

Law of the Sea, Environmental Law and Settlement of Disputes

Liber Amicorum Judge Thomas A. Mensah

Edited by

Tafsir Malick Ndiaye

Rüdiger Wolfrum

Chie Kojima

Assistant Editor

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TAKING AND ASSESSING EVIDENCE IN INTERNATIONAL ADJUDICATION

*Rüdiger Wolfrum**

I. Introduction

In his Declaration¹ to the Judgment of the International Tribunal for the Law of the Sea (ITLOS, or the Tribunal) of 18 December 2000 in the *Monte Confurco* case,² Judge Mensah criticised the way in which the Tribunal dealt with a factual assumption of the French municipal court of Saint Paul.³ This criticism touches upon three different issues, namely: the appropriateness for the Tribunal to assess a factual situation, the concrete assessment of facts by the Tribunal, and the Tribunal's relationship in that respect to national courts. Only the first two aspects will be dealt with in this chapter, taking into consideration the law and practice of other international courts and tribunals.

Evidence in international adjudication embraces information submitted to an international court or tribunal by parties to a case or from other sources, or collected by the court itself, with a view to establishing or disproving alleged facts.⁴ The production, collection and evaluation of evidence are processes

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¹ Declaration of Judge Mensah, ITLOS Reports 2000, Vol. 4, 118.

² The *Monte Confurco* case (*Seychelles v. France*), ITLOS Reports 2000, Vol. 4, 86 *et seq.*

³ See para. 86 of the judgment: "The Tribunal does not, however, consider the assumption of the court of first instance of Saint-Paul as being entirely consistent with the information before this Tribunal".

⁴ C.F. Amerasinghe, *Evidence in International Litigation*, 2005, 31; Sh. Rosenne, *The Law and Practice of the International Court of Justice, 1920-2005*, 2006, 1039, who describes the function of the ICJ as follows: "to establish on whom the burden of proof falls and to ascertain, and certainly to assess the relevance and the weight of the evidence produced insofar as it is necessary for the determination of the issues which it finds it essential to

which serve a particular purpose: they are meant to enable the adjudicative body in question to decide a legal dispute or to deliver an advisory legal opinion in accordance with all relevant facts. The production, collection and assessment of evidence are thus essential elements of the judicial function of international courts or tribunals.

As far as the appropriateness of the assessment of evidence by the Tribunal is concerned, it is a particularity of the prompt release cases, such as *Monte Confurco*, that the Tribunal's judgment is without prejudice to the merits of the case before the appropriate domestic forum.⁵ Does that mean that the Tribunal has to refrain from assessing the factual situation as Judge Mensah seems to indicate? This would be problematic if it excluded in general the possibility for the Tribunal to take and assess evidence. The procedure under article 292 of the UN Convention on the Law of the Sea (LOS Convention) applies only to particular factual situations identified as such in the LOS Convention, namely that a ship has been arrested in an exclusive economic zone for having allegedly violated the law of the coastal State concerned in respect of the management of living resources or the protection of the environment. A decision as to whether this situation existed requires an assessment of the factual situation prevailing at the moment of the arrest. Also, the main function of the Tribunal under this procedure, namely to examine whether to order the release of the vessel and the crew upon posting a reasonable bond or security as defined by the Tribunal, requires an assessment of the factual situation since the decision on the reasonableness of the bond or financial security has to reflect, *inter alia*, the value of the ship and the nature of the alleged offences. In this respect the assessment of the Tribunal may clearly differ from that of the coastal State concerned.

As far as the assessment of evidence by international courts or tribunals is concerned, international judges have, in general, a wide discretion (principle of free assessment of evidence).⁶ The principle of free assessment of evidence does not absolve international courts and tribunals, though, from indicating in the final judgment how they reached their conclusions. However, international courts and tribunals are, in general, reluctant to deal in depth with questions of evidence when rendering their judgments or opinions. In particular, they do

resolve"; M. Lachs, "Evidence in the Procedure of the International Court of Justice: Role of the Court", in: E.G. Bello/B.A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias*, 1992, 265 *et seq.*; A.A. Mawdsley, "Evidence before the International Court of Justice", in: R.St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya*, 1994, 533 *et seq.*

⁵ See the wording of art. 292, para. 3, of the LOS Convention.

