PETER TOMKA* AND VINCENT-JOEL PROULX**

The Evidentiary Practice of the World Court

1. INTRODUCTION

The role and place of evidence in international legal proceedings are of fundamental importance for international justice and the rule of law. In many ways, the production and management of evidence constitute the most crucial building blocks in ensuring a just and well-reasoned judicial outcome in a dispute between sovereign States. Unsurprisingly, the subject of evidence before international courts and tribunals and surrounding issues have generated considerable scholarly output over the years, including in relation to specific international legal fields.1 What is more, the academic literature has also devoted considerable time and space to discussing the various aspects of the evidentiary practice of the International Court of Justice ("Court", "ICJ" or "World Court"), be they related to the

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burden of proof, standard of proof or broader procedural questions.\(^2\)

Over the last decade, there has been renewed interest in the Court’s approach to evidentiary issues, as it is increasingly confronted with fact-intensive and science-heavy cases. Evidentiary questions have also been central in some scholarly accounts addressing the role of the law of State responsibility in tackling modern security threats such as international terrorism, leading some publicists to formulate proposals for normative and policy reform or deliver critical assessments of the current evidentiary system on the international plane.\(^3\) In any event, the principal judicial organ of the United Nations (UN) remains paramount in applying and developing international legal principles; its many contributions on evidentiary matters warrant further consideration.

In this brief chapter, we canvass some key aspects of the evidentiary practice of the World Court, while placing some emphasis on recent developments on that front. While providing an exhaustive treatment of this subject is simply impossible in only a few pages, our ambition is nonetheless to provide insight into both the Court’s jurisprudential pronouncements on important evidentiary matters, and its institutional culture and practice as regards the management and treatment of evidence. This chapter begins by mapping out the evidentiary framework governing the Court’s work, with reference to relevant provisions, before turning to the

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2. THE EVIDENTIARY FRAMEWORK BEFORE THE COURT AND RELEVANT PROVISIONS

From a more traditionalist standpoint, the Court’s pronouncements are not only a way to peacefully resolve disputes between States, but they also strive to establish an accurate historical record, be it of the negotiation history between two States in the context of a maritime delimitation case or boundary dispute, the drafting history of a particular international convention, or the background facts of an armed conflict relevant to a dispute before the Court. In that light, the role of evidence before the Court becomes central in establishing a faithful historical record, in addition to assisting the Court in ascertaining the facts relevant to its legal decision with a view to reaching a just and well-reasoned outcome. After all, it should be recalled — and stressed — that the principal judicial organ of the UN is not only a court of first instance but also of last instance. According to Article 60 of the Statute of the Court, ‘[t]he judgment is final and without appeal.’\(^4\) Invariably, in each case brought to it, the Court is called upon to sift through vast evidentiary records, establish the factual complex related to the proceedings and, ultimately, reach well-supported and just conclusions both on the facts and the law, thereby peacefully settling the disputes of which it is seized.

At the outset, it must be emphasised that the Court differs in some regards from domestic tribunals, in that the rigidity of evidentiary rules found in some municipal legal systems has not been transposed integraely to the international legal order. Quite the contrary, the rule of thumb for evidentiary matters before the Court is flexibility. The Statute of the Court is correspondingly cursory in the wording of Article 48, simply providing that the Court shall ‘make all arrangements connected with the taking of evidence’. In principle, there are no highly formalised rules of procedure governing the submission and administration of evidence before the Court, nor are there any restrictions about the types of evidentiary materials that may be produced by parties appearing before it.

