznan, later in Warsaw, and also in the many universities throughout Europe and the United States where he has held visiting appointments. Still, he remains more widely known as the Foreign Minister of Poland's Solidarity government, a post he held for just over four years. Currently President of the Iran-United States Claims Tribunal in The Hague, he has served twice as Judge *ad hoc* at the International Court of Justice.

Skubiszewski recalls with evident satisfaction his years spent in teaching – this despite admitting that he leaned at first towards a career in the diplomatic service, a path effectively blocked at the time to all but Communist Party members. International law was, for him, a natural choice. The University of Poznan seemed a haven relatively free of control and interference, with Poland enjoying, in the immediate post-war years, the lowest percentage of party membership in higher education institutions of any Soviet bloc country. At a time when none of the professors at Poznan were Party members, Skubiszewski set out to pursue the tradition, strong in Poland, of the teaching and study of law as a pure scientific discipline. To Skubiszewski, the Party and its dogmas were irrelevant to international law. He saw clearly the pitfalls of attempting to work from within: "You could not influence the Party. It influenced you, by creating the framework in which you had to function. If you thought you could change it, it never worked." He elected to remain outside it, aware that his chosen path was likely to be long and uncomfortable. "We all believed the Soviet empire would collapse," he says, "they all do, in the end. But nobody believed it would be soon."

Until the demise of Stalinism after 1956, it remained conspicuously difficult to avoid criticism for refusing, as Skubiszewski did, to propound the 'acceptable' Marxist doctrinaire interpretations. For that reason, his doctoral dissertation, on admission of new members to the United Nations, was not allowed to be

International Law FORUM du droit international 1: 232–236, 1999.

published. He chose for his 'dozent' thesis a subject (money and the law of belligerent occupation) obscure enough not to attract undue attention – so obscure, in fact, that a 'prohibited' reference to the Ribbentrop-Molotov Pact passed altogether unnoticed by the State censor. Cultivating an active and committed approach, he worked individually with his students, compiling reading lists and encouraging informal discussion – a teaching style he himself claims to have admired in the late Richard Baxter's seminars at Harvard, but not one which can have been easy to sustain in Poznan. By the late 1960s and early 1970s, Skubiszewski's influence in Poznan had grown to the point where open conflict with the authorities threatened. Indeed, in 1968 he protested against the anti-Semitic policies of the then government of Poland and against the invasion of Czechoslovakia by the armed forces of the Warsaw Pact, thus attracting the attention of the Public Prosecutor. There was to be no professorship. He transferred instead to the Warsaw Institute.

Skubiszewski is dismissive of the suggestion that he endured very real privations throughout his academic career. He does not deny that there were persistent, if clumsy, attempts on the part of the authorities to restrict his travel and curb his growing influence, but he puts these firmly in perspective: others were worse off, some even condemned as the result of spurious charges. "I could still teach," he insists. "I had my tenure." And teach he did, a standing example to generations of students and academic colleagues that the disinterested pursuit of a precious core of international legal values was both sustainable and worthwhile.

The cost to Skubiszewski in terms of career advancement is hard to assess, but he recalls how in 1964 he applied for an appointment in the UN Secretariat for which he would have been suitably qualified. Permission – let alone endorsement – was withheld by the Polish authorities because, as he puts it, he refused to commit himself to cooperate with the intelligence services. In other words, to join the ranks of barely-covert spies from Eastern European countries. And so he stayed, though he went on to undertake a number of teaching engagements abroad, the most fruitful of which was a visiting professorship at the University of Geneva. When fresh opportunities opened up to move permanently to the West, he again remained in Poland, this time by choice: "I felt a responsibility to my University." Later, after he had left the University, family responsibilities made it difficult for him to move away.

The very fact that Skubiszewski had not left Poland may in the end have helped secure for him the rich prize which awaited when the collapse of the Communist system set in. He insists that the call to become Foreign Minister in the Solidarity government was "quite unexpected". Prime Minister Tadeusz Mazowiecki's government, the first non-communist administration in the Eastern bloc, was functioning under the continuing Presidency of General Jaruzelski, the instigator of the régime of martial law; a more brittle cohabitation

is difficult to imagine. The Prime Minister did not by any means have a free hand in his choice of cabinet. He refused, however, to let the Foreign Ministry fall into Party hands. Skubiszewski had been among the earliest members of Solidarity, but in years of principled opposition to the Communist régime he had managed to lose neither the respect nor the attention of those in power. In him, Mazowiecki found a statesman of transparent integrity, and one who was ready, moreover, to defend the simple tenet that foreign policy needed to conform to international law, and not to domestic party dogma. It is one thing to insist that "there is no place for a political party in foreign affairs", but quite another to convey that message, as Skubiszewski did, to General Jaruzelski.