⁶ In the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits) (*Nicaragua case*), the ICJ stated that within the limits of its Statute and Rules "[it] has freedom in estimating the value of the various elements of evidence" ICJ Reports 1986, 14 *et seq.*, at para. 60; see also K. Highet, "Evidence, the Court, and the Nicaragua Case", *AJIL* 81 (1987), 1 *et seq.*

not consider themselves obliged to explain which standard of proof they have used and how they reached conclusions on disputed facts.⁷ This deficit is more and more acknowledged not only in legal commentary, but also by international courts themselves. Recent case law of international courts and tribunals indicates a more thorough and systematic approach to evidentiary issues.⁸

Evidentiary rules of international courts or tribunals adjudicating on inter-State claims, as laid down in their respective statutes or rules of procedure, are not enlightening in this respect. The rules mostly deal with formalities concerning the production by the parties and the taking of evidence by the international court or tribunal in question, such as the time of submission and requirements for specific means of proof. The value of such formalities should not be underestimated; they are the means through which international courts or tribunals control the production of evidence which is *de facto* mostly entrusted to the parties.

II. Principles Governing the Production, Taking and Assessment of Evidence

By its very nature, litigation between two or more States or between States and international organisations may be compared, in general, with civil litigation under national law. In civil proceedings, both parties are, in principle, on an equal footing, as opposed to criminal or administrative cases, where the State has a considerable advantage due to its resources and means of collecting evidence. This makes the equality of parties the leading principle governing inter-State litigation.

The collection of evidence by international courts and tribunals in disputes among States should be organised so as to enable the court or tribunal in question to deliver its decision impartially and on the basis of all factual information necessary correctly to decide the case. The International Court of Justice (ICJ) has emphasised this point in the *Nicaragua* case.⁹ In the application of the more technical rules in question, the court should, however, bear in mind that a

⁷ Critical of the ICJ, see *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits), ICJ Reports 2003, 161 *et seq.* (Separate Opinion of Judge Higgins, at 233 *et seq.*, paras 30 *et seq.*).

⁸ See the recent judgment of the ICJ in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, at paras 202 *et seq.*

⁹ “[T]he provisions of the Statute and the Rules of the Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent’s contention” (The *Nicaragua* case, see note 6, at 26, para. 31).

decision on purely procedural grounds does not always serve the objective of international dispute settlement, i.e. putting an end to a dispute and thereby furthering international peace. What is decisive is the underlying substance of the dispute, as the Permanent Court of International Justice emphasised.¹⁰

The principle as formulated in the *Nicaragua* case contains two interrelated aspects, namely, the proper administration of justice and the fair opportunity for each party to comment on the opponent's legal and factual contentions. Whereas the proper administration of justice refers to the judicial task of the court, i.e. to reach a decision based on sound procedural principles, the second limb refers to the parties to the case. It implies the equality of the parties and the *audiatur et altera pars* principle.

The procedures before international courts and tribunals are influenced by different procedural models developed in national law. They proceed from the basis that it is mainly the responsibility of the parties to provide the court with the relevant factual material. In this respect, the procedure can be characterised as adversarial predominantly or principally, even though the procedure of international courts and tribunals also contains elements providing for a more active role for the court. Qualifying the procedure for international courts or tribunals in inter-State litigation as predominantly adversarial does not mean that the responsibility for the production of evidence rests solely on the parties to a dispute. This is most apparent in cases where one of the parties does not appear or fails to defend its case; here, the other party may request the court or tribunal to continue the proceedings and to make its decision. In such a case, the court or tribunal must satisfy itself not only that it has jurisdiction over the dispute, but also that the claim is well-founded in fact and law.¹¹ The power of international courts and tribunals to call upon the parties to produce evidence or to supply any other factual explanations is detailed by their respective rules.¹² On this basis and on the basis of existing jurisprudence of the ICJ and ITLOS, it is safe to say that under particular circumstances, these international courts and tribunals may take a more active role, including recourse to more inquisitorial mechanisms concerning the collection of evidence. This does not, however, alter the adversarial system of adjudication as described above in proceedings among States or between them and international organisations in principle.

One of the principles resulting from or corresponding to the adversarial nature of inter-State litigation is *actori incumbit probatio* (the party that alleges a fact

¹⁰ *Free Zones of Upper Savoy and the District of Gex* case (*France v. Switzerland*), PCIJ Reports Series A/B No. 46, 155 *et seq.*

¹¹ See art. 53, para. 2, ICJ Statute; art. 28 ITLOS Statute.

¹² See art. 49 ICJ Statute; art. 62 ICJ Rules; art. 77 ITLOS Rules.

bears the burden of proof).¹³ The applicability of this principle is not absolute, though. A distinction should be made between the phase of the production of evidence and the assessment phase. As far as the first phase is concerned, even though it will generally be incumbent on the party bearing the burden of proof to submit relevant evidence capable of sustaining its allegations, the parties to a dispute are obliged to cooperate with the international court or tribunal in question and to supply it with evidence on all matters of fact or law.¹⁴ Only in the second phase does the *actori incumbit probatio* principle become relevant, namely, when the adjudicative body holds that the party was not able to prove a fact upon which its submission relied. It will then dismiss this particular claim for lack of proof.

