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GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

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Chapter 16

PROOF AND BURDEN OF PROOF

In a previous Chapter mention was made of the opinion of the Permanent Court of International Justice that the Court, as a judicial body, should not be left to ascertain the facts of the case.[1] It falls primarily upon the parties, therefore, to place the facts of the case before the Court, although a Court may also require points not dealt with by the parties to be further elucidated.[2] When this has been done,

" [The Court] must consider the totality of the allegations and evidence laid before [it] by the Parties, either *motu proprio* or at [its] request and decide what allegations are to be considered as sufficiently substantiated." [3]

It may be said that the aim of an international tribunal is to arrive at a moral conviction [4] of the truth and reality of all the relevant facts of the case upon which its decision is to be based.[5]

"It is for the Arbitrator to decide both whether allegations do or—as being within the knowledge of the tribunal—do not need

[1] *Supra*, p. 298.
[2] *Cf.* P.C.A.: *Palmas Case* (1928), 2 H.C.R., p. 83, at p. 85.
[3] *Ibid.*, at p. 95.
[4] *Cf., e.g.*, Germ.-Ven. M.C.C. (1903): *Faber Case, Ven.Arb. 1903*, p. 600, at p. 622: ". . . Judge J. C. Bancroft Davis said, in *Caldera Cases* (15 C.Cls.R. 546) (a Dissenting Opinion, p. 666): 'In the means by which justice is to be attained the Court is freed from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces *moral conviction*. This proposition is self-evident. . . .'"
Germ.-U.S. M.C.C. (1922): *Drier Case* (1935), *Dec. & Op.*, pp. 1037, 1079; Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930), D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109.
[5] *Cf., e.g.*, Mex.-U.S. G.C.C. (1923): *Parker Case* (1926), *Op. of Com.* 1927, p. 35, at p. 39: " The greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted."
Brit.-Mex Cl.Com. (1926): *Cameron Case* (1929), *Dec. & Op. of Com.*, p. 33, at p. 34: " Ascertain the truth in a manner which is not subject to any restriction."
PCIJ: *Oscar Chinn Case* (1934), S.O. by van Eysinga, A/B. 63, pp. 146-147: " The Court is not tied to any system of taking evidence, . . . Its task is to co-operate in the objective ascertainment of the truth."
ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports 1949*, p. 1, at p. 20. The I.C.J. spoke of " its search for the truth."

evidence in support and whether the evidence produced is sufficient or not." [6]

While international tribunals are thus "entirely free to estimate the value of statements made by the Parties," [7] their activity in this regard is nevertheless governed by a large number of general principles of law recognised by States *in foro domestico*. In the succeeding pages some of the general principles of law concerning proof and burden of proof applied by international tribunals will be examined.

JUDICIAL NOTICE

First of all, as the above quotation indicates, certain allegations of the parties that are within the knowledge of the tribunal need no evidence in support.[8] "*Judicial notice*" is taken of the facts averred.[9] Proof may thus be dispensed with as regards facts which are of common knowledge or public notoriety [10] or which, in the circumstances of the case, are self-evident.[11]

[6] *Palmas Case* (1928), 2 H.C.R., p. 83, at p. 95.
[7] PCIJ: *German Interests* (Merits) (1926), A. 17, p. 73. Franc.-Mex. M.C.C. (1924): *Pinson Case* (1928), *Jurisprudence*, p. 1, at p. 14: " In the matter of evidence, I consider . . . as fundamental the complete freedom of the Franco-Mexican Commission in admitting any evidence which it deems fit and in determining its value " (Transl.). See further *infra*, pp. 307–8.
[8] *Supra*, p. 302. In that case, the Treaty of Utrecht invoked by one of the parties was not in the record produced but was nevertheless taken into consideration by the Tribunal because its text " is of public notoriety and accessible to the Parties " (*Palmas Case* (1928), 2 H.C.R., p. 83, at p. 96.
[9] See Sandifer, *Evidence Before International Tribunals*, 1939, pp. 269–278.
[10] Germ.-U.S. M.C.C. (1922): *Mendel Case* (1926). Concerning what took place with regard to the former German colony of New Guinea before, during and since the First World War, the Commission said: " From the record therein and *from historical sources and official reports of which the Commission takes judicial notice* it appears . . . ." (*Dec. & Op.*, p. 772, at p. 784. Italics added).
Cf. Charter of the I.M.T. (Nuremberg), Art. 21. Charter of the I.M.T. for the Far East, Art. 13 (d). Judicial notice is to be taken of facts of common knowledge and also official government documents of the United Nations.
[11] *e.g.*, Portugo-German Arbitration (1919): *The Cysne* (1930), 2 UNRIAA, p. 1011, at p. 1056: " As has been maintained by the claimant, the captor of a neutral prize *must*, in principle, take it to port [1] ([1] Art. 48, Declaration of London). If he makes use of the *exceptional* right to destroy his capture, he *must* prove [2] ([2] Art. 51, Declaration of London) that he had acted in the face of such necessity as is envisaged in Art. 49. *But this proof*, contrary to the Portuguese contention, *is unnecessary, if it is obvious* that the captor, because of its type, was not in a position to escort the seized vessel or to detach a prize crew. This was certainly the case with a German submarine, Mark 1915, operating in the western parts of the Channel [3] ([3] . . . . .). Its extreme vulnerability and the weakness of its armament would practically exclude the possibility of its escorting the prize. Moreover, the small number of German submarines [4] ([4] . . . . .), did not make it possible for a unit to leave its sector in order to escort a prize of little importance, without involving danger,

In this connection it may be mentioned that the information obtained by a tribunal through an inspection of the places concerned in proceedings ("*descente sur les lieux*"), a procedure which has sometimes been applied in international arbitral and judicial proceedings,[12] presents considerable affinity with judicial notice.

PRESUMPTIONS

Proof may also be dispensed with as regards facts, the truth of which, though not within judicial knowledge, is presumed by the tribunal. Without going so far as to holding them to be true, it is legitimate for a tribunal to presume the truth of certain facts or of a certain state of affairs, leaving it to the party alleging the contrary to establish its contention. These presumptions serve as initial premises of legal reasoning.

in the sense of Art. 49 of the Declaration of London, to the success of the operations in which she was engaged. The crews of submarines, reduced to the strict minimum, were too small for detaching prize crews, especially when operating at a great distance from the German coast. It must therefore be conceded to Germany that the German submarine 41 was, in fact, in the exceptional situation envisaged in Art. 49 of the Declaration of London" (Transl. Italics added). *N.B.*—proof was considered unnecessary, even when Art. 51 of the Declaration of London prescribes that the captor has to "establish" that he was acting in a case of necessity. An argument may thus be based on logical deduction from the circumstances of the case.

[12] *Cf.* PCIJ: *Meuse Case* (1937) A/B. 70, p. 9; Order of May 13, 1937, Ser. C. 81, pp. 553–4. This Order was made under Arts. 48 and 50 of the Statute. On the suggestion of the Belgian Government which met with no opposition on the part of the Government of the Netherlands, the Court decided to visit the places concerned in the proceedings and there witnessed practical demonstrations of the operation of locks and of installations connected therewith. Manley O. Hudson, one of the judges who took part in the inspection, writing afterwards in 31 A.J.I.L. (1937), p. 696, "Visits by International Tribunals to Places concerned in Proceedings," said: "The Court viewed the Belgian suggestion, not as an offer to present evidence, but as an invitation to the Court to procure its own information" (p. 697). The procedure may thus be regarded as a means for edifying the judicial knowledge.

Cf. also *Tillett Case* (1890). Concerning the question of treatment in prison of Antwerp, the Arbitrator went to inspect the place itself "in order, by means of a full knowledge of the case, to solve certain questions which seemed doubtful to me." (92 B.F.S.P. (1899–1900), p. 105, at p. 105. Transl.)

Other international precedents of "*descents sur les lieux*" include the *Meerauge Boundary Arbitration* (1902), Martens, III (3) N.R.G., p. 71; at p. 72. P.C.A.: *Grisbadarna Case* (1909), Norway/Sweden, *Recueil des Comptes rendus de la visite des lieux et des Protocols des séances du Tribunal arbitral, constitué en vertu de la Convention du 14 mars 1908, pour juger la question de la délimitation d'une certaine partie de la frontière maritime entre la Norvège et la Suède*, 1909.