Inevitably, the new Foreign Minister found that he was virtually the only person in the ministry who was not a Party member. He rebuked his officials for insisting on addressing him as "Comrade Minister". Worse, he remembers being accompanied on official visits by an under-secretary whose clear function was to watch his movements and restrain any excesses of doctrinal incorrectness. A ready- prepared speech was presented to him, for delivery at the 1989 session of the UN General Assembly. He threw it away and started again. Then he recalled all of the country's ambassadors, and replaced many of them in a radical 'clean sweep'.

Just how precarious was the balance of political power in the region at that time is difficult to grasp. In Russia, President Gorbachev, himself under constant threat, had introduced *glasnost* and *perestroika* with the intention of rescuing the Soviet system, not of destroying it. Poland's early experiment with democracy was viewed as so dangerous by the German Democratic Republic and by President Ceauscescu – himself within weeks of the extinction of his régime in Romania – that both contemplated military invasion. Skubiszewski attributes the survival of the experiment to Gorbachev's decision not to intervene. Gorbachev had a thorough respect for Jaruzelski, and he also fully understood that the tragic dimensions of the economic crisis made some sort of change inevitable. The second key factor was the overwhelming unifying force of the Solidarity movement itself, and in particular the role played by Lech Walesa. The popular leader, according to Skubiszewski, had an unerring political instinct, conducting himself impeccably in the knowledge that the system of martial law would collapse. He exercised great caution in matters of foreign policy and readily listened to his Foreign Minister's advice. "I have the best memories of him," Skubiszewski says.

And so began the process of repositioning Poland on the political map. At an operational level, this involved the reconstruction of an entire network of bilateral treaty relations with neighbouring States. More radically, Skubiszewski implemented a strategy of establishing a new basis for relations with the Soviet Union once Russian troops were finally withdrawn from Polish soil. This was to be based not on conflict, but on Poland's assumption of its own role within the

framework of other broad political groupings. Skubiszewski was determined to apply for membership of the European Communities as early as possible: to "strive for maximum participation". To him, the very existence of such groupings fosters stability and is therefore an important factor in the success of international relations. Far from threatening a nation's identity, the tendency – which he sees as increasing – towards integration into groupings or communities does the very opposite: it promotes and strengthens the ability of States to function internationally. He sees no point in denying that the European Union was born out of political, rather than economic, imperatives.

NATO was a different matter. Despite having the benefit of much, albeit cautious, goodwill from the West, for Poland to seek membership at that time was, to Skubiszewski, "out of the question", certainly as long as Gorbachev was in power, and he felt it his responsibility not to put his country in a position where it would be rebuffed. Instead he invested effort in forging sound working relationships with his counterparts – in particular Hans-Dietrich Genscher, Roland Dumas, James Baker, Edvard Shevardnadze and Douglas Hurd. Personal contact was invaluable to him in oiling the wheels of diplomatic exchanges. His fluency in French assured him of an invitation from President Mitterand each time he visited Paris (English, incidentally, was the last foreign language he learned).

Skubiszewski's success in that role testifies to what can be achieved by the pursuit of principle, objectivity and independent thought: qualities demanded to an equally exacting degree in his present function. When, in 1993, he took up appointment as a third-country Arbitrator at the Iran-United States Tribunal (he became President shortly afterwards), it mattered little that he had had, until then, no formal experience of dispute resolution. He accepts that the definition of dispute resolution may be largely artificial: much of his work as Foreign Minister consisted of resolving disputes, often with the German Democratic Republic and other neighbouring States, which presented themselves under some other guise. Skubiszewski describes that experience as "helpful" in what he does now. With characteristic modesty, he claims that the reverse is also true: that he would have made a better Foreign Minister for having been exposed to the slow, at times painful, deliberative process of consensus-building necessary for the elaboration of the Tribunal's decisions, a process which has enabled it under Skubiszewski's presidency to come close on occasion to achieving unanimity.