The adversarial nature of inter-State litigation is of lesser relevance as far as the jurisdiction of the international court or tribunal is concerned. It is for an international court or tribunal to establish its jurisdiction; jurisdiction belongs to the issues that an international court or tribunal must examine *proprio motu*. This does not necessarily mean that the court or tribunal in question is under an obligation to take an active role by seeking relevant evidence.¹⁵ Nevertheless, it has to address the question of jurisdiction, even where the parties fail to make any submissions on that issue, on the basis of all evidence submitted by the parties.

When considering the production and assessment of evidence, the adjudicative body has to bear in mind that the parties are States which have consensually submitted to the jurisdiction of that adjudicative body, which has to respect the sovereignty of the former. Parties are to be given adequate opportunity to express themselves on the relevant facts, as well as on all evidence submitted by the opponent; the accuracy of facts within the knowledge of the State concerned and submitted by it should not be questioned without good reason. An example to that extent was the decision of the Tribunal to accept the uncontested statement of the government of Belize that the *Grand Prince* was removed from the ships'

¹³ Amerasinghe, see note 4, 61 *et seq.*; Rosenne, see note 4, 1040; M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals*, 1996; J.C. Witenberg "Onus Probandi devant les juridictions internationales", *RGDIP* 55 (1951), 321 *et seq.*

¹⁴ J.F. Lalive "Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de justice", *ASDI* 7 (1950), 77 *et seq.*, at 85.

¹⁵ For example, in para. 92 of the judgment on the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)*, judgment of 3 February 2006, at para. 91, the ICJ stated that the evidence has not satisfied the Court that the Democratic Republic of the Congo in fact sought to commence negotiations with Rwanda as provided for by article 29 of the Convention on the Discrimination against Women as a precondition to initiate proceedings. The Court further noted that the Democratic Republic of the Congo has failed to prove any attempts on its part to initiate arbitration proceedings.

register of Belize without seeking for evidence supporting or opposing the fact of such removal.¹⁶

As already indicated, evidence is meant to prove or to disprove facts. Questions of law, in contrast, need not be proved by the parties. This reflects the established *jura novit curia* principle frequently referred to in international litigation.¹⁷ This principle has several procedural implications. Moreover, there are some particularities for the Tribunal which have not been sufficiently elaborated upon.

Questions of law, whether relating to jurisdiction or to the merits, need not be raised by the parties. The international court or tribunal must examine them *proprio motu*.¹⁸ It is for the international court or tribunal to establish within the frame of its constituent instrument which law is applicable to the subject matter of the dispute, which, in turn, is defined by the parties. In doing so, it is not limited by the legal arguments put forward by the parties.¹⁹ Even if the parties agree on the applicable law, their agreement would not be binding upon the court or tribunal in question unless provision for such agreement was enshrined in the constituent instrument of the judicial body, delimiting its jurisdiction. This differs from an agreement on the facts. The parties can always agree on the

¹⁶ The *Grand Prince* case (*Belize v. France*), judgment of 20 April 2001, ITLOS Reports 2001, Vol. 5, 17 *et seq.*, at paras 76 *et seq.*, in particular para. 92; however, see the dissent of nine judges, 66 *et seq.*, at para. 12.

¹⁷ *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (*France v. Brazil*), PCIJ Reports Series A No. 21, 124; *Fisheries Jurisdiction* case (*United Kingdom of Great Britain and Northern Ireland v. Iceland*) (Merits), ICJ Reports 1974, 3 *et seq.*; *Fisheries Jurisdiction* case (*Federal Republic of Germany v. Iceland*) (Merits), ICJ Reports 1974, 175 *et seq.*; *Nicaragua* case, see note 6, at 24; *Amerasinghe*, see note 4 at 50-58.

¹⁸ In the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (*River Oder* case) (*United Kingdom of Great Britain and Northern Ireland, et al. v. Poland*), (PCIJ Reports Series A No. 23, p. 1 *et seq.*), the Permanent Court of International Justice dismissed the objection of the parties to the dispute that Poland invoked belatedly that it had not ratified the Barcelona Convention. The Court pointed out that this was a matter of law to be examined by the Court *ex officio* (at 18-19). A somewhat different position is advanced by R. Kolb, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary*, 2006, at 821-822, who distinguishes between general international law, which international courts or tribunals must know, in contrast to bilateral conventions and regional customary international law. For the situation before in the WTO Dispute Settlement System compare Appellate Body Report, *EC – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, 7 April 2004, para. 105.