Cf. also the use of experts to inspect the places, ICJ: *Corfu Channel Case* (Order of December 17, 1948) *ICJ Reports 1947–1948*, p. 124; (Merits) (1949) *ICJ Reports 1949*, p. 4, at p. 9. The opinion of the Court's experts, although no doubt of great weight, differs, however, in nature from the information acquired by the Court itself (*cf.*, *e.g.*, *ICJ Reports 1949*, p. 4, at p. 21).

International tribunals have applied a number of *presumptions founded on general principles of law.* In the first place, international tribunals constantly have recourse to the rebuttable presumption of the regularity and validity of acts and recognise that this is a general principle of law. Thus, the Umpire in the German-Venezuelan Mixed Claims Commission (1903) held that:—

"*Omnia rite acta praesumuntur.* This universally accepted rule of law should apply with even greater force to the acts of a government than those of private persons." [13]

Similarly, according to another general principle of law, good faith is to be presumed,[14] whilst an abuse of right is not. "It rests with the party who states that there has been such misuse to prove his statement." [15] In the sphere of international law, it follows from these important presumptions that, as the *Rapporteur* in the Spanish Zone of Morocco Claims (1923) said:—

"The international responsibility of the State is not to be presumed." [16]

[13] *Valentiner Case*, *Ven.Arb. 1903*, p. 562, at p. 564. U.S. Domestic Commission: Mexican Claims (Act of 1849): *Felix Case*, 3 *Int.Arb.*, p. 2800, at p. 2811: Regularity and Validity of a municipal judgment presumed. Mex.-U.S. G.C.C. (1923): *Robinson Smith Putnam Case* (1927) *Op. of Com. 1927*, p. 222, at p. 225: Municipal judgment to be respected save for "a clear and notorious injustice, visible, to put it thus, at a mere glance." Mex.-U.S. Cl.Com. (1868): *Black & Stratton Case*, 3 *Int.Arb.*, p. 3138: Confiscation by Mexican Officials. Fran.-Ven. M.C.C. (1902): *Frierdich & Co. Case*, Ralston's *Report*, p. 31, at p. 42: "The general presumption is that public officers perform their official duties, and that their official acts are regular. . . . Where some preceding act or pre-existing fact is necessary to the validity of an official act, the presumption in favour of the validity of the official act is presumptive proof of such preceding act or pre-existing fact." Ital.-Ven. M.C.C. (1903): *Guerrieri Case*, *Ven.Arb. 1903*, p. 753, at p. 754. The Neth.-Ven. M.C.C. (1903): *Bembelista Case*, *Ven.Arb. 1903*, p. 900, at p. 901. Fran.-Mex. Cl.Com. (1924): *Nájera Case* (1928) *Jurisprudence*, p. 156, at p. 177: Regularity and validity of an option of nationality accepted by the Government concerned. *Salem Case* (1932) 2 UNRIAA, p. 1161, at p. 1186: Regularity and validity of naturalisation presumed. Mex.-U.S. G.C.C. (1923): *Chazen Case* (1930), *Op. of Com. 1931*, p. 20, at p. 32: An auction sale. ICJ: *Corfu Channel Case* (Merits) (1949) D.O. by Ečer, *ICJ Reports 1949*, p. 4, at pp. 119–20, 127, 129.

[14] Fran.-Ven. M.C.C. (1902): *Frierdich & Co. Case*, Ralston's *Report*, p. 31, at p. 42. PCIJ: *Lighthouses Case* (1934) S.O. by Séfériadès, A/B. 62, p. 47. PCIJ: *Mavrommatis Jerusalem Concessions Case* (1925) A. 5, p. 43. P.C.A.: *Norwegian Claims Case* (1922) 2 H.C.R., p. 39, at p. 57.

[15] PCIJ: *German Interests Case* (Merits) (1926) A. 7, p. 30: see French text which is more explicit. PCIJ: *Free Zones Case* (Second Phase: Order) (1930) A. 24, p. 12.

[16] Claim 28: *Haj Mohamed Harrej (Tanger, Horses) Case* (1924), 2 UNRIAA, p. 615, at p. 699. (Transl.) *Cf.* ICJ: *Corfu Channel Case* (Merits) (1949) D.O. by Ečer, *ICJ Reports 1949*, p. 4, at p. 119: "I consider therefore that

The party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion.[17]

If good faith and the observance of law may be regarded as the general rule and not the exception, as indeed they should be, the above presumptions may be said to belong to a still wider principle that what exists as a general rule will be presumed while he who alleges an exception to this general rule incurs the burden of substantiating his allegation. As Commissioner Gore said in the case of *The Neptune* (1797):—

" Whoever will derive to himself advantage by the exception to a general rule, or by an interference with the generally acknowledged rights of another, is bound to prove that his case is completely within the exception." [18]

Since sovereignty and independence of States constitute the cardinal rule of international law,

" Restrictions upon the independence of States cannot . . . be presumed." [19]

The party alleging such restrictions or wishing to derive a right therefrom must prove the exception to the general rule.[20] In general, it may be said that what is normal, customary or the more probable is presumed, and that anything to the contrary has to be proved by the party alleging it.[21]

in international law there is a presumption in favour of every State, corresponding very nearly to the presumption in favour of the innocence of every individual in municipal law. There is a *presumptio juris* that a State behaves in conformity with international law."

17 *Cf.* Portugo-German Arbitration (1919): *Claims for Losses suffered in Belgium* (1930) 2 UNRIAA, p. 1011, at p. 1040, § 4.

18 Jay Treaty (Art.VII) Arbitration (1794): 4 *Int.Adj.*, M.S. p. 372, at p. 407. The right of the neutral to carry on commerce with either of the parties at war being recognised by the Tribunal, the party who alleges contraband must prove his allegation. See also Brit.-U.S. Cl.Arb. (1910): *The Wanderer* (1921) Nielsen's *Report*, p. 459, at p. 462.

19 PCIJ: *The Lotus* (1927), A. 10, p. 18. *Id.*: *Free Zones Case* (Second Phase: Order) (1930), A. 24, p. 12.

20 *Cf.* P.C.A.: *North Atlantic Coast Fisheries Case* (1910), 1 H.C.R., p. 141, at p. 157. The general principle being that territory is conterminous with sovereignty, if the United States asserts that the right to regulate the fishery industry in British waters does not reside independently in Great Britain, she incurs the burden of proving such an exception to the general rule.

21 PCIJ: *Eastern Greenland Case* (1933), A/B. 53, p. 49: " The geographical meaning of the word 'Greenland,' *i.e.*, the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the parties that some unusual or exceptional meaning is to be attributed to it, it lies on that party to establish its contention." See also, *ibid.*, p. 52.

THE ADMISSION AND THE APPRAISAL OF EVIDENCE

Allegations of the parties of the truth of which the tribunal does not take judicial notice or which are not presumed by it, have to be proved, unless they are admitted by the other party.[22] Those which are not proved need not be taken into consideration by the tribunal: *Idem est non probari non esse.*[23] The conviction of the Tribunal as to the truth of the assertions of the parties is secured by means of evidence. In the *Faber Case* (C.1903), the following definition of evidence is to be found:—

" ' In its wider and universal sense it [evidence] embraces all means by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. (1 Green, Ev., sec. 1).' " [24]

Apart from special provisions, international tribunals claim, and indeed exercise, complete freedom in the admission and evaluation of evidence in order to arrive at the moral conviction of the truth of the whole case.[25] With regard to the appraisal of evidence, however, as the American Commissioner in the Mexican-United States General Claims Commission (1923) said in one of his concurring opinions:—

22 Exceptionally, however, the admission by the other party of a fact alleged does not relieve the party alleging it from bringing adequate proof, in cases where the truth of the fact alleged is a condition *sine qua non* for the right of action of a party or for the jurisdiction of the tribunal. See Mex.-U.S. G.C.C. (1923): *Hatton Case* (1928), *Op. of Com. 1929*, p. 6, at p. 8. *Cf.* ICJ: *Corfu Channel Case* (Merits) (1949), D.O. by Azevedo, *ICJ Reports 1949*, p. 1, at p. 84.

23 *Cf., e.g.*, ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports 1949*, p. 1, at pp. 15–7: " Although the United Kingdom Government never abandoned its contention that Albania herself laid the mines, very little attempt was made by the British Government to demonstrate this point. . . . . Although the suggestion that the minefield was laid by Albania was repeated in the United Kingdom statement in Court on January 18, 1949, and in the final submissions read in Court on the same day, this suggestion was in fact hardly put forward at that time except *pro memoria*, and no evidence in support was furnished. In these circumstances, the Court need pay no further attention to this matter. . . .