In short, in deciding the cases submitted to it, the overarching objective of the Court is to obtain all relevant evidence pertaining to both facts and

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4 The Statute of the Court is available at www.icj-cij.org/documents/index.php?i1=4 &p2=2&c1=0.
law that may assist it in ruling on issues of substance, as opposed to providing a judicial outcome grounded primarily on technical and/or procedural rationales. The Court’s predecessor institution, the Permanent Court of International Justice (‘PCIJ’), had identified this as its dominant judicial philosophy as early as 1932 in the Free Zones of Upper Savaux and the District of Gex case. In that regard, it proclaimed that ‘the decision of an international dispute of the present order should not mainly depend on a point of procedure’.5

Interestingly, the current Statute of the Court is modelled after the Statute of its predecessor, which saw the light of day in 1920. This explains why several of the statutory guidelines concerning evidence carried over from the previous institution to the new Court in 1945. Together, these institutions provide over 90 years of accumulated evidentiary practice, which is a testament to the foresight of the framers of the UN Charter with respect to institutional continuity. Thathas said, it should be emphasised that despite the inspiration drawn from the PCIJ’s Statute by the ICJ’s Statute — supplemented by the Rules of Court — the genesis of the provisions on evidence in those instruments actually derives from the draft rules of procedure for international arbitration of the Institute of International Law of 1875, the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, and the accumulated evidentiary practice of international courts of arbitration.6

It goes without saying that the Court disposes of a wide margin of latitude not only in requesting evidentiary elements, but also in assessing the evidence in each dispute submitted to it, while considering both the relevant rules of international law and the specific facts and circumstances of each case.7 While the resulting procedural and evidentiary model governing the Court’s work is in many ways sui generis and tailored to the singular mission of the Court as the principal judicial organ of the UN, it nonetheless draws inspiration from both the Anglo-Saxon legal tradition and continental systems of civil law.

By way of example, the active search for evidence carried out by the Court is reminiscent of the continental judicial culture whereas the introduction of affidavit evidence finds its roots in the common law tradition, thereby resulting in the absence of any rigid hierarchy of different types

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5 Case of the Free Zones of Upper Savaux and the District of Gex, 1932 PCIJ (ser. A/B) No 46 (7 June) at 137.
6 See Aguiñiga Mawley, above note 2 at 334 and 341; Lacha, above note 2 at 265.
8 Indeed, both the PCIJ and the ICJ have assessed affidavit evidence (i.e. sworn statements) in disputes brought before them, including in off-cited cases such as Macromutulis and Corfu Channel.
9 Equally important are the wide-ranging powers conferred upon the Court, enshrined in Article 62 of the Rules of Court, to call witnesses and direct the parties to provide evidence. In fact, the scope of powers generated by the wording of this provision is best illustrated by quoting the text itself:

[i]f the Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.10

This includes — always with the aim of attaining the objective truth — the possibility of the Court arranging ‘for the attendance of a witness or expert to give evidence in the proceedings’. The Rules of Court — particularly Articles 57 and 58 — lay down a fairly robust evidentiary framework with respect to the submission and admission of oral evidence. In contrast, the practical effect of these provisions is somewhat tempered by Article 60 of the Rules of Court, which prescribes succinctness and finalness of oral statements, and by Article 61, which enables the Court to manage the administration of evidence and to question the parties. By virtue of Article 49 of the Court’s Statute, ‘[t]he Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal’. In fact, the Court has availed itself of the power conferred upon it by this provision on several occasions.12 Moreover, Article 50 of the Statute confers vast fact-finding powers upon the Court, which allows it to entrust ‘any individual, body, bureau, commission, or
other organization that it may select, with the task of carrying out an en-
quiry or giving an expert opinion.12 It should also be mentioned that the
statutory and procedural framework governing proceedings before the
Court enables parties to call witnesses — including expert witnesses —
which may in turn be cross-examined.

In fact, testimonial evidence — including in the form of expert wit-
nesses — was very much a part of two recent oral proceedings before the
Court: First, in the dispute concerning Whaling in the Antarctic opposing
Australia and Japan, which was heard from late-June to mid-July 2013;
and second, in the case concerning the Application of the Convention on
the Prevention and Punishment of the Crime of Genocide (Croatia v. Ser-
bia), which was heard in March and early-April 2014. What is more, these
two proceedings involved intricate factual complexes — in one case the
consideration of highly scientific evidence and in the other alleged viola-
tions of the Genocide Convention during the conflict in the Balkans —
along with important stakes for both the interpretation of the Genocide
Convention and the protection of the environment and conservation of
living resources. In many ways, the former case constituted an additional
illustration of the Applicant’s willingness to submit a fact-intensive and
science-heavy dispute to the Court for adjudication, thereby entrusting it
with the assessment of sophisticated evidentiary records, much in the vein
of the scientifically complex case concerning Pulp Mills on the River
Uruguay.13