¹⁹ See *Free Zones of Upper Savoy and Gex* case, see note 10, at 138; *Asylum* case (*Colombia v. Peru*), ICJ Reports 1950, 266 *et seq.* at 278; *Fisheries Jurisdiction* cases, see note 17, at 9 and 181 respectively; *Nicaragua* case, see note 6, at 24.

facts either explicitly or by not objecting to facts as presented by one side.²⁰ In addition, they can determine the question of which party bears the burden of proof for specific facts.²¹

The jurisprudence of international courts and tribunals is not totally coherent as far as requesting evidence on the existence of customary international law is concerned.²²

The separation of fact and law may not always be as clear-cut as theory may suggest. The Tribunal may be increasingly faced with this problem, for example in cases where the nationality of ships becomes decisive, as in prompt release cases. Whether a ship has a particular nationality is a fact. Whether a ship has been removed from a national register is, as far as national law is concerned, equally a fact. Whether such removal conforms to international law is a matter of law on which the Tribunal will have to decide. Generally speaking, the separation of facts and law is part of the exercise of the judicial function by international courts or tribunals.

The *jura novit curia* principle applies to public international law only, not to national law. According to a dictum of the Permanent Court of International Justice, municipal laws are merely facts.²³ Judges of international courts or tribunals are not obliged to be cognisant of national law. Therefore, the parties are responsible for proving their internal rules, and the court may request further evidence in this respect. The same is true for all other non-international law, including, for example, the regulations and directives issued by the European

²⁰ D.W. Bowett, "Estoppel before international tribunals and its relation to acquiescence", *BYIL* 33 (1957), 176 *et seq.*, at 182.

²¹ Sir A. Watts, "Burden of Proof, and Evidence before the ICJ", in: F. Weiss (ed.), *Improving WTO Dispute Settlement Procedures*, 2000, 289 *et seq.*, at 293.

²² Although it has been emphasised that customary international law does not need to be proved (*Fisheries Jurisdiction case, United Kingdom of Great Britain and Northern Ireland v. Iceland*, see note 17, Separate Opinion of Judge De Castro, at 79), international courts and tribunals have stated, on several occasions, that custom had to be proved by the party relying on it. See *Asylum case*, see note 19, at 276 *et seq.*; *United States Nationals in Morocco case (France v. United States of America)*, ICJ Reports 1952, 176 *et seq.*, at 200; the case of the *SS Lotus (France v. Turkey)*, PCIJ Reports Series A No. 10, at 18. The Eritrea-Ethiopia Claims Commission has stated in two of its Partial Awards that the party alleging that individual provisions of the Geneva Conventions I-IV of 1949 or the Hague Regulations were not part of customary international law at the time of the conflict had the burden of proof regarding this status (Prisoners of War, Eritrea's Claim 17 (Partial Award), 1 July 2003, at para. 41, available at <www.pca-cpa.org/ENGLISH/RPC/EECC/ER17.pdf> (last visited 7 March 2007); Central Front, Ethiopia's Claim 2 (Partial Award), 28 April 2004, para. 16, available at <www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Partial%20Award.pdf> (last visited 7 March 2007).

²³ *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (Merits), PCIJ Reports Series A No. 7, at 19.

Union, which do not qualify as public international law (in contrast to the agreements constituting the European Union).

The separation of international public law and national law is, however, also not as clear-cut as it may seem. Both have become increasingly interlinked, in particular, when the adjudicating body is called upon to decide whether national law has implemented international obligations. This is a function the Tribunal is called upon to perform more frequently than other international courts or tribunals except perhaps human rights courts. In particular, Section 6 of Part XII of the LOS Convention as well as the rules on the management of fish resources in the exclusive economic zone and on the high seas provide that States Parties enforce international environmental standards or fishing standards through national law. Such enforcement measures are only legitimate if they keep within the limits set by international law. For example, article 73, paragraph 3, of the LOS Convention excludes imprisonment as a means of enforcing laws and regulations of the coastal State concerning fishing.

The production of evidence is governed by articles 48 *et seq.* of the ICJ Statute and by the rules adopted by the Court, in particular articles 61 *et seq.* The relevant rules of the Tribunal (articles 76 *et seq.*) adhere closely to those of the ICJ.

The procedural law of international courts and tribunals traditionally does not include any strict rules concerning the admissibility of evidence, and thus leaves the parties with considerable freedom to submit what they consider to be relevant. In international adjudication there is, however, a tendency by international courts or tribunals to seek a juridical solution based upon undisputed facts.²⁴ This is legitimate. However, recent jurisprudence, in particular that of the ICJ, indicates that courts do not shy away from assessing highly disputed facts.²⁵

According to article 43, paragraph 1, of the ICJ Statute and article 44, paragraph 1, of the ITLOS Rules, the proceedings before these two courts consist of two parts: written and oral. Accordingly, one distinguishes between evidence submitted in the course of the written proceedings, namely, documentary evidence, and the evidence produced during the oral proceedings. This primarily includes statements of witnesses and experts as well as, to a limited extent, documentary evidence.