" The Court need not dwell on the assertion of one of the counsel for the Albanian Government that the minefield might have been laid by the Greek Government. It is enough to say that this was a mere conjecture which, as counsel himself admitted, was based on no proof."

24 Germ.-Ven. M.C.C. (1903): *Ven.Arb. 1903*, p. 600, at p. 622.

25 Fran.-Mex. Cl.Com. (1924): *Pinson Case* (1928), *Jurisprudence*, p. 1, at p. 94. See also *ibid.*, p. 48. *Shufeldt Case* (1930), 2 UNRIAA, p. 1079, at p. 1083. Neth.-Ven. M.C.C. (1903): *Evertsz Case*, *Ven.Arb. 1903*, p. 904, at p. 905. P.C.A.: *Palmas Case* (1928), 2 H.C.R., p. 83, at pp. 95–6. U.S.: War Claims Arbiter (Act of 1928): *Administrative Decision No. II* (1928) 23 A.J.I.L. (1929), p. 659, at pp. 667–8.

See also case cited *supra*, p. 302, notes 4 and 5, p. 303, note 7.

"This Commission cannot apply strict rules of evidence such as are prescribed by domestic law, but it can and must give application to well-recognised principles underlying rules of evidence and of course it must employ common-sense reasoning in considering the evidential value of the things which have been submitted to it as evidence." [26]

Speaking for the Commission in a subsequent case, the same Commissioner said:—

"With respect to matters of evidence they [international tribunals] must give effect to common-sense principles underlying rules of evidence in domestic law." [27]

General principles of law prevailing *in foro domestico* relating to evidence must, therefore, be applied. In this connection, it may be mentioned that the above cases disprove the theory which tends to regard the general principles of law recognised by civilised nations as a kind of mathematical highest common factor among the various systems of municipal law, including all their particularities introduced on account of special circumstances. It shows, on the contrary, that a much broader approach has to be adopted in order to arrive at the common underlying principles, without regard to the particularities of individual systems.[28]

As, however, the appraisal of evidence is an intellectual process depending upon the circumstances of each case, any attempt to itemize broad principles governing such subjective mental activity must perforce be somewhat hazardous.[29] In

[26] *Mallén Case* (1927), C.O. by American Commissioner, *Op. of Com. 1927*, p. 254, at p. 268.

[27] *Kling Case* (1930), *Op. of Com. 1931*, p. 36, at p. 45. *Id.*: *Dillon Case* (1928), C.O. by American Commissioner, *Op. of Com. 1929*, p. 61, at p. 65. P.C.A.: *Norwegian Claims Case* (1921), *Counter Case of the U.S.*, Washington, 1922, p. 4.

[28] *Cf.* also Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930), D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109: "Under the rules governing the procedure of the Commission we are not bound by the laws of evidence prevailing in Mexico or in England or in any other country. But it is our duty to apply general principles of justice and equity and to give to any oral evidence or document produced before us such evidential value as we consider in all the circumstances of the case it ought to carry."

[29] *Cf.* British India: Appellate High Court: *The Queen* v. *Madhub Chunder Giri* (1873), Sutherland 21, *The Weekly Reporter* (1874), Criminal Rulings, p. 13, at p. 19, c. 2, *per* Birch J.: "For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and common sense and shrewdness must be brought to bear upon the facts elicited in every case."

particular, it should be pointed out that the following principles inferred from the practice of international tribunals are not to be considered as in any sense absolute. They can either support one another to increase the value of the evidence, or they may cancel each other out so that the value of the evidence is diminished. The determining factor can thus only be ascertained after judiciously weighing all the relevant considerations.

STATEMENTS AND AFFIDAVITS OF THE CLAIMANT

Generally speaking, unless the fact or state of affairs be within judicial notice or presumed, the mere *ex parte* statements of the facts by the interested party in a dispute are not considered as evidence and do not constitute sufficient proof of the facts alleged. In the *Odell Case* (1931), before the British-Mexican Claims Commission (1926), the claimant alleged that he had been forced to conduct a military train and was subsequently injured in the derailment of the train caused by Mexican revolutionary forces. No other evidence was adduced relative to the whole incident. Held:—

"The Commissioners do not deny that the description of the derailment, as given by the claimant, and taken as a whole, bears a certain appearance of truth, but a judicial decision cannot be based on this personal impression alone. . . . A decision which imposes upon a State a financial liability towards another State, cannot rest solely upon the unsupported allegations of the claimant. . . . If an international tribunal were to accept all these allegations without evidence, it would expose itself to the not unjustifiable criticism of placing jurisdiction as between nations below the level prevailing in all civilised States for jurisdiction as between citizens." [30]

Even where absolute sincerity and good faith are not in doubt, the statement of the facts in the pleadings by one of the interested parties, being a partial statement drawn up specially to present the case in the best possible light, cannot be considered

[30] *Further Dec. & Op. of Com.*, p. 61, at pp. 62–3. *Cf.* also I.C.J.: *Corfu Channel Case* (Merits) (1949), *ICJ Reports 1949*, p. 4, cited *supra*, p. 307, note 23.

Cf., however, Mex.-U.S. G.C.C. (1923): *Hatton Case* (1928), *Op. of Com. 1929*, p. 6, at p. 10: "The proof of the value of the animals taken is meagre, but since it has not been contested, the claimant should have an award for the amount asked." *N.B.*, the amount was not contested. *Cf. infra*, p. 319, note 80.

as evidence and regarded as conclusive.[31] A tribunal must base its decisions upon allegations of the truth of which it is convinced, and not upon those which merely have a semblance of truth.[32] It appears from the above decision that a departure from this principle would be a violation of the international minimum standard for the administration of justice.

Moreover, allegations of the interested parties may often contain exaggerations and even misrepresentations on account of the personal interest at stake, a factor which must be taken into account,[33] although, as the Mexican-United States General Claims Commission (1923) has indicated, "exaggerations and even misrepresentations of facts on the part of claimants are not so uncommon as to destroy the value of their contentions."[34]

As we shall see, an oath is regarded as a considerable safeguard of veracity.[35] In the *National Paper and Type Co. Case* (1928), counsel for the claimant argued before the Mexican-United States General Claims Commission (1923) that since the memorial containing the allegations of fact had been sworn to by the claimant, there was in fact an affidavit in support of the allegations before the Commission. The Commission ruled, however, that the verification of the memorial prescribed by the rules of the Commission would not justify the view that "a pleading might be regarded at once as a pleading and as evidence."[36]

Sworn statements emanating from the claimants, may, however, be legitimately considered by a tribunal.[37] But with regard to affidavits in general and uncorroborated affidavits of the claimants in particular, the British-Mexican Claims Commission (1926) said:—

"In its decision on the demurrer, filed by the Mexican Agent in the name of Mrs. V. C. [*sic*] Cameron, the Commission has made

[31] Brit.-U.S. Cl.Arb. (1910): *Studer Case* (1925), Nielsen's *Report*, p. 547, at p. 552.
[32] *Cf. infra*, pp. 325, 326.
[33] *White Case* (1864), 2 *Arb.Int.*, p. 305, at p. 322. Mex.-U.S. G.C.C. (1923): *Chattin Case* (1927), *Op. of Com. 1927*, p. 422, at p. 438.
[34] *Mallén Case* (1927) *Op. of Com. 1927*, p. 254, at p. 256. *Id.*: *Walter H. Faulkner Case* (1926), *ibid.*, p. 86, at pp. 90–91.
[35] *Infra*, pp. 312 *et seq.*
[36] *Op. of Com. 1929*, p. 3, at p. 4.
[37] Mex.-U.S. G.C.C. (1923): *Dillon Case* (1928), C.O. by American Commissioner *Op.of Com. 1929*, p. 61, at p. 65. See also *ibid.*, pp. 62–63.

known its attitude as to affidavits in general. The unanimous view of the Commissioners was expressed as follows:—

> "'It is true, no doubt that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commissioners to decide according to the circumstances of a particular case. Affidavits must and will be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether.'
>
> "...
>
> "It may be useful for the further guidance of the Agents, that the Commission announces that its majority has come to the conclusion, in general, that unsupported affidavits of claimants possess the very defective character of which the quotation speaks, and that only in cases of the rarest exception, they can be accepted as sufficient evidence. Such documents are sworn without the guarantee of cross examination by the other party; in nearly all cases a false statement will remain without penalty, and, as they are signed by the party most interested in the judgment, they cannot have the value of unbiased and impartial outside evidence."[38]