The dispute brought to the Court in 2008 concerning Aerial Spraying
(Ecuador v. Colombia) had similarly involved voluminous scientific and
testimonial evidence (primarily in the form of highly complex scientific
reports and witness statements), which the Court had begun to absorb
and digest in preparation of the oral hearings up until the case was with-
drawn by Ecuador, just a few weeks prior to the commencement of those

12 For different views on the Court’s fact-finding function in different eras, see Ruth Tiek-
brahim, ‘Recent Fact-Finding Developments at the International Court of Justice’ (2007)
6 The Law and Practice of International Courts and Tribunals: A Practitioner’s Journal
119; Elizabeth Joyce, ‘Fact-Finding and Evidence at the International Court of Justice: Sys-
temic Crisis, Change or Muse of the Same? (2007) 18 Finnish Yearbook of International
Law 283; Neil Alfred Jr, ‘Fact Finding by the World Court’ (1938) 4 Villanova Law Re-
view 28.

13 For further discussion on the Court’s treatment of scientific evidence, see Anna Riddell,
‘Scientific Evidence at the International Court of Justice: Problems and Possibilities’
(2009) 20 Finnish Yearbook of International Law 229; Joan Sandoval Coutestaze and
Emily Sweeney-Sanzén, ‘Adjudicating Conflicts Over Resources: The ILC’s Treatment of
Technical Evidence in the Pulp Mills Case’ (2011) 3 Grotius’ Journal of Interna-
tional Law 447.

hearings. In a welcome development, the Parties settled the case prior to
the hearings, while also openly acknowledging the Court for its hard work
and dedication in the case, which they considered to have been indispen-
sable in reaching their settlement.

The Court rendered its judgment on 31 March 2014 in the abovemention-
cased dispute concerning Whaling in the Antarctic.14 As the judgment
demonstrates, this precedent constitutes further and incontrovertible
proof that the Court can deal with vast amounts of highly technical and
scientific evidence in a cogent and methodical fashion, invariably deliver-
ing judgments of exemplary rigour characterised by their analytical clari-
ty. Similarly, on 3 February 2015 the Court delivered its judgment in the
case concerning the Application of the Convention on the Prevention
and Punishment of the Crime of Genocide (Croatia v. Serbia). Unsurprisingly,
the voluminous testimonial evidence added to the context of the Parties’
written and oral submissions, which included some in camera witness ses-
sions during the oral hearings, again played an important role in estab-
lishing the factual record before the Court.

While parties appearing before the Court are afforded a wide margin of
freedom as regards the submission of evidence, the Statute nonetheless
requires that all evidentiary elements be the parties’ itself on using to sup-
port their claims be presented in the course of the written proceedings,
and according to the modalities prescribed by the Rules of Court. This
essentially means that those documents must be annexed to the written
pleadings. Thus, the overarching guideline — perhaps an effort to re-
place or replicate some aspects of the ‘discovery’ process sometimes fol-
lowed in domestic judicial settings — is that of full disclosure of the
evidence at the written stage of the proceedings.15 In some instances, a
party may attempt to produce a new evidentiary element after the con-
clusion of the written proceedings, during the oral phase, or refer during
its oral statement to the contents of a document that has not been pro-
duced during the written proceedings. The Court is increasingly con-
fronted by this type of litigation strategy.