Documentary evidence before international courts and tribunals comprises all information submitted by the parties in support of the contentions contained

²⁴ Rosenne, see note 4 at 1039.

²⁵ Compare the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, paras 57 *et seq.* in respect of the use of force in respect of Kitona; concerning the military actions in the East of the Democratic Republic of the Congo, paras 78 *et seq.*; concerning self-defence of Uganda, paras 106 *et seq.*; concerning violation of international human rights, paras 208 *et seq.* and the *Genocide* case, see note 8.

in the pleadings other than expert and witness testimony. According to article 49 of the ICJ Rules and article 62 of the ITLOS Rules, a memorial shall contain three parts: a statement of the relevant facts, a statement of law and the submissions. The counter-memorial shall include an admission or denial of the facts stated in the memorial and, if necessary, any additional facts, observations concerning the statement of law in the memorial and the submissions. In order to ensure the effectiveness of proceedings before the Tribunal, it is necessary that a reply and a rejoinder do “not merely repeat the parties’ contentions” but “be directed to bringing out the issues that still divide them”. In complicated cases, it is only at that stage that the parties will be in a position to determine whether they will need to bring witnesses and experts in the oral proceedings. The Guidelines of ITLOS or the Practice Directions of the ICJ include additional instructions as to the contents of the pleadings. For example, paragraph 8 of the ITLOS Guidelines requires that a party in its pleadings should deal specifically with each allegation of fact in the pleadings of the other party of which it does not admit the truth; it will not be sufficient for it to deny generally the facts alleged by the other party.

The term document has been interpreted broadly in the practice of the ICJ and of the Tribunal. It includes the text of treaties (although the *jura novit curia* principle applies), national legislation, judgments of national courts, diplomatic correspondence, commentaries, maps, charts, photographs, video presentations, written opinions of experts and declarations. Also, press statements and statements by third parties have been submitted. In the *Gulf of Maine* case, the presentation of a video film was a matter of dispute. Canada had informed the Court that it was considering the presentation of a film during the hearing, to which the United States objected. The Registrar, in a letter addressed to the Government of Canada, stated that “in the few cases in the past in which films have been presented before the Court such films have had the character of a form of evidence comparable to a document”.²⁶ The Tribunal follows the same practice.²⁷

In general, documentary evidence is to be submitted during the written proceedings within the time limits prescribed for the filing of pleadings (memorial,

²⁶ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, 7 ICJ Pleadings 334; this practice was confirmed in the *Land and Maritime Boundary between Cameroon and Nigeria case (Cameroon v. Nigeria)*, in which the President of the ICJ stated that it had been the practice of the ICJ that if videos were to be shown during the hearing, they must be communicated to the Registry and the other party in advance (see also, ICJ Yearbook 1996-1997 at 210 on the *Gabčíkovo-Nagymaros case (Hungary v. Slovakia)*, ICJ Yearbook 1999-2000, at 273, on the *Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar v. Bahrain)*).

²⁷ See the *Camouco case (Panama v. France)*, judgment of 7 February 2000, ITLOS Reports 2000, Vol. 4, 10 *et seq.*, at 15 (para. 17).

counter-memorial and, optionally, reply and rejoinder). There are, however, two exceptions to this rule. A party may submit additional documents during the oral proceedings, if the other party consents thereto or the international court or tribunal authorise the party to do so.²⁸ In practice, parties have used the opportunity to submit additional documents not only after the closure of the written proceedings and during the oral proceedings, but also after the closure of the oral proceedings.²⁹ The Court may even order such late production itself. If evidence is submitted after the closure of the oral proceedings, it is communicated to the other party by the Court. The party then has the opportunity of commenting upon it. If necessary, the Court may even reopen the oral proceedings (articles 72 ICJ Rules, 87 ITLOS Rules).

The submission of documentary evidence has to meet some formal requirements. Article 50, paragraphs 1 and 2 of the ICJ Rules and article 63, paragraphs 1 and 2 of the ITLOS Rules provide that the originals or certified copies of documents in support be filed with the Registry and that only the necessary extracts of such documents be submitted. Documents which do not meet the formal requirements have to be returned to the party for rectification. The said provisions require, in principle, that certified copies of any relevant documents submitted in support of the contentions contained in the pleading be annexed to the original of the pleading. The ultimate sanction for non-compliance with the formal requirements on the time and the form of submission of evidence set out in the Rules is in fact substantive rather than procedural. If an assertion made in a pleading is unsupported by evidence meeting the formal requirements, and challenged by the other party, the international court or tribunal in question may consider the assertion as unproven. Apart from the formal requirements for the production of documentary evidence (and relevance of the evidence), there are no general rules on the non-admissibility of documents for the ICJ or Tribunal comparable to those in some national legal systems. The situation is different for international criminal courts.