Personal interest of the deponent and the uncontrolled character of his affirmation are, therefore, important considerations which generally deprive a claimant's affidavit of much of its probative force. Thus the British-Mexican Claims Commission (1926) dismissed a large number of claims based solely on uncorroborated affidavits of the claimant,[39] and, as it said in the *Engleheart Case* (1931):—

"An unsupported affidavit of the claimant cannot be considered as outside evidence, it is part of the claim itself."[40]

[38] *Mexico City Bombardment Claims* (1930), *Dec. & Op. of Com.*, p. 100, at pp. 102–103. The decision referred to is that on the claim of Mrs. V. L. Cameron, *ibid.*, p. 33, at p. 35.
[39] *Tracy Case* (1930), *Dec. & Op. of Com.*, p. 118, at p. 121; *Leigh Case* (1931), *Further Dec. & Op. of Com.*, p. 80, at p. 83; *Lynch Case* (Claim No. 32) (1931), *ibid.*, p. 101, at p. 103; *Payne Case* (1931), *ibid.*, p. 110, at p. 111; *Read Case* (1931), *ibid.*, p. 154, at p. 156; *Delamain Case* (1931), § 6, *ibid.*, p. 222, at p. 224; *Mackenzie and Harvey Case* (1931), *ibid.*, p. 277, at p. 280; *David Bruce Russell Case* (1931), *ibid.*, p. 278, at p. 280; *Debenture Holders of the New Parral Mines Syndicate and Blunt Case* (1931), *ibid.*, p. 281, at p. 286; *Bryant Case* (1931), *ibid.*, p. 361, at p. 362.
Pan.-U.S. G.C.C. (1926): *Agnes Ewing Brown Case* (1933), Hunt's *Report*, p. 85, at p. 94.
[40] *Further Dec. & Op. of Com.*, p. 65, at p. 66.

In the *Office belge de Vérification Case* (1926), however, the Belgo-German Mixed Arbitral Tribunal was of the opinion that, in the absence of other means of proof, the affidavit of the claimant could possess a special probative value on account of his recognised respectability (*honorabilité*) or on account of reasons adduced by him to explain why the production of better evidence was not possible.[41]

TESTIMONIAL EVIDENCE [42]

Testimony by third persons not interested in the claim is free from the defect of personal interest mentioned above which weakens the probative value of the statements by an interested party and, even if unsworn, is entitled, as the United States-Venezuelan Mixed Claims Commission (1903) said, to "such consideration as they may seem to deserve." [43] The same Commission also recognised, however, that:—

"Legal testimony presented under the sanction of an oath administered by competent authority will undoubtedly be accorded greater weight than unsworn statements." [44]

[41] 6 T.A.M., p. 704, at p. 706. Affidavits of the National Bank of Belgium, of an insurance company, etc. *Cf.* however, *infra*, p. 320, note 82, 2nd paragraph.
See also Mex.-U.S. G.C.C. (1923): *Dillon Case* (1928), *Op. of Com. 1929*, p. 61, at p. 62: "According to the affidavit of the claimant, and no evidence to the contrary having been produced, it is to be assumed that during all the time of his detention the claimant was kept incommunicado . . . and that no information was given him concerning the purpose of his arrest and detention." The affidavits were, however, considered insufficient evidence of other alleged ill-treatment in jail. The inherent difficulty in proving a negative fact seems to have been taken into account by the Commission. *Cf.*, however, the apparently more stringent requirement of proof in P.C.A.: *Chevreau Case* (1931), 2 UNRIAA, p. 1113, at p. 1133.

[42] *i.e.*, evidence by means of witnesses, as distinguished from documentary evidence.

[43] *Lasry Case*, *Ven.Arb. 1903*, p. 37, at p. 38.
Mex.-U.S. G.C.C. (1923): *Parker Case* (1926), *Op. of Com. 1927*, p. 35, at p. 37.
Cf. Brit.-Mex. Cl.Com (1926): *Bartlett Case* (1931), *Further Dec. & Op. of Com.*, p. 51, at p. 52.

[44] *Lasry Case*, *Ven.Arb.* 1903, p. 37, at p. 38.
Cf. an opinion on the legal effect of a solemn affirmation to speak the truth as a guarantee of veracity, D.O. by Mexican Commissioner, Brit.-Mex.Cl.Com. (1926): *Stacpoole Case* (1930) *Dec. & Op. of Com.*, p. 124, at pp. 128–29. The dissenting commissioner was clearly wrong, however, in considering an affidavit by the claimant as a "confession" in civil law countries and in believing that the subscription to a solemn affirmation always implied the possibility of cross-examination. He seemed also to have neglected entirely the moral effect of an oath or solemn affirmation.
Cf. Mex.-U.S. Special Cl.Com. (1923): *Naomi Russell Case* (1931), Opinion of American Commissioner who spoke of the "moral sanction" and "legal sanction," *Op. of Com., 1926–1931*, p. 144 at p. 54.

An oath always enhances the probative value of a statement whether emanating from a disinterested person, or from an interested party.[45] Thus in the *Fouilloux Case* (1922), the Franco-German Mixed Arbitral Tribunal, in the absence of any satisfactory evidence as to the value of the articles which were the subject of the claim, accepted the statement of the claimant after administering to him an oath in Court as to the sincerity and veracity of his claim.[46] An oath may be a sufficient consideration to give to the statement of a disinterested person satisfactory probative value and the character of being true. Thus the British-Mexican Claims Commission (1926), in accepting the affidavit of a third person as sufficient corroborative evidence, said:—

"He is himself not interested in the decision on the claim, and it is difficult to see why he should have committed perjury." [47]

The allegation of the claimant supported by the affidavit of even one creditable witness is thus often considered as sufficiently established in the absence of countervailing evidence,[48] although it has sometimes been contended that the testimony of one single witness cannot constitute full proof.[49] While trustworthy

[45] *Cf.* Brit.-Mex.Cl.Com. (1926): *Kidd Case* (Demurrer), *Dec. & Op. of Com.*, p. 50, at p. 51: "From one point of view, an affidavit sworn by a father concerning the birth of his child has more value than the statement [*sic*] he may make to the Registrar of Births, since the latter statements are not made upon oath." *Cf. infra*, p. 317, note 65.

[46] 3 T.A.M. p. 108, at p. 110. *Cf.* also Ital.-Ven.M.C.C. (1903): *Cervetti Case*, *Ven.Arb. 1903*, p. 658. In the absence of satisfactory evidence, the facts of the case were elucidated by means of examining the claimant under oath by the Commission.

[47] *Stacpoole Case* (1930), *Dec. & Op. of Com.*, p. 124, at p. 126.

[48] *Stacpoole Case* (1930) *ibid.* *Id*: *Ward Case* (1931), *Further Dec. & Op. of Com.*, p. 107. The same Commission in the *Payne Case* (1931) (*ibid.*, 110, at p. 111) recalled that in the *Mexico City Bombardment Claims* (1930), § 5 (*Dec. & Op. of Com.*, p. 100, at pp. 102–103), they accepted the depositions of those claimants only when they were corroborated by the affidavit of an independent witness, while rejecting that of another claimant whose deposition was not so corroborated. *Cf.* also the Mex.-U.S. G.C.C. (1923) in the *Chattin Case* (1927) (*Op. of Com. 1927*, p. 422, at pp. 438–39) explaining why the uncorroborated statement of claimants concerning ill-treatment in prison could not in general be accepted without reserve and why in the *Harry Roberts Case* (1926) (*ibid.*, p. 100) it was accepted only because it was corroborated by a contemporaneous statement of the American Consul.

[49] Brit.-Mex.Cl.Com. (1926): *Cameron Case* (Demurrer) (1929), Separate Opinion of Mexican Commissioner, *Dec. & Op. of Com.*, p. 33, at p. 49: "As a general rule the testimony of a single witness, however honourable he may be, cannot constitute full proof." The old adage *Testis unus testis nullus*, generally abandoned in modern legal systems, is not valid in international law where the judge enjoys complete freedom in assessing the evidence.

affidavits have been accepted as satisfactory evidence by international tribunals in the absence of rebutting evidence,[50] their defective character, as has already been mentioned, is not unrecognised by international tribunals.[51] As the sole Arbitrator in the *Walfisch Bay Case* (1911) observed:—

"All the evidence alluded to has been produced out of court, in the sense that the arbitrator has not been able to conduct any cross-examination and without being disputed, inasmuch as the party prejudiced by it has not cross-examined the witness either, circumstances which, though they do not deserve blame and appear easily explicable in the present case, certainly diminish the value of the evidence."[52]

It follows *a contrario* that where the testimony of a witness has successfully undergone the interrogation of the Court and the cross-examination by the opposing party, its value as evidence will be considerably enhanced.[53]

In general, in so far as they can be established, the antecedents and character of a person would influence the probative value to be attributed to his testimony,[54] and if conscious

[50] *Cf.* also Neth.-Ven. M.C.C. (1903): *Ertsz Case*, *Ven.Arb. 1903*, p. 904, at p. 905.