14 For the text of the judgment, see Whaling in the Antarctic (Australia v. Japan: New

15 For further discussion on the concept of ‘discovery’ in international legal proceedings,
see generally: Ali Marandi, ‘The Need for Discovery of Evidence in the Fact-Finding
Martin Davies, ‘Evidence, Documents and Preliminary Discovery in International Litiga-
tion’ (1994) 56 University of Western Australia Law Review 286; David Robinson,
‘Compelling Discovery and Evidence in International Litigation’ (1994) 18 The Interna-
tional Lawyer 533.
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In that regard, the Rules of Court are rather straightforward, at least in principle: 'After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party'. Unsurprisingly, the Rules of Court enable the Court to authorise the production of such documents after hearing the parties. In the second scenario considered earlier, whereby reference is made by a party to the contents of a previously unproduced document, such evidentiary item may be admitted if it is 'part of a publication readily available'.

This last cas de figure arose in one of the Court’s most recent judgments on sovereignty and maritime delimitation opposing Nicaragua and Colombia, dealing both with sovereignty over certain maritime features located in the Western Caribbean Sea and the delimitation of an international maritime boundary in that area. In its judgment of November 2012, the Court pointed out that the Parties had provided judgments folders during the oral proceedings, as is customary in litigation before the World Court.16 Referring to its Statute, the Court further noted that Nicaragua had included two documents in one of its judgments folders which had not been annexed to the written pleadings and were not 'part of a publication readily available'.17 Consequently, the Court decided not to allow those documents to be produced or referred to during the hearing.18

It is also interesting to underscore that the Court recently adopted a new practice direction for States appearing before it in relation to this type of evidence, with a view to governing the introduction of new, or previously unproduced, audio-visual or photographic material at the oral proceedings stage.19 Among other things, the new Practice Direction D’quarter directs the requesting State—that is to say, the State intending on producing the new evidentiary item or referring to the previously unpublished material—to make its intention sufficiently known, and in advance of the date on which it wishes to present the material. The provision further requires the requesting State to provide reasons for the request and directs it to comply with other modalities spelled out in the new practice direction.

20 See, e.g., Aguilar Mawdsley, above note 2 at 539.
21 On the practice of the Court and international tribunals — with some reference to the Corfu Channel case — as regards the question of admissibility of evidence unlawfully obtained, see, e.g., W. Michael Reisman and Eric Freedman, The Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication (1982) 76 AJIL 737. For a more recent look-though treatment of fraudulent evidence before international tribunals, with special reference to four IJC cases, see W. Michael Reisman and Christian Skinder, Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law (Cambridge, Cambridge University Press, 2014). In particular, chapters 3, 4, 5 and 8 of this recent monograph address evidentiary issues related to the Corfu Channel, Tuncel/Loby, Nicaragua v. United States, and Qatar v. Bahrain cases. Interestingly, the parties’ conduct as regards evidentiary matters in the case concerning Military and Paramilitary Activities in and against Nicaragua has been divisive in the literature. In one instance, it pitted an eminent former Member of the Court against a distinguished counsel over the production and presentation of evidence in that case. Both individuals were involved in the original proceedings related to that case. See Stephen Schw Obs, ‘Celebrating a Frand on the Court’ (2012) 106 AJIL 102; Paul Reicher, ‘The Nicaragua Case: A Response to Judge Schw Obs’ (2012) 106 AJIL 514; Stephen Schw Obs, ‘The Nicaragua Case: A Response to Paul Reicher’ (2012) 106 AJIL 582; Paul Reicher, ‘Paul Reicher’s Rejoinder’ (2012) 106 AJIL 583.
the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task.22

The Court rejected this line of defence, thereby inevitably equating the ‘alleged right of intervention’ with the ‘manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses’, and ultimately expounding that this line of reasoning ‘cannot, whatever be the present defects in international organizations, find a place in international law’.23 The Court went on to point out that “[i]ntervention was perhaps still less admissible in the particular form it would [have] take[n]’ in the case before it, revealing itself alive to the concern that ‘from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself’.24 The Court remained equally unpersuaded by the United Kingdom’s attempts to classify its conduct as falling under the rubric of “self-protection or self-help’. In this regard, the Court emphasized that ‘between independent States, respect for territorial sovereignty is an essential foundation of international relations’.25 While the Court acknowledged that Albania had completely failed in fulfilling its duties after the explosions and had engaged in dilatory tactics through its diplomatic notes, which both constituted extenuating circumstances as regards the United Kingdom’s conduct, the Court nonetheless deemed it necessary ‘to ensure respect for international law’ and ‘declare that the action of the British Navy constituted a violation of Albanian sovereignty’.26 It should be recalled that, ultimately, the Court admitted the evidence obtained through conduct that violated international law given that, in the case at hand, Albania had failed to raise any objections as to the admissibility of the proof obtained.27 However, as mentioned above, the Court did so while admonishing the United Kingdom for its unlawful actions. Understandably, this