In respect of the oral proceedings, the ICJ and the ITLOS are guided by their Rules³⁰ to be read in the light of, and interpreted consistently with, the relevant Statute, as well as other procedural instruments such as the ICJ Practice Direc-

²⁸ See art. 56, paras 1 and 2, ICJ Rules; art. 71 paras 1 to 5, ITLOS Rules.

²⁹ In February 2002, the ICJ issued Practice Direction IX to the effect that parties should refrain from submitting new documents after the closure of the written proceedings, that reasons for any such request should be given, and that authorisation would be granted only in exceptional circumstances (ICJ Yearbook 2001-2002, at 5). The Rules for Arbitration of the Permanent Court of Arbitration (see arts 67-68, Convention for the Pacific Settlement of International Disputes, 1907) are more flexible as far as the late submission of documents is concerned.

³⁰ See arts 54 to 72, ICJ Rules, and arts 69 to 84, ITLOS Rules, which concern the presentation of arguments and evidence, and the making of enquiries.

tions and the ITLOS Guidelines concerning the Preparation and Presentation of Cases. Witnesses report facts within their personal knowledge. Such reports are made, in general, during the oral proceedings. The parties are required to submit a list of witnesses and experts within a sufficient time before the opening of the oral proceedings. This is meant to prevent one party from surprising the other or the international court or tribunal. In principle, a party may call any person whose name has been communicated to the international court or tribunal. The international court or tribunal retains its general power to control the conduct of proceedings. However, only under exceptional circumstances may a witness on the list not be called to give evidence.³¹ This is mainly the case when the witness cannot testify to facts relevant for the decision of the case. A witness not on the list may be called, with the consent of the other party or when the international court or tribunal so decides. It is also possible to hear a witness by means of a two-way video link.³² International courts or tribunals, in general, have no power to ensure the presence of witnesses by way of coercive measures such as subpoenas or contempt of court proceedings. Given that they are not of a supranational character, but are international, they have to rely in this respect on the powers of the parties to implement and enforce their decisions.

The hearing is public unless it is decided otherwise or unless the parties demand that the public is not to be admitted. Accordingly, the questioning of witnesses takes place in public. With respect to the examination of witnesses, international courts or tribunals follow the system of examination-in-chief (examination by the party calling the witness), cross-examination (examination by the opponent), and re-examination (examination by the party calling the witness). After re-examination, no further cross-examination is permitted except where new matters have been introduced in re-examination. These examinations take place under the control of the president who, like the judges, may also question the witness, usually after re-examination. Parties may object to the questioning of a witness on the followings grounds: the witness is asked a "leading question"; the answer of the witness is not responsive to the question which is put; the witness is asked to report about hearsay or reports about hearsay; or the witness responds as an expert without qualifying as such. Particularly difficult situations arise when an expert witness is called upon to report facts as well as to give an opinion. In such situations, the expert witness should clearly distinguish whether he or she is reporting facts or opinions.

The nomination and the examination of experts by the parties follow, in general, the same procedure as that concerning witnesses. Expert witnesses are

³¹ See, for example, the decision of the Tribunal in the *M/V Saiga* case (*Saint Vincent and the Grenadines v. Guinea*) (Minutes), at 103, when the ITLOS decided that the testimony of the witness was of no possible relevance and declined to call the latter.

³² See art. 63, para. 2, ICJ Rules; art. 78, para. 2, ITLOS Rules.

not disqualified by the mere fact that they are government officials of the party which called them. However, the international court or tribunal may take this position into consideration when evaluating the evidence and deciding upon the probative value of the testimony.

According to article 49 of the ICJ Statute, article 62 of the ICJ Rules, and article 77 of the ITLOS Rules, the ICJ and the ITLOS may call upon the parties to produce additional evidence as considered necessary. Such power may be exercised not only prior to and during the hearing, but also after the closure of the oral proceedings. It may be considered akin to the procedure in certain national courts known as discovery of documents, although this is conducted at the initiative of, and usually by, the parties, whereas the procedure before the ICJ or the ITLOS is mainly court-driven. Also, the possibility exists of seeking to acquire information necessary for the elucidation of a matter at issue, a power supplemented by the possibility of visiting the scene of a case. Finally, the ICJ and the ITLOS are empowered to arrange for the attendance of witnesses and experts of their own choosing to give evidence.