[51] See *supra*, pp. 310 *et seq.* *Cf.* also Chil.-U.S. Cl.Com. (1892): *E. C. Murphy Case*, 3 *Int.Arb.*, p. 2262, at p. 2265: see, however, D.O. by American Commissioner, *ibid.*, at p. 2272.

[52] *Award*, Recital XLVII (Cd. 5857, p. 29). *Cf.* Chil.-U.S. Cl.Com. (1892): *Thorndike Case*, 3 *Int.Arb.*, p. 2274, at pp. 2275–76.

[53] *Cf.* Brit.-Mex. Cl.Com. (1926): *Cameron Case* (1929), *Dec. & Op. of Com.*, p. 33. S.O. by British Commissioner: "Cross-examination in the true sense of the word means that a witness has to face the ordeal of an open court in which he is verbally cross-questioned by counsel, both with regard to the facts of the case, and his own antecedents and credibility. The value of this method of ascertaining the truth lies in the personal contact between the witness, who has no idea of what questions may be asked him, and the personality of the advocate who puts the questions to him. The effect of the evidence of a witness subjected to this ordeal may be completely destroyed. In this sense the evidence of a witness who has been cross-examined is of greater weight than an *ex parte* statement" (p. 43). The British Commissioner in a preceding passage appeared to construe the meaning of interrogation by the court too narrowly. While cross-examination may not be the exact term, interrogation may consist in questions freely put by the judge to the witness and in such a case what the British Commissioner has said with regard to cross-examination "in the true sense of the word" should apply all the more to the interrogation by the court. Interrogation by the court and cross-examination by the opposing party are admitted in the procedure of the P.C.I.J. (Statute, Art. 43 V, Rules (1936), Art. 53), I.C.J. (Statute, Art. 43 (5), Rules, Art. 53), the I.M.T. at Nuremburg (Charter, Arts. 16 (*e*), 17), and for the Far East (Charter, Arts. 9 (*d*), 11).

[54] *Cf.* Hague Commission of Inquiry: *The Tubantia* (1922), 2 H.C.R., p. 135 at p. 140. The Commission took into consideration that the witness was a person who had served a prison sentence. *White Case* (1864) 2 *Arb.Int.*, p. 305, at p. 322: "It appears indisputably from the documents that White, being at the time of his arrest a foreigner without occupation, without income and without fixed address, was not at all in a situation to warrant particular credence for his words" (Transl.).

On the other hand, the "known respectability" of a person may enhance the probative value of his testimony, see *supra*, p. 312.

untruth is found in a testimony, no weight will be attached to such statements.[55]

The purpose of evidence being to prove the truth of an alleged fact, testimony is useful only inasmuch as it purports to testify knowledge of its truth and reality. Thus the Mexican-United States General Claims Commission (1922) has held that:—

"Affidavits constitute full proof either when stating acts of the affiant or acts that said affiant knew directly, but when they contain hearsay evidence or only refer to rumours, their value diminishes considerably, at times to such an extent as to become void."[56]

For this reason, testimony even by persons directly or indirectly interested in a case may be accorded due weight if they are the persons best informed of the facts,[57] while testimony even by "respectable" persons would be given little, if any, weight,

[55] *Cf. White Case* (1864), *ibid.*, at p. 323. Having given examples of the deponent's "voluntary alterations of the truth," the award said: "One should not then attach any weight to the assertions of a man who shows so little respect for the truth" (Transl.).

Cf. also Germ.-U.S. M.C.C. (1922): *Lehigh Valley Railroad Co. Case* (1939), *Op. & Dec.*, p. 1.

[56] *McCurdy Case* (1929) *Op. of Com. 1929*, p. 137, at p. 141. Brit.-Mex. Cl.Com. (1926): *Shone Case* (1930), *Dec. & Op. of Com.*, p. 136, at p. 140. See also ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports 1949*, p. 4, at pp. 16–17, regarding the statements of the witness Kovacic. See also Krylov's D.O., *loc. cit.*, p. 68.

Cf. Walfisch Bay Case (1911), Cd. 5857, Recital XLIX. See also Recital LI (i).

Compare Brit.-Mex. Cl.Com. (1926): *Tracy Case* (1930) (*Dec. & Op. of Com.*, p. 118, at p. 121) with Mex.-U.S. G.C.C. (1923): *Pomeroy's El Paso Transfer Co. Case* (1930) (*Op. of Com. 1931*, p. 1, at p. 4). In the former case the affidavit of the president of a company on matters relating to the affairs of the company was accepted by the Commission, while in the latter case it was considered as of little value; for, in the latter case, the witness did not assume office till after the events in question had taken place. Consequently his knowledge of them was considered "second hand." A comparison of these two cases shows the importance of personal knowledge.

See also Chil.-U.S. Cl.Com. (1892): *Murphy Case*, 3 *Int.Arb.*, p. 2262, at p. 2271. Mex.-U.S. G.C.C. (1923): *Mallén Case* (1927), C.O. by American Commissioner, *Op. of Com. 1927*, p. 254, at p. 269.

[57] Mex.-U.S. G.C.C. (1923): *Dillon Case* (1928), C.O. by American Commissioner, *Op. of Com. 1929*, p. 61, at p. 65. *The Montijo Case* (1875), 2 *Int. Arb.*, p. 1421, at p. 1434. Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930), D.O. by British Commissioner, *Dec. Op. of Com.*, p. 100, at p. 109; *Scrope Case* (Merits) (1931), *Further Dec. & Op. of Com.*, p. 269, at pp. 270–1. Mex.-U.S. G.C.C. (1923): *Dyches Case* (1929), *Op. of Com. 1929*, p. 193, at p. 195.

if based on hearsay.[58] For the same reason, testimony should, as far as possible, be individual[59] and spontaneous.[60] The competency of the witness to grasp the exact truth of the things to which he testifies is naturally also an important consideration in estimating the value of his testimony.[61] The testimony of experts will, therefore, usually possess greater probative force.[62] Moreover, witnesses are only expected to testify to facts within their knowledge. The legal conclusion to be drawn from these facts is a matter for the tribunal.[63]

With regard to the testimony generally, it may be said in the words of the British-United States Arbitral Tribunal (1910) that "Allowance must be made for infirmities of memory,"[64]

[58] Mex.-U.S. Cl.Com. (1868) *Cramer Case* (1876) 4 *Int.Arb.*, p. 3250, at p. 3250: "Anyone who carefully reads the evidence of the three witnesses, one of whom was the United States consul, will acquire the conviction that it was obtained principally from hearsay." Claims dismissed for insufficiency of proof.

[59] *Cf.* Mex.-U.S. G.C.C. (1923): *Pomercy's El Paso Transfer Co. Case* (1930), *Op. of Com. 1931*, p. 1, at p. 5: "It is not denied that the statement of a person who confirms what another states in detail may have some value, but it is unquestionably true that in order to form a definite opinion each witness must set forth in his own manner the things he saw or knew since the comparison of different statements throws a light upon the facts equivalent to a confrontation of witnesses."

[60] *Cf.* Mex.-U.S. Cl.Com. (1868): *Ignacio Torres Case*, 4 *Int.Arb.*, p. 3798, at pp. 3799–800: "The civil law discountenances suggestive questions as much as the common law disapproves of leading questions. At least this is the case in those countries in which the civil law is the basis of the legal fabric, and with which I am acquainted; and I must suppose that it is so likewise in Mexico. The whole disapproval of leading or suggestive questions in the different law systems is dictated by morality and a simple sense of justice, which can no longer be disregarded, whatever used to be done in times happily past."

[61] *Cf.* Portugo-German Arbitration (1919): *Naulilac Incident* (1928), 2 UNRIAA, p. 1011, at p. 1020: Reservation made by tribunal on the probative force of the depositions of a person regarding conversations held in a language which he hardly understood although he was supposed to be an interpreter. *Cf.* also *ibid.*, p. 1024.