22 Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 4 at 34.
23 Ibid. at 35.
24 Ibid.
25 Ibid.
26 Ibid.

28 See e.g., Kasazi, Burden of Proof, above note 1 at 206. See also Hugh Thibault, ‘Dilemma or Choice? — Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 AJIL 632, 641 (pointing that the approach espoused by the Court in Corfu Channel was “both rational in itself and more in harmony with the fundamental nature and powers of international tribunals than any exclusionary rule would be”).
30 Corfu Channel, above note 22 at 17. See also: Rosone and Ronen, above note 11 at 558 (highlighting that the Court will typically exclude hearsay evidence, which they describe as “evidence attributed by the witness or deponent to third parties of which the Court has received no personal and direct confirmation”, and further adding that “[d]ecisions of this kind will be regarded as “allegations” falling short of conclusive evidence”).
ble, original documents would have to be produced in lieu of photocopies or certified copies. It follows that no official hierarchy is established in the Court’s evidentiary framework between different types of evidence. As a consequence, the submission of oral evidence is in no way excluded or limited by the documentary evidence, while the Court remains unfettered in its ability to determine the probative value of any type of evidence presented to it.

By way of example, the Court is often called upon to weigh the evidentiary value of reports prepared by official or independent bodies, which provide accounts of relevant events. This is particularly true in fact-intensive disputes, such as those taking root against the backdrop of armed conflict, as was the case in both the Bosnian Genocide case, opposing Bosnia Herzegovina and Serbia and Montenegro, and the Armed Activities case, opposing the Democratic Republic of the Congo (‘DRC’) and Uganda. In the Bosnian Genocide case, the Court indicated that the probative value of this type of evidence will hinge:

among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).

It is not unusual for the Court to attribute *prima facie* weight to factual statements made by the principal organs of the UN, although the actual weight afforded to such items may vary. As a result, such evidence may well be afforded *prima facie* superior credibility since it may originate in the statements of what the Court has termed a ‘disinterested witness’ in the *Military and Paramilitary Activities in and against Nicaragua* case, that is to say ‘one who is not a party to the proceedings and stands to gain or lose nothing from its outcome’. What is more, those types of reports or factual statements emanating from UN organs, are often produced by UN commissions of inquiry, peacekeeping missions or other subsidiary organs, and are inspired by direct knowledge and involvement with the situation in the field or stem from an international consensus of States regarding the occurrence of certain events. Those evidentiary

31 See e.g., Aguirre Muxiola, above note 2 at 540.
33 Military and Paramilitary Activities in and against Nicaragua, above note 29 at 43, para. 69.
34 See generally: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion, I.C.J. Reports 2004*, p. 136. For further scholarly discussion of the weight to be afforded by the Court to factual qualifications made by principal organs of the UN, see Katherine Del Mar, ‘Weight of Evidence Generated through Intra-Institutional Fact-Finding before the International Court of Justice’ (2011) 2 Journal of International Dispute Settlement 393.
35 Bosnian Genocide case, above note 32 at 137, para. 230.
37 Ibid at 239, para. 207.
the sovereignty of that State and the prohibition on the use of force enshrined in the UN Charter.38 This evidentiary practice by the Court — namely to refer to both preambular and operative paragraphs of Security Council resolutions — is somewhat common, having cemented the reasoning for its factual assertions in other portions of this judgment and in other decisions as well.