According to article 34, paragraphs 2 and 3 of the ICJ Statute and article 69 of the ICJ Rules, the ICJ may request information from international organisations. Article 84 of the ITLOS Rules follows the same approach. For many years, it appeared that these provisions would remain dead letters. Since 1978, however, the provision has been invoked several times before the ICJ.

III. Assessment of Evidence

It is for the relevant adjudicative body to decide whether facts are evident and whether it thus may take judicial notice of them. Facts that are evident, that are not disputed, or that are agreed upon among the parties, do not require to be proved.³³ The procedure for admitting or objecting to facts is not formalistic in practice. The facts submitted by the applicant in its memorial must be objected to, otherwise they are considered admitted. The opponent is under an obligation to specify its objection; a general objection phrased such as “all that is not admitted

³³ In the *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran)* (Merits) ICJ Reports 1980, 3 *et seq.* (at para. 12), the ICJ stated that the essential facts of the case were a matter of public knowledge, having received extensive coverage in the world press. It further stated that since the Iranian Government, to which all the information had been communicated, had not questioned such information; the Court was satisfied that the allegations of facts on which the United States based its claims were well-founded. For example, while assessing the claim of Uganda (*Case Concerning Armed Activities on the Territory of the Congo*, see note 25, at para. 129) that it acted in self-defence, the ICJ not only considered reports submitted by the parties but also referred to documents distributed by NGOs, which it considered as being in the public domain.

is objected to” is not sufficient. The refusal of a party to produce evidence that had been requested may be of relevance. The ICJ, like other international adjudicative bodies, may draw conclusions from a party’s refusal to produce a document or to give an explanation necessary to disprove a fact submitted by the other party. Such refusal may be considered as amounting to an admission.

The absence of facts (negative facts) raises problems concerning the burden of proof and also the standard of proof. International jurisprudence of international adjudicative bodies seems to indicate that the *negativa non sunt probanda* rule of Roman law does not apply.³⁴ The ICJ has, however, acknowledged the difficulties that arise from the necessity to prove the absence of a fact.³⁵

The provisions on evidence of the ICJ and of the Tribunal do not refer to the use of presumptions as evidence. Nevertheless, international adjudicative bodies make use of reasoning based on presumption.³⁶ It is common to distinguish between presumptions of fact (judicial presumptions or inferences) and presumptions prescribed by law (legal presumptions). Presumptions of fact are established tools of reasoning. Based upon general experience, judges may draw conclusions from certain established facts to the existence of other facts. Legal presumptions may have their basis either in international treaties or other texts. For example, the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides that under certain conditions, a warship may board a foreign vessel on the high seas if the request to the flag State for permission to board the ship was not responded to within four hours. In this case, the failure to respond is presumed to constitute permission.

In spite of the investigative powers that international courts and tribunals enjoy to various degrees, the *actori incumbit probatio* principle becomes relevant in the phase of assessing the evidence. If the relevant facts sustaining the claimant’s contention cannot be regarded as proven after all the evidence before it has been evaluated by the court, such claim will be dismissed. The same applies to the defences of the other party if the facts sustaining such defences cannot be proven. The *actori incumbit probatio* principle has been modified for several reasons.

³⁴ Kolb, in: Zimmermann *et al.*, see note 18, 824 *et seq.*

³⁵ In the *Nicaragua* case, the ICJ stated that “[t]he evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to the allegation, Nicaragua has to prove a negative”, see note 6, 14 *et seq.*, at 80 (para. 147). This indicates that threshold of the standard of proof may be lowered in such cases.

³⁶ C.F. Amerasinghe, “Presumptions and Inferences in Evidence in International Litigation”, *LPICT* 3 (2004), 395 *et seq.*; Y. Chang, “Legal Presumptions and Admissibility of Evidence in International Adjudication”, *Annals of the Chinese Society of International Law* 3 (1966), 1 *et seq.*; T.M. Franck/P. Prows, “The Role of Presumptions in International Tribunals”, *LPICT* 4 (2005), 197 *et seq.*

The distinction between the applicant and the respondent is not always clear in international adjudication. This is particularly true when the case has been brought by special agreement. As opposed to contentious litigation, there are no parties in advisory proceedings. Accordingly, there can be no burden of proof. Nevertheless, advisory proceedings naturally raise questions of fact. Whether the international court or tribunal has enough facts to decide the question put to it is a factor which it has to take into account when discussing the propriety of giving the opinion.