[62] Mex.-U.S. G.C.C. (1923): *I. R. Clark Case* (1928), *Op. of Com. 1929*, p. 131, at pp. 131–2: "Whatever may be the facts with respect to this particular matter, careful consideration must be given in connection therewith to what may be called expert testimony accompanying the memorial. This is an affidavit of a physician. . . ."

ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Report 1949*, p. 4, at p. 21. Pan.-U.S. G.C.C. (1926): *De Sabla Case* (1933), Hunt's *Report*, p. 379, at p. 448. Spanish Zone of Morocco Claims (1923), *Rapport VI* (1925), 2 UNRIAA, p. 615, at p. 735.

Cf. ICJ: *Corfu Channel Case* (Compensation) (1949) D.O. by Ečer *ICJ Reports 1949*, p. 244, at p. 253.

[63] Mex.-U.S. G.C.C. (1923): *Hatton Case* (1928) *Op. of Com. 1929*, p. 6, at p. 7: *Re* nationality.

Mex.-U.S. Special Cl.Com. (1923): *Naomi Russell Case* (1931) Opinion of American Commissioner, *Op. of Com. 1926–1931*, p. 44, at p. 54.

[64] Brit.-U.S. Cl.Arb. (1910): *Studer Case* (1925) Nielsen's *Report*, p. 547, at p. 552. Brit.-Mex. Cl.Com. (1926): *Cameron Case* (1929) *Dec. & Op. of Com.* p. 33, at p. 35. *Abu Dhabi Oil Arbitration* (1951) 1 I.C.L.Q. (1952), p. 247, at pp. 259–60.

and, between two testimonies, that which is nearer in time to the event attested will ordinarily be given greater credence.[65] While a circumstantial account of things and events would give the impression of veracity,[66] too detailed testimony may, in certain circumstances, also arouse suspicion.[67] While a certain amplification by a witness in his account through the addition of details does not destroy the value of his testimony,[68] inconsistencies, obscurities and patent errors contained in a deposition will obviously diminish its probative force.[69] Moreover, those who testify to things which are most unlikely,[70] obviously erroneous or naturally impossible will of course not be believed.[71]

As regards the credibility of witnesses in general, while it has been seen that persons who are not interested in the claim are generally considered impartial, where special relations exist between the witnesses and the party in whose favour they testify, such relations may be taken into account in weighing their testimony. In a claim presented on behalf of an individual, even though in international law this is regarded as the claim of his State,[71a] the personal, business or other relations between the individual claimant and the third persons whose testimony is offered may be legitimately considered by the tribunal.[72] In the *Walfisch Bay Case* (1911), which involved national claims, the Arbitrator, finding that:—

"The witnesses brought forward by one or the other depend in some way or other, by reason of nationality, residence, or office, on the State in whose favour they are giving evidence,"

[65] Brit.-Mex. Cl.Com. (1926): *Tracy Case* (1930) *Dec. & Op. of Com.*, p. 118, at p. 122; *Clapham Case* (1931), *Further Dec. & Op. of Com.*, p. 159, at p. 161. Chil.-U.S. Cl.Com. (1892): *Murphy Case*, 3 *Int.Arb.*, p. 2262.

[66] Brit.-Mex. Cl.Com. (1926): *Delamain Case* (Merits) (1931), *Further Dec. & Op. of Com.*, p. 222, at p. 224.

[67] Mex.-U.S. Cl.Com. (1868): *Ignacio Torres Case*, 4 *Int.Arb.*, p. 3798, at p. 3799.

[68] Hague Commission of Inquiry: *The Tubantia* (1922), 2 H.C.R., p. 135, at p. 137.

[69] Brit.-Mex. Cl.Com. (1926): *Shone Case* (1930), *Dec. & Op of Com.*, p. 136, at p. 140.

[70] Belgo-German M.A.T.: *Cattoor Case* (1924), 4 T.A.M., p. 702, at p. 704.

[71] ICJ: *Corfu Channel Case* (Merits) (1949), D.O. by Krylov, *ICJ Reports 1949*, p. 4, at p. 68.

[71a] See PCIJ: *Mavrommatis Palestine Concessions* (1924) A. 2, p. 12.

[72] Mex.-U.S. G.C.C. (1923): *Parker Case* (1926), *Op. of Com. 1927*, p. 35, at p. 37. *Cf.* Czechoslovak-German M.A.T.: Rules of Procedure, Art. 39 (1 T.A.M., pp. 948–57). Persons in the direct line of descent of the parties, brothers and sisters, uncles and nephews, and spouses, even when divorced, are disqualified as witnesses although they may be heard, not under oath, for the sake of information.

Cf. however, *supra*, p. 315.

stated that this fact,

"though it does not properly constitute a legal objection, is a ground for a reasonable presumption that they may accentuate their assertions, whether they wish it or not, in a definite sense." [73]

As regards testimonial evidence in general, therefore, the same Arbitrator adopted a method of appraisal which, he said,

"is in accordance with the rules of sane criticism, in conformity with the leading system in modern law and the only one acceptable in the proceedings of an international arbitration, in which no principle or positive rule imposes any other limit on the powers of the arbitrator,"

whereby, testimonial evidence introduced by either one of the parties,

"the value of which, being in favour of the high party which invokes it, should be weighed more carefully than is necessary when it is unfavourable to that party." [74]

In conclusion, it may be said that a tribunal in deciding whether to give credence to an allegation "should take into consideration all the circumstances of the affair, the inherent probability or otherwise of the alleged facts and the likelihood of, and opportunity for, fraud or exaggeration" [75] or error; and in examining testimonial evidence in general should consider "a person's sources of information and his capacity to ascertain and his willingness to tell the truth." [76]

DOCUMENTARY EVIDENCE

"Testimonial evidence," it has been said, "due to the frailty of human contingencies is most liable to arouse distrust." [77] On the other hand, documentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed

[73] *Award*, Recital XLVIII, Cd. 5857, p. 29. *Cf.*, on the other hand, Hague Commission of Inquiry: *The Tubantic* (1922) 2 H.C.R., pp. 135, 140: "The manner in which this witness has attempted to offer his testimony in favour of a foreign government is not likely to inspire the necessary confidence."

[74] *Award*, Recital XLVI, Cd. 5857, p. 29.

[75] Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930), D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109.

[76] Mex.-U.S. G.C.C. (1923): *Kling Case* (1930), *Op. of Com. 1931*, p. 36, at p. 47.

[77] See Mex.-U.S. Special Cl.Com. (1923): *Naomi Russell Case* (1931), *Op. of Com. 1926–31*, p. 44, at p. 184.

either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from this distrust and considered of higher probative value. As we have seen, however, an international tribunal "can assuredly also apply common-sense reasoning with respect to the value of what might be called purely documentary evidence." [78] On account of the great variety in the nature and form of documentary evidence it would be still more difficult here to give to such common-sense reasoning any precise formulation without falling into dangerous over-generalisation. It may, however, be said that similar considerations to those which influence the probative force of testimonial evidence apply *mutatis mutandis* to documentary evidence, particularly with respect to hearsay.[79]

With regard to the appraisal of evidence as a whole, it may be said that the amount of evidence required to sustain an allegation may vary with the nature of the allegation, its relative importance in the case, the strength of the legal and logical presumptions for or against such an allegation and the relative ease or difficulty for the parties to produce evidence in support or in rebuttal. Thus the Portugo-German Arbitral Tribunal (1919) has held that:—

"In their appraisal of the evidence, the arbitrators will be obliged to be strict with regard to the prejudicial act, its author, and its date; for these are the very conditions of their competency. They may be less severe with regard to the amount of damage and be satisfied with simple presumptions; taking into account particular difficulties the injured owners may have in establishing what took place in Belgium in their absence during the German occupation." [80]

[78] *Naomi Russell Case* (1931), *ibid.*, at p. 88.

[79] *Cf.* Brit.-Mex. Cl.Com. (1926): *Cameron Case* (Demurrer) (1929), S.O. by British Commissioner, *Dec. & Op. of Com.*, p. 33, at p. 44. The presumption in favour of government documents does not cover hearsay statements of fact. P.C.A.: *Palmas Case* (1928), 2 H.C.R., p. 83, at pp. 108–9, 111, with regard to maps based not on authentic information carefully collected but on existing maps.

[80] *Claims for Losses suffered in Belgium* (1930) 2 UNRIAA, p. 1011, at p. 1040. (Transl.)