Furthermore, relying again on the Sixth Report of the Secretary-General on the UN Mission in the DRC mentioned earlier, among other evidence, the Court found that it was confronted with 'persuasive evidence that the UPDF incited ethnic conflicts and took no action to prevent such conflicts in Ituri district'.39 On the basis of similar documents, the Court further considered that it was faced with 'convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control'.40 However, in another portion of its judgment, the Court did not afford any weight to various evidentiary items, including a report generated by the Secretary-General on the UN Mission in the DRC in finding that the Mouvement de Libération du Congo had not been instituted by Uganda, observing that document's ‘reliance on second-hand reports’.41

In sum, various kinds of evidence may be introduced by parties appearing before the Court, subject to both the evidentiary parameters we have outlined earlier and the Court's wide margin of appreciation in determining the probative value of each item of evidence. As such, maps, photographs, small scale models, bas relief, recordings, films, video tapes and, more generally, all audio-visual techniques of presentation are admissible in the evidentiary realm of the World Court. Interestingly, Norway presented a relatively large-scale bas relief of Norway during the oral proceedings in the Anglo-Norwegian Fisheries case; a similar piece of evidence was also introduced in the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya). In the abovementioned Anglo-Norwegian Fisheries case, Norway introduced a model of a trawler, fully equipped with a trawl and other fishing equipment; in the Preah Vihear Temple case — on which the Court heard the Parties again in April 2013, 52 years later, this time in the context of a request for interpretation — the judges that heard the original case in 1961 attended a private screening of a film about the dispute, as evidence, with representatives of the Parties;

4. SELECT SUBSTANTIVE PRONOUNCEMENTS BY THE COURT ON EVIDENTIARY MATTERS

This last observation leads into the last section of our chapter, which shall devote some attention to select substantive pronouncements made by the Court on the subject of evidence. At the outset, we should point out that the rule of thumb with respect to the burden of proof before the Court — often reiterated in its jurisprudence — resembles that found in most do-

38 See e.g., ibid at paras. 92–165.
39 Ibid at 240, para. 209.
41 Ibid at 228, para. 159.
42 See e.g., Eromes, above note 1 at 53–54; Aguilar Mawdesley, above note 2 at 547 (also pointing out that the Netherlands introduced a bas relief and a model of a boat-gate as evidence in the Disenchantment of Water from the River Moselle case before the PCIJ, and that aerial photographs were introduced by Nauru in its case against Australia concerning Certain Phosphate Lands in Nauru).
44 Nicaragua v. Colombia, above note 16 at 651, para. 100.
45 Frontier Disputes (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 554 at 582, para. 54.
mestic judicial proceedings on civil matters: A party alleging a fact typically bears the burden of proving it, while the usual standard of proof tends to align with 'proof by a preponderance of the evidence.'

While this evidentiary principle was reaffirmed in the Diallo case, the Court nonetheless qualified its application by declaring that 'it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances.' The Court went on to clarify that the onus will vary based on the type of facts required to prove the resolution of the case; in other words, the subject-matter and the nature of each dispute submitted to the Court will inform and ultimately dictate the determination of the burden of proof in any given case. It should be recalled that the Diallo case, the Republic of Guinea was arguing that Mr. Diallo — its national — had suffered several fundamental human rights violations while in the DRC. However, strict adherence to the aforementioned rule would have engendered significant evidentiary hurdles to the Republic of Guinea's case in establishing these violations, which were equated with 'negative facts' given that they had occurred in the Respondent's State, and the DRC was therefore better situated to adduce evidence about its compliance with the relevant obligations.

The Court provided further clarification as regards the modulated application of the burden of proof in situations involving the establishment of negative facts, while affording equal consideration to the corresponding implications for the case of the DRC. The Court declared that:

...where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove

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47 Ahmadou Sadio Diallo, above note 46 at 660-65, para. 54.

48 Ibid.

49 Ibid at 660-61, para. 55.

50 In that case, the Court underscored the following:

'The fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other States, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.'