There is no hierarchy among the different kinds of evidence. Documentary evidence or expert testimony does not have a higher probative value than witness testimony or vice versa. It is for the adjudicative body to decide in each case on the probative value of each piece of evidence presented and considered of relevance. In the *Armed Activities on the Territory of the Congo* and the *Application of the Genocide Convention* cases, the ICJ gave some indication on the method of evaluating evidence.³⁷

Neither the ICJ nor other international courts or tribunals have discussed in detail the matter of the standard of proof to be applied or indicated the standard they used to reach their decision. A positive exception is the Eritrea-Ethiopia Claims Commission. Two standards of proof are most frequently referred to in international adjudication, namely, “proof beyond reasonable doubt” and “preponderance of evidence”. The parties to a dispute may agree on a particular standard to be applied.

Proof beyond reasonable doubt requires a high degree of cogency. It means that the evidence weighs heavily in one direction. Preponderance of evidence means that the evidence adduced by one party on the basis of reasonable probability weighs heavier than the evidence produced by the other side. The difference between these two standards may, in fact, be small.

The standard of proof in international litigation among States, in general, is the preponderance of evidence. There are exceptions to this rule, though. International courts and tribunals have to establish their jurisdiction beyond reasonable doubt. This is due to the fact that the jurisdiction of adjudicative bodies is based upon the consent of the States concerned. There must be no reasonable doubt that such consent existed. Apart from that, a tendency has developed that allegations against a State which imply a negative ethical judgment (violation of human rights or of international humanitarian law) have to be proven beyond reasonable doubt. For example, the ICJ applied a high standard of proof (without referring to the standard “beyond reasonable doubt”) in respect of the allegation by the United Kingdom in the *Corfu Channel* case (Merits) that the minefields

³⁷ *Case Concerning Armed Activities on the Territory of the Congo*, see note 25, at paras 59 *et seq.* *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, see note 8, at paras 211 *et seq.*

in question had been laid with the connivance of the Albanian Government.³⁸ This rule has recently been reaffirmed in the *Application of the Genocide* case.³⁹ In international criminal law it is established that the guilt of the accused has to be proved beyond reasonable doubt.

In some instances, the standard of *prima facie* evidence is used. This standard means that the adjudicative body decides provisionally on the basis of evidence submitted by one party, mostly the applicant. In fact, the assessment establishes whether the application meets a plausibility test on the basis of the evidence submitted in its support. *Prima facie* evidence shifts the burden of proof from the proponent of the burden of proof to the other party. By providing *prima facie* evidence, the claimant discharges its burden of proof. The respondent has to rebut such evidence whereupon the burden of proof shifts back to the proponent. If the respondent does not respond, it is for the adjudicative body to decide whether the evidence submitted is strong enough to sustain the claim. This shows that *prima facie* evidence is not to be confused with the principle of *actori incumbit probatio*.

It is often argued that international courts or tribunals should more clearly identify which standard of proof they have used or that such standard should be enshrined in the respective rules. The effect of such approach is limited as far as the objectivity of the decision is concerned. Even if the standard of proof is identified in a particular judgment, this says little about how each judge decided on the factual situation. The decision of each judge to be convinced, or not to be convinced, by the evidence submitted embraces a subjective element. This decision is influenced by past experience and, probably, the professional or other background of each judge. Therefore, identifying the standard of proof does not necessarily render the judgment less subjective. However, identifying the standard of proof and explaining why a particular conclusion was reached provides for more transparency and forces the adjudicating body to deal with this point intensively in its deliberations.

IV. Conclusions

The legitimacy of judgments of international courts and tribunals has been questioned recently. In particular it has been said that international adjudicative bodies lack accountability compared to national judges. This is not the place to deal with this issue in depth, but such sentiments should not be discarded lightly,

³⁸ The *Corfu Channel* case (*United Kingdom of Great Britain and Northern Ireland v. Albania*) (Merits), ICJ Reports 1949, 4 *et seq.*, at 15-16.

³⁹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, see note 8, at paras 209-210.

all the more so if they become commonplace, since they touch upon the roots of the international adjudicative system. There is, actually, little room to improve upon the legitimacy but there are possibilities for enhancing the transparency of international adjudicative decisions. One of them is to clearly explain to the parties to a conflict how the international court or tribunal in question assessed the evidence presented or at its disposal and what was decisive in reaching a conclusion on the factual situation. This would include clearly identifying the standard of proof. Furthermore, it would be helpful if the court in question also explained why it considered certain facts to be relevant and others not. Finally, it would increase the transparency of their decisions if the courts and tribunals established a relationship with the parties to the conflict ensuring that the decision rendered does not come as a complete surprise. This would require a more active role for international courts and tribunals *vis-à-vis* the parties than they are mostly willing to undertake at present.