He is proud of the Tribunal's work in putting flesh on the bones of international law, and in particular its decisions on the taking of property and the establishment of dominant and effective nationality. He is not among those who see the 'proliferation' of international tribunals as a threat to consistency in the development of international law. The weaving of the very fabric of international law depends, he says, on there being a variety of institutions for judicial

and arbitral settlement, and if conflicts should arise, with the passage of time it will be the better solutions which come to prevail. The high degree of consistency between rules of procedure enables different tribunals to function in a manner which is largely complementary, and it is not unknown for two such bodies to be seised of different aspects of the same dispute without any adverse consequences. But, Skubiszewski adds, simply isolating the legal elements of a dispute for resolution by a court or tribunal falls a long way short of providing a complete solution to entrenched political problems. It is a sobering reflection, from a man with a lifelong commitment to the furtherance of international law.

Work in Progress / Travaux en cours

Research on Evidence in Arbitral Proceedings

CAROLYN FUNG FEN CHUNG*

My doctoral thesis focuses on evidence in commercial arbitration proceedings, especially as to the Dutch arbitration practice. In proceedings before an arbitral tribunal, as before a State court, evidence is of crucial importance. In general, the parties are required to prove their assertions; the arbitrators must weigh the evidence in making their award. While the autonomy of the parties is one of the basic assumptions in arbitration, it is of particular interest to know in what way arbitrators may or should function in the course of the procedure, especially with regard to evidence, because in practice parties do not generally agree on rules in this respect. The role of the arbitral tribunal under different arbitration acts and arbitration rules is not usually a subject of extensive research. The international literature on evidence tends to focus on the traditional distinction between the inquisitorial and adversarial systems of obtaining evidence, in general not looking at the manner provisions on evidence are formulated.

My thesis research concentrates on the tasks and powers of the arbitral tribunal with respect to evidence, as opposed to the rights of the parties on this particular topic. The points of discussion include such subjects as documentary evidence, evidence by witnesses and experts (including expert witnesses) and site inspection. I expect my study to provide answers to such questions as for example: Who can take the initiative to obtain documentary evidence, and call witnesses and experts? Who examines the witnesses, and what to do with recalcitrant witnesses? I deal with both domestic and international arbitration, and examine various arbitration acts and arbitration rules.

As I am writing this study – in Dutch – from a Dutch point of view, a large portion of the research is devoted to the 1986 Netherlands Arbitration Act, which is codified in Articles 1020–1076 of the Code of Civil Procedure. In general, Dutch scholarly writing on arbitration has not paid much attention to evidence. My research is comparative and thus Dutch law is compared to other arbitration acts. This type of comparative approach could be of particular use to the legislator, as it is interesting to see what Dutch arbitration practice might learn from arbitration practice abroad. Such an approach was indeed used by the drafters of the 1986 Netherlands Arbitration Act. In addition to the Dutch legislation, I have selected fairly new and important legislative acts, including

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International Law FORUM du droit international 1: 237–239, 1999.

those of Switzerland (1969, 1989) and England (1996). No such research would be complete without reference to the 1985 UNCITRAL Model Law, which has successfully served as a model for a number of jurisdictions.

Arbitration legislation, including the above-mentioned acts, does not generally contain extensive evidentiary provisions. This does not, however, mean that there are no differences among the various acts. The Netherlands Arbitration Act and the English Arbitration Act are somewhat more detailed, while the Swiss Private International Law Act is less so. In any case, all acts give the arbitrators a degree of discretionary power. Unless the parties agree otherwise, for example, the arbitral tribunal is not obliged to apply the strict rules of evidence applicable in state court proceedings. The arbitral tribunal must, however, in all cases, take full account of the mandatory rules of the applicable arbitration act.

All the arbitration acts, even the more extensive ones, leave room for the parties to agree on (or for the arbitrators to refer to) pre-established procedural rules, whether or not associated with a particular arbitral institution. My research includes several sets of arbitration rules, including the 1998 Rules of the Netherlands Arbitration Institute (NAI), the 1998 International Chamber of Commerce Rules of Arbitration (ICC), the 1998 Rules of the London Court of International Arbitration (LCIA), and the 1976 UNCITRAL Arbitration Rules. Most interesting in this context are the LCIA Rules which, together with the NAI Rules, form an example of very detailed arbitration rules, especially with respect to evidence. Although arbitration rules often contain more detailed procedural provisions than the legislation applicable to the proceedings, in no case may they derogate from the mandatory rules of the applicable arbitration act.