See *Djura Channel*, above note 22 at 182.

having articulated several key aspects of procedural law which still govern the work of the present-day Court. Of particular importance was the PCIJ’s pronouncement in the case concerning Certain German Interests in Polish Upper Silesia, when it underscored that “[t]he essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries.”53 It went on to hold that “[t]he information available ... [was] wholly consistent and concurrent as to the main facts and circumstances of the case.”54 This exact passage was referenced again by the Court six years later in its judgment in the Military and Paramilitary Activities in and against Nicaragua case. However, in that instance the Court remained alive to the fact that this type of evidence should be approached with ‘particular caution’, pointing to the risk that “[w]idespread reports of a fact may prove on closer examination to derive from a single source.”55 This observation echoed remarks formulated earlier by the Court in that same judgment to the effect that such evidence should be treated with ‘great caution’; in short, the Court construed such evidentiary items ‘not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact’.56 It should be stressed that the Court’s conclusion on this front remained unaffected by the fact that such evidence might ‘seem to meet high standards of objectivity’.57

In the wake of increasingly fact-intensive cases, with particular focus on scientific evidence, there has been renewed interest in questions related to the burden of proof before the Court. Such an issue arose in the case concerning Pulp Mills on the River Uruguay. In that case, the Court was confronted with a considerable amount of contradictory factual allegations, which both Parties sought to support with particularly abundant

53 United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1990, p. 3 at 9, para. 12. After all, one must always bear in mind the conclusion reached by Max Huber in the Island of Palmas case, in which he considered that no evidence was required to establish the existence of the Treaty of Tordesillas of 1494, which was of public notoriety. See The Island of Palmas Arbitration, 4 April 1928, 2 Reports of International Arbitration at 529, 542.

54 Iran v. United States, 1980, 1295, para. 35.

55 Military and Paramilitary Activities in and against Nicaragua, supra note 55 at 10, para. 13.

56 Ibid.

57 Ibid at 40, para. 62.

58 Ibid.

59 Ibid.
information. Argentina contended that the relevant Statute adopted a precautionary approach according to which "the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment." Argentina argued further that the onus should be shared by both Parties as prescribed by the Statute under review, which divided the burden of persuasion amongst the parties; that is to say that one should prove that the plant is innocuous while the other should demonstrate that it is harmful. In response, the Court relied again on its jurisprudence constante and reaffirmed the importance of the principle of omnis probandi incumbit auctori in the following manner: "It is the duty of the party which asserts certain facts to establish the existence of such facts." 61

In short, this meant that the Applicant — Argentina in this specific case — was expected to first submit the relevant evidence to substantiate its claims. However, the Court continued, "[i]t is not means that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute." 62 The Court further expressed that, while a precautionary approach may deem a relevant prism through which one could contemplate the relevant statutory provisions, this legislative framework did not operate a reversal of the burden of proof, nor did it place it equally on both Parties. 63

With respect to the expert evidence put forward, the Court stressed that it had "given most careful attention to the material submitted to it by the Parties" before recalling that it was its "responsibility ... after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate." 64 In short, the Court's approach in that case aligned with its own evidentiary practice, which typically involves it making "its own determination of the facts, on the basis of the evidence presented to it, and then applying

61 Pulp Mills, above note 46 at 70, para. 160.
63 Pulp Mills, above note 46 at 71, para. 163.
64 Ibid at 71, para. 164.
65 Ibid at 72, para. 167-68.

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...the relevant rules of international law to those facts which it has found to have existed. 65 Consequently, the Court rejected those evidentiary items it found "insufficient", for instance when deciding not to attribute "the alleged increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill." 66 Similarly, the Court remained unconvinced that there existed "sufficient evidence to conclude that Nicaragua breached its obligation to preserve the aquatic environment including the protection of its fauna and flora", or that "convincing evidence" had been adduced to establish that Nicaragua had breached certain provisions of the relevant Statute, which embodied other substantive obligations. 67