Cf. Mex.-U.S. G.C.C. (1923): *McCurdy Case* (1929) *Op. of Com. 1929*, p. 137, at pp. 140–1: "In this case it is endeavoured to prove misconduct, in a grave degree, of Mexican officials and therefore the Agency advancing the

"BEST EVIDENCE" RULE

As a general rule, to quote the Final Report of the sole Commissioner of the United States Domestic Commission established pursuant to the Convention with Spain of February 17, 1834:—

"Each claimant was required to produce the highest evidence, which the nature of his claim admitted, to establish the allegations of his memorial." [81]

Where evidence of better quality should be available and its non-production is not satisfactorily explained, this will weigh against the party whose allegations may either be proved or disproved by such evidence.[82] Where documentary evidence should be available, this must be produced.[83] The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production.[84]

charge should submit evidence of the highest and most conclusive character." ICJ: *Corfu Channel Case* (Merits) (1929) *ICJ Reports 1949*, p. 4, at p. 17. A charge of less gravity, it seems, may be substantiated with less evidence.

Cf. also the slender requirement of proof in a question of minor importance in the issue of the case, Mex.-U.S. G.C.C. (1923): *Acosta Case* (1928) *Op. of Com. 1929*, p. 121, at p. 121. See also *supra*, p. 309, note 30.

[81] U.S. Domestic Commission, Spanish Claims (Act of 1836): *Final Report* (1838) 5 *Int.Arb.*, p. 4542, at p. 4544.

[82] Mex.-U.S. G.C.C. (1923): *McCurdy Case* (1929) *Op. of Com. 1929*, p. 137, at p. 141; *Pomeroy's El Paso Transfer Co. Case* (1930) *Op. of Com. 1931*, p. 1, at p. 6.

Cf. Mex.-U.S. Cl.Com. (1868): *La Abra Silver Mining Co. Case* (1875) 2 *Int.Arb.*, p. 1324. Umpire relied on "respectable" testimony, although he recognised that evidence, presumably available, in the form of books or reports from the company had, without explanation, not been produced (p. 1328). The claim was subsequently discovered to be a fraud and the money awarded was returned to Mexico. See *infra*, p. 359.

[83] Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930) D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109: "Thus, in the case of a contract, there is a principle which is almost universally admitted and with which I am in entire agreement, that, in general, both the existence and the terms of the contract must be established by a written document signed by the parties, for in making a contract it should always be possible to reduce it to writing, and this, moreover, is the common practice of civilised mankind." See footnote 84.

U.S. Domestic Commission, Spanish Claims (Act of 1836): *Final Report* (1838) 5 *Int.Arb.*, p. 4542, at p. 4544.

See also the first two cases cited in the preceding footnote.

[84] *Pomeroy's El Paso Transfer Co. Case* (1930) *loc. cit.*, at p. 6. Claim for payment from Mexican Government for alleged services rendered at latter's order. No evidence submitted except two affidavits from members of the claimant company. Held that at least a written order should have been required from the Mexican authorities. The decision in this case concerned only the problem of proof. Even for an international agreement between two States the written form is not necessary (see PCIJ: *Legal Status of Eastern Greenland Case* (1933) D.O. by Anzilotti, A/B. 53, p. 91). *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923) 1 UNRIAA, p. 369, at p. 393. *Cf. Lamu Case* (1889) 5 *Int.Arb.* p. 4940, at p. 4942.

"But in the case of a tort or a criminal matter it is obviously almost always impossible to have any document attesting the facts." [85]

Much, however, depends upon the circumstances of the case as to the amount of evidence that may be available.[86] While a Government cannot rely on its own lack of power to procure evidence as an excuse for the non-production of available evidence when such power could easily be obtained,[87] the collecting of evidence for an international dispute is not a valid reason for violating the rights of another State.[88]

In general, therefore, as the British-Mexican Claims Commission (1926) said with regard to the amount of evidence to be adduced by the claimant:—

"He is to create the conviction that he has earnestly tried to place all existing evidence at our disposal," [89]

although, as was said by the same Commission in the *Odell Case* (1931):—

"The Commission also realise that the weighing of outside evidence, if any such be produced, may be influenced by the degree to which it was possible to produce proof of a better quality. In cases where it is obvious that everything has been done to collect stronger evidence and where all efforts to do so have failed, a court

[85] Brit.-Mex. Cl.Com. (1926): *Mexico City Bombardment Claims* (1930) D.O. by British Commissioner, *Dec. & Op. of Com.*, p. 100, at p. 109.

[86] Thus in a case where the claimant complained of being injured by the derailment of a train, the Brit.-Mex. Cl.Com. (1926) said: "The wrecking of a military train by revolutionaries in the neighbourhood of one of the principal towns of the country, is a fact that could hardly have passed unnoticed. It must have left some trace in the archives of the Railway Company and in the contemporary press. Mr. Odell relates that on the fatal spot itself he was attended to by a surgeon, that the Superintendent of the Railway Company at Puebla also spoke to him at the scene of the derailment, that he was as soon as possible taken to the Hospital at Puebla, that he resumed work nine months later, and that finally, in June, 1912, he was given a certificate of dismissal on account of his disability to serve. It is difficult to believe that none of those sources could furnish confirmation of one or more of the facts alleged by the claimant". (*Odell Case* (1931) *Further Dec. & Op. of Com.*, p. 61, at pp. 63–4). *Cf.* U.S.-Ven. M.C.C. (1903): *Gage Case*, *Ven.Arb. 1903*, p. 164, at p. 167: "From the nature of the facts as to the treatment of prisoners by their gaoler, it will always be difficult to find other witnesses besides the prisoners themselves."

[87] Germ.-U.S. M.C.C. (1922): *Lehigh Valley Railroad Co. Case* (1933) *Dec. & Op.*, p. 1084, at pp. 1126–7.

[88] *Cf.* ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports*, *1949*, p. 1, at pp. 34–35.

[89] *Gill Case* (1931), *Further Dec. & Op. of Com.*, p. 85, at p. 90.

can be more easily satisfied than in cases where no such endeavour seems to have been made." [90]

The general principle requiring the best available evidence is thus tempered by considerations of possibility.[91]

CIRCUMSTANTIAL EVIDENCE

In cases where direct evidence of a fact is not available, it is a general principle of law that proof may be administered by means of circumstantial evidence. In the *Corfu Channel Case* (Merits) (1949), before the International Court of Justice, Judge Azevedo said in his dissenting opinion:—

"A condemnation, even to the death penalty, may be well-founded on indirect evidence and may nevertheless have the same value as a judgment by a court which has founded its conviction on the evidence of witnesses.

"It would be going too far for an international court to insist on direct and visual evidence and to refuse to admit, after reflection, a reasonable amount of human presumptions with a view to reaching that state of moral, human certainty with which, despite the risks of occasional errors, a court of justice must be content." [92]

This part of his opinion is in agreement with the majority decision, which, in admitting proof by inferences of fact (*présomptions de fait*) or circumstantial evidence, held that:—

"This indirect evidence is admitted in all systems of law, and its use is recognised by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion . . . The proof may be drawn from inferences of fact [*présomptions de fait*], provided that they leave *no room* for reasonable doubt." [93]

[90] *Ibid.*, p. 61, at p. 63.

[91] *Cf.* also ICJ: *Corfu Channel Case* (Merits) (1949); *ICJ Reports, 1949*, p. 4, at p. 18. In case one State is the victim of an unlawful act committed within the exclusive territorial jurisdiction of another State, "the fact of this exclusive territorial control exercised by one State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence."

[92] *ICJ Reports, 1949*, p. 4, at pp. 90–91.

[93] *Ibid.*, at p. 18. Italics of the Court. From the established fact that Albania kept a strict watch over the Corfu Channel during the whole period when the mines could have been laid there, and the established fact that any laying of mines in the Channel during that period would have been detected from the observation posts set up in Albania, the "Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government" (p. 22). In other words, knowledge by the Albanian Government was considered proved. Judge Badawi Pasha and also the *ad hoc* judge in their dissenting opinions, concurred in the use of circumstantial evidence, although both emphasised that the conclusion adopted must be the only rational one to be drawn from the established circumstances (pp. 60, 120). Judge Krylov alone doubted if State responsibility could be proved by indirect evidence (p. 69).

In cases before the Brit.-Mex.Cl.Com. (1926), knowledge of the Mexican authorities of certain acts was inferred from their public notoriety in the locality. See *McNeill Case* (1931), *Further Dec. & Op. of Com.*, p. 96, at p. 100; *The Sonora (Mexico) Land and Timber Co. Case* (1931), *ibid.*, p. 292, at p. 296; *Taylor Case* (1931), *ibid.*, p. 297, at p. 298.