One interesting distinction between the 1986 Netherlands Arbitration Act and the 1996 English Arbitration Act, is the determination of which provisions are mandatory. Both acts have rather detailed procedural provisions. In the 1986 Netherlands Arbitration Act, the arbitrators and parties are obliged to follow the mandatory provisions of Art. 1039 (a general provision on evidence), Art. 1041 (on witnesses) and Art. 1042 (on experts appointed by the arbitral tribunal); the parties generally cannot deviate from the procedure specified in those articles. As a result there is a greater likelihood that at least some part of the agreed arbitration rules will contravene mandatory articles of the Netherlands Arbitration Act.

While the 1996 English Arbitration Act also contains extensive provisions on procedural and evidential matters, parties retain the right to agree otherwise (see, e.g., Arts. 34 and 37). Under the 1996 English Arbitration Act, the parties may agree in nearly all respects on the course of the arbitral proceedings. This illustrates the difference between the Dutch arbitration law as an exponent of the inquisitorial method of obtaining evidence, and the English arbitration law as an exponent of the adversarial method.

My thesis deals in detail with the above-mentioned subject. I make a number of proposals for certain provisions of the Dutch arbitration legislation with respect to evidence, as in my opinion those provisions should give more autonomy to the parties. This could have the effect, inter alia, of increasing the attractiveness of the Netherlands as a venue for international commercial arbitration.

Conference Scene / Le tour des conférences

MERCOSUL, Human Rights and Sustainable Development

PAUL J.I.M. de WAART*

The first regional conference of the International Law Association (ILA) in Latin America, held at São Paolo on 26 and 27 July 1999, focussed on MERCOSUL human rights and development. MERCOSUL is the Portuguese and MERCOSUR the Spanish acronym for the Mercado Comun do Sul/del Sur. This Southern Common Market was created by Argentina, Brazil, Paraguay and Uruguay on 26 March 1991. Chile and Bolivia became associate members in 1996 and 1997 respectively.

The relevance of the conference topic, chosen in 1998, was greatly enhanced by two major events in 1999, i.e. the publication on 12 July 1999 of UNDP's Human Development Report 1999 on "Globalization with a Human Face" and the present economic crisis in MERCOSUL, particularly between its economic powers Argentina and Brazil.

The co-sponsors of the conference – the Brazilian ILA Branch, the Brazilian Society for International Law, the University of São Paulo, the University São Francisco and the Brazilian Institute for International Law and International Relations (IDIRI) – had skilfully anticipated the challenge of globalization in the new century as a search for 'the rules and institutions for stronger governance – local, national and regional – to preserve the advantages of global markets and competition, but also to provide enough space for human, community and environmental resources to ensure that globalization works for people – not just for profit.' [1]

Moreover, the programme urged practitioners and scholars from the countries of MERCOSUL, the North American Free Trade Agreement (NAFTA) and the European Union, as well as from Asia (Bangladesh, People's Republic of China/Hong Kong and Japan) to discuss the impact of the present economic crisis on globalization and regionalisation.

The general feeling was that there is no way back for MERCOSUL. The unmistakable advantages of having a market with a population of almost 220 million largely outweigh the present disadvantages of members availing themselves unilaterally of the safeguard clauses in the trade-liberalising programme in order to prevent the import of certain products such as Brazilian cotton or

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[1] Human Development Report 1999, p. 2.

International Law FORUM du droit international 1: 240–242, 1999.

Argentinian rice from seriously damaging their respective domestic markets.

It was stressed time and again that MERCOSUL offers its investors a securities market and a treaty system to avoid double taxation. Such advantages were highlighted in the programme of the conference under the headings of possibility for intra-regional co-operation and the impact of regional integration processes upon companies. To that end MERCOSUL was compared with the European Union. It was concluded that the former is deliberately less institutionalized than the latter.

The speakers underlined in a variety of ways that MERCOSUL prefers flexibility in the mutual economic relations between member states, if only for the reason that its members detest supranationality. There are thus only limited parallels with Western European models. In other words, MERCOSUL intends to be more a free trade zone and customs union than a real common market. It does not provide, for instance, for compulsory settlement of disputes between the members themselves, let alone with the institutions.

It was also observed that the institutional structure of MERCOSUL does not include a permanent court. The Brasilia Protocol of 17 December 1991 on a system for the settlement of disputes provides for arbitration by ad hoc three-judge tribunals, the composition of which requires the co-operation of the States involved. What is more, the 1994 Ouro Preto Protocol on the institutional structure of MERCOSUL shifted the emphasis to a General Procedure for Complaints to the MERCOSUL Trade Commission.