In the Armed Activities case discussed earlier, the Court provided further substantive guidance on the evidentiary parameters within which it carries out its judicial mandate. In particular, it underscored that it "will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source." 68 Moreover, the Court indicated that it "prefer[s] contemporaneous evidence from persons with direct knowledge" of the facts or realities on the ground. 69 It similarly emphasized that it would "give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them", thereby echoing the remarks it offered almost twenty years earlier in the Military and Paramilitary Activities in and against Nicaragua judgment. 70 Along similar lines, the Court in the Armed Activities case went on to say that it would ascribe weight to evidence "that has[n]t, or even before this litigation, been challenged by impartial persons for the correctness of what it contains[ed]." 71 Finally, special attention should also be afforded, the Court continued, to "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature." 72

65 Ibid at 72-3, para. 168.
66 Ibid at 72-3, para. 168.
67 Ibid at 71, para. 238 and 100, para. 262.
68 Armed Activities case, above note 36 at 201, para. 61.
69 Ibid.
70 Ibid. Military and Paramilitary Activities in and against Nicaragua, above note 29 at 41, para. 64.
71 Armed Activities case, above note 36 at 201, para. 61.
72 Ibid.
5. Conclusion

In this brief contribution, we have attempted to demonstrate that the Court’s evidentiary practice is rather flexible when compared to that espoused by most domestic courts and tribunals. That said, the World Court nonetheless applies a great degree of caution when handling certain evidentiary items, rigorously scrutinising all evidence put before it and balancing relevant evidentiary standards against the facts, circumstances and subject-matter of each case. The Court’s practice is equally forward-looking as regards the introduction of new modes of producing evidence, thereby embracing new technology and innovative ways of establishing factual records. A rich fact-finding judicial tradition emerges from its jurisprudence: While an applicant State appearing before the Court will typically be called upon to substantiate its claims with available evidence, the other party is by no means exempted from assisting the Court in fulfilling its judicial function. Rather, the idea of evidentiary collaboration between the parties and the Court—supplemented by a productive dialogue between the bench and the agents and counsel of the parties, sometimes actuated through the submission of testimonial evidence before the Court—ensures that the principal judicial organ of the UN can carry out its noble duties in the most effective and impartial way. That is to say, the search for objective truth, the peaceful settlement of disputes, and the promotion of the international rule of law.

73 See e.g., Wiensberg, above note 1 at 97; Laible, above note 1 at 267 (both underscoring that parties to a dispute have due duty to prove their claims and a corresponding obligation to cooperate with the international judiciary in this regard).

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ANTÓNIO AUGUSTO CANÇADO TRINDADE*

La Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia

1. Introducción

Es con grata satisfacción que me asocio a este justo tributo al jurista Gudmundur Eiríksson. A lo largo de los años, nos aproximó nuestra atención compartida a la labor de los tribunales internacionales contemporáneos. En sucesivas ocasiones nos encontramos al final de sesiones de la Corte Interamericana de Derechos Humanos (CIDH), en su sede en San José de Costa Rica, y, más recientemente, al final de sesiones de la Corte Internacional de Justicia (CIJ), en su sede aquí en La Haya. También nos acercó nuestra visión universalista del derecho internacional contemporáneo. Así, es para mí una alegría poder juntar mi contribución a este Liber Amicorum en honor de Gudmundur Eiríksson, ciudadano del mundo y amigo de todas las horas.

Me propongo aquí abordar un tema de que me es muy caro. Hace años vengo insistiendo en que la emergencia y la consolidación, en la doctrina jurisprudencial de la persona humana como sujeto del derecho internacional, constituyen el mayor en el pensamiento jurídico internacional del siglo XX, a dar expresión al primado de la razón de humanidad sobre la razón de Estado, y a inspirar el proceso histórico en curso de gradual humanización del derecho internacional contemporáneo. En las páginas siguientes pasaré de

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2 Ibid., pp. 282-288; y cf. A.A. Cançado Trindade, “La Persona Humana como Sujeto del Derecho Internacional: Consolidación de Su Posición al Inicio del Siglo XXI”, en Democracia y Libertades en el Derecho Internacional Contemporáneo (Libro Comemorativo...