So far the arbitration procedure has remained a dead letter. It is telling that the recent fundamental differences regarding the interpretation and application of the MERCOSUL safety clauses did not change this situation even in spite of Brazil submitting the dispute to the World Trade Organization. Such a step was seen more as an affront to MERCOSUL than as an endorsement of the WTO.

The secretary of the Brazilian ILA branch, Susana Camargo Vieira[2], was the key figure in the preparation and organization of the conference. The conception and ideas for the present evolved out of the 1996 Amsterdam Conference on International Economic Law with a Human Face, convened by the University of Amsterdam under the auspices of the ILA Committee on Legal Aspects of Sustainable Development.

The greater part of the programme dealt with sustainable development, the related themes being the implementation of the main environmental treaties; environmental aspects of the law of the sea and international co-operation; human rights and sustainable development law, including the Inter-American

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[2] Susana Camargo Vieira, 'Regional integration and protection of the environment: the case of MERCOSUL' in: Fried Weiss, Erik Denters and Paul de Waart (eds.), *International Economic Law with a Human Face* (Kluwer Law International,1998), pp. 327-345.

System for the Protection of Human Rights, the Central American experience, the right to development, environmental protection and national sovereignty over natural resources.

As to implementation, speakers stressed again that it is up to States to move with the times. For human rights the same holds true, in that some States allege 'changes in mores should not be brought about by imposition from an international jurisdictional body but rather by the internal debate within the legislature and the reflection of the popular will.'[3] However, it was also said that 'no State can ignore the impact of its action on the citizens of other States' and that the right to development 'can serve very well as the synthesis of core economic and social and civil and political rights.'[4]

The next day the ILA Committee discussed sustainable development in the twenty-first century, including topics such as common but differentiated responsibilities; the equitable utilization of watercourses; and the need to strike a balance between the goals of fast economic growth and environmental protection. It also discussed the responses of national branches to the questionnaire on legal aspects of sustainable development, which will serve as a basis for the preparation of an ILA Declaration of Principles of International Law on Sustainable development.

The proceedings of the conference and the seminar will be published in due course.

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[3] Paper on 'Challenges to compliance with the human rights decisions of the Inter-American System' submitted by Christina M. Cerna.

[4] Kamal Hossain and Nico Schrijver, chairman and general rapporteur of the ILA Committee on Legal Aspects of Sustainable Development.

The Bookshelf / La bibliothèque

By Jeremy P Carver CBE *

To choose one, or two, books out of thousands is not an easy task. A restless and eclectic – perhaps eccentric – curiosity has produced overflowing shelves. No more than a handful could be described as "law books" but the selection must be guided by my response, as an international lawyer, when first I read them.

Professor Peter Drucker's books on management have had a seminal influence on both the teaching of management studies and the way in which modern business is organised. Knowing little more, I found myself intrigued by a short newspaper review for his book, published in 1989 by Heineman Professional Publishing.

The New Realities is a remarkable book. Drucker writes with the simplicity and confidence of a great thinker. Just turned eighty and with his major contribution already made, Drucker set out his wider analysis of the way the world had become. The publishers describe *The New Realities* as an "ambitious" book, presenting an "incisive and challenging examination of the central issues, trends and developments of the next decade and the questions, problems and opportunities they present on a global scale". With the decade almost past, Drucker's perception can be measured against events. Although he did not anticipate the fall of the Berlin Wall or Iraq's invasion of Kuwait, his analysis remains valid. His ideas on the new limits and functions of government and the changing demands on political leadership in a transnational economy and environment are acute. His observations on the increasing impotence of arms politically and militarily are important at a time when voices are raised to suggest that peace-keeping is pointless.

The style is fresh and stimulating, provoking and enthralling the reader. He has no need to persuade. The assurance and excitement of his vision is infectious.

The New Realities chimed with me in Drucker's questioning of the role and relevance of national boundaries. He pointed out that it was not just the decline of great empires but the different relationship between government and governed that revealed the path ahead. The book cannot be called subversive; but, having read it, I knew that the State was a redundant concept, and that we must divert our efforts to find new forms for society's evolution.

My second book is more curious. Published in 1966, by Chatto and Windus its title is: *Defeating Communist Insurgency – experiences from Malaya and Vietnam*, by Sir Robert Thompson.

Robert Thompson entered the Malayan civil service in 1938. The book

* Head of International Law, Clifford Chance, London

International Law FORUM du droit international 1: 243–244, 1999.

describes the tactics he developed successfully during the 1948–1960 Malayan Emergency. At the end he reveals, with slight bitterness, his depressing experience as Head of the British Advisory Mission to South Vietnam from 1961–1965, assisting the Vietnamese government over their insurgency problems from the north.

The book is no literary feast; but is marked by honest language. The validity of both author and subject shine through. For him, the insurgents who tried to breed Mao's new communism were less the enemy, and more a phenomenon which needed to be understood. He saw insurgency as an evolutionary form of warfare designed to gain control over people. His practical experience taught him that a guerrilla unit would not be defeated by military operations unless and until the political organisation which supported it was broken. This would never be achieved by military power; only by the establishment of political and economic stability.

This analysis now seems almost trite. The fascination lies in the detail of the way in which success was so swiftly achieved under his direction. He describes how he turned the considerable – one million British soldiers served in Malaya during the Emergency – military forces around; so that, instead of attacking the guerrillas in the jungle, the army's task was to protect the villages from contamination. Then, as now, the terrorists started by public and hideous murder of community leaders. Thus cowed, villagers could be relied upon to feed, hide and even finance the spreading insurgency. By depriving the guerrilla of this oxygen, his jungle sovereignty is futile. Within three years of initiating Thompson's new strategy in Malaya, the Emergency was substantially finished.

Thompson's insight and skills were then made available to the government in Saigon. Perhaps he would have dealt with insurgents; but he failed signally against the US military advisers to the beleaguered South Vietnamese government. Opposed and frustrated, his Mission was eventually withdrawn in 1965.

The failure to understand Thompson's experiences is far from confined to the United States. The history of Northern Ireland from 1972 demonstrates comparable ignorance. Even now, we continue to embark upon military excursions with ever more sophisticated weaponry, and scant interest in the political and economic instability which precipitated the conflict.

One final thought on these two selections. Neither book contains any reference to law or lawyers. Other works of global perspective, for example the Brundtland's Commission's *Our Common Future*, make no mention of international law and its role in society's order. As international lawyers, we have to accept responsibility for this marginalisation of what we study, profess and practice. If we admit that international law has no relevance for these great topics, we should understand that the lessons of these two authors will never be learnt.

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Sur la couverture

Le Comité de Rédaction a choisi d'orner la couverture de FORUM du droit international d'une oeuvre d'art qui changera avec chaque volume. "Une oeuvre d'art est un coin de la création vu à travers un tempérament" a dit Emile Zola. Or, nous voulons que FORUM soit aussi l'expression du monde dans lequel nous vivons à travers le tempérament de ses auteurs et lecteurs. Le lien entre FORUM et l'art était donc aisé et naturel à établir. L'oeuvre choisie pour le premier volume ("Uil" – "Chouette", en français) a été créée par Edith Brinkman qui a donné à FORUM l'autorisation gracieuse de la reproduire. EIle représente la liberté et la force, l'élan et la légèreté que tous les membres du Comité de rédaction espèrent mettre en oeuvre pour la création et le développement de FORUM.

Edith Brinkman est représentée par la Galerie Het Cleyne Huys, Noordeinde 117, 2514 GE La Haye, Pays-Bas. (Tel. +31-70-364-3556).

On the Cover

The Editorial Board has decided to illustrate the cover of FORUM with a work of art that will change with each volume. "A Work of art is a segment of creation seen through a temperament," said Emile Zola. We hope that FORUM will also be an expression of the world in which we live, seen through the personality of its authors and readers. The connection between FORUM and art is thus easy and natural to establish. The work chosen for the first volume ("Uil" – "Owl" in English) has been created by Edith Brinkman who has graciously given permission for FORUM to reproduce it. It represents the freedom and strength, the élan and lightness that the members of the Editorial Board hope will be realized in the creation and development of FORUM.

Edith Brinkman is represented in the Gallery Het Cleyne Huys, Noordeinde 117, 2514 GE The Hague, Netherlands (Tel: +31 70 364 35 56).

Information for Authors

Manuscripts and correspondence relating to articles for submission should be sent to: International Law FORUM du droit international, The Publisher, Annebeth Rosenboom, Kluwer Law International, P.O. Box 85889, 2508 CN The Hague, The Netherlands. Four typewritten copies of papers should be submitted with double spacing between the lines. Footnotes should be numbered consecutively. Figures should be provided camera-ready. No page charges are levied on authors or institutions. Twenty-five free offprints will be provided for each accepted paper; additional offprints will be available to order. The author will receive one set of page proofs. One set with corrections must be returned to the publishers without delay to avoid hold-up in the production schedule. A charge may be made for any substantial alteration to the manuscript at this stage.