See other examples of the use of circumstantial evidence: Hague Commission of Inquiry: *The Tubantia* (1922) 2 H.C.R., p. 135. Germ.-U.S. M.C.C. (1922); *Taft Case* (1926), *Dec. & Op.*, p. 801. In the latter case, the desired inference from the facts was rebutted by conclusive counter-evidence. Portugo-German Arbitration (1919): *The Cysne Case* (1930), 2 UNRIAA, p. 1011, at p. 1056; *supra*, p. 303, note 11.

Spanish Zone of Morocco Claims (1923): Claim I: *Rzini (Tetuan Orchards) Case* (1924), 2 UNRIAA, p. 615, at p. 654.

PRIMA FACIE EVIDENCE

Sometimes, in view of its particular nature, conclusive proof of a certain fact is impossible. With regard to the nationality of claimants, for instance, the British-Mexican Claims Commission (1926) held:—

"It would be impossible for any international commission to obtain evidence of nationality amounting to certitude unless a man's life outside the State to which he belongs is to be traced from day to day. Such conclusive proof is impossible and would be nothing less than *probatio diabolica*. All that an international commission can reasonably require in the way of proof of nationality is prima facie evidence sufficient to satisfy the Commissioners and to raise the presumption of nationality, leaving it open to the respondent State to rebut the presumption by producing evidence to show that the claimant has lost his nationality through his own act or some other cause." [94]

In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, *i.e.*, prima facie evidence.

[94] *Lynch Case* (1929), *Dec. & Op. of Com.*, p. 20, at p. 21. The Commissioners were of the opinion that where a fact can be more easily and conclusively established, *e.g.*, birth, death, etc., a stricter degree of proof would be required (*ibid.*).

See, also, Hungaro-Serb-Croat-Slovene M.A.T.: *Cie pour la Construction du Chemin de Fer d'Ogulin à la Frontière, S.A., Case* (1926), 6 T.A.M., p. 505. Restitution of articles under Art. 250, Treaty of Trianon. Claimants having produced sufficient proof to establish at least a presumption in favour of their ownership, the Tribunal could not admit "that the Serb-Croat-Slovene State is legally entitled to exact the absolute proof of ownership, this *probatio diabolica* being generally impossible" (p. 509. Transl.).

" Prima facie evidence has been defined as evidence ' which unexplained or uncontradicted, is sufficient to maintain the proposition affirmed.' " [95]

It does not create a moral certainty as to the truth of the allegation, but provides sufficient ground for a reasonable belief in its truth, rebuttable by evidence to the contrary.[96] The absence of evidence in rebuttal is an essential consideration in the admission of prima facie evidence. Where the opposite party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence before the Commission.[97] As the American Commissioner said in the *Naomi Russell Case* (1931), when referring to those " common-sense principles underlying " the rules of evidence in domestic law:—

" It [the Commission] can analyse evidence in the light of what one party has the power to produce and the other party has the power to explain or contravert. And in appropriate cases it can draw reasonable inferences from the non-production of evidence." [98]

Again, in the *Kling Case* (1930), the Mexican-United States General Claims Commission (1923) said:—

" A claimant's case should not necessarily suffer by the non-production of evidence by the respondent. It was observed by the Commission in the *Hatton Case, Op. of Com., Wash., 1929*, pp. 6, 10, that, while it was not the function of a respondent government to make a case for the claimant government, certain inferences could

[95] Mex.-U.S. G.C.C. (1923): *Kling Case* (1930) *Op. of Com. 1931*, p. 36, at p. 49, quoting 23 *Corpus Juris*, p. 9.

[96] *E.g.*, Brit.-Mex. Cl.Com. (1926): *Lynch Case* (1929), *Dec. & Op. of Com.*, p. 20, at p. 22. In the absence of evidence impugning the accuracy of a consular certificate, this, although it " cannot be considered as absolute proof of nationality," was " accepted as prima facie evidence." Compare this case with the *Cameron Case* (Demurrer) (1929), decided by the same Commission, *ibid.*, p. 33, at p. 36: " The certificate of consular registration put in by the British Agent does raise a presumption of British nationality, though that presumption is rebutted by another document put in by the Mexican Government." Though the latter was not conclusive, the former was considered weakened to such an extent that British nationality was considered not to have been established.

[97] *Cf.* Fran.-Ven. M.C.C. (1902): *Brun Case*, Ralston's *Report*, p. 5 at p. 25: " The Umpire might hesitate to adopt these findings if it were not true, and had not been always true, that the respondent Government could ascertain and produce before this mixed commission the exact facts regarding the positions and movements of its own soldiers, and the position and movements of the insurgent forces at the time in question."

[98] Mex.-U.S. Special Cl.Com. (1923): *Naomi Russell Case* (1931), *Op. of Com. 1926–1931*, p. 44, at p. 88.

be drawn from the non-production of available evidence in the possession of the former. See also the *Melczer Mining Co. Case*, *ibid.*, pp. 228, 233. The Commission has discussed the conditions under which, when a claimant government has made a prima facie case, account may be taken of the non-production of evidence by the respondent government, or of unsatisfactory explanation of the non-production of evidence. Case of *L. J. Kalklosch*, *ibid.*, p. 126. [In this case, the Commission said: ' In the absence of official records the non-production of which has not been satisfactorily explained, records contradicting evidence accompanying the Memorial respecting wrongful treatment of the claimant, the Commission can not properly reject that evidence ' (p. 130)]." [99]

Whilst it is true, as the German Commissioner observed in the *Lehigh Valley Railroad Co. Case* (1936) that:—

" Mere suspicions never can be a basic element of juridical findings," [1]

where counter-proof can easily be produced but its non-production is not satisfactorily explained,

" it may therefore be assumed that such evidence as could have been produced on this point would not have refuted the charge in relation thereto." [2]

The inference in every case must, however, be one which can reasonably be drawn.[3] The situation, as established by prima facie evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation. This was regarded as a general principle of law by the American Commissioner who said in his concurring opinion in the *Daniel Dillon Case* (1928):—

" Evidence produced by one party in a litigation may be supported by legal presumptions which arise from the non-production

[99] *Op. of Com. 1931*, p. 36, at pp. 44–5. See other cases therein cited. See also *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923) 1 UNRIAA, p. 369, at p. 393.

[1] Germ.-U.S. M.C.C. (1922), *Dec. & Op.*, p. 1175, at p. 1176. See also *supra*, pp. 309–10.

[2] Mex.-U.S. G.C.C. (1923): *Melczer Mining Co. Case* (1929), *Op. of Com. 1929*, p. 228, at p. 233.
Neth.-Ven.M.C.C. (1903): *Evertsz Case*, *Ven.Arb. 1903*, p. 904 at p. 905.

[3] *Cf.* ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports, 1949*, p. 4, at pp. 32, 129.

of information exclusively in the possession of another party, and this well-known principle of domestic law is one which it seems to me an international tribunal is justified in giving application in a proper case." [4]

An attempt has been made above to elicit some of the "common-sense principles underlying rules of evidence" as they have been applied by international tribunals. It is quite natural, if not inevitable, that these principles should be the same in different legal systems, since, in the final analysis, they merely represent the concrete embodiment of the long experience of judges in seeking to ascertain the truth. To sum up, the words of the British Commissioner in the *Mexico City Bombardment Claims* (1930) may be quoted:—

"If, after giving due weight to all these considerations, it [the Commission] feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established." [5]

In dubio pro reo.[6]

BURDEN OF PROOF

We may now turn to the question of burden of proof and inquire whether international tribunals admit the existence of any general principles of law governing its incidence.

In this connection, the *Parker Case* (1926), decided by the Mexican-United States General Claims Commission (1923), needs to be carefully examined; for the language used by the Commission in that case has sometimes given rise to the impression [7] that, contrary to the view generally accepted by

[4] Mex.-U.S. G.C.C. (1923): *Op. of Com., 1929*, p. 61, at p. 65.
[5] Brit.-Mex. Cl.Com. (1926): D.O. by British Commissioner, *Dec. & Op. of Com.* p. 100, at p. 109.
[6] Span.-U.S. Cl.Com. (1871): *Zaldivar Case* (1882), 3 *Int.Arb.*, p. 2982. U.S.-Ven. M.C.C. (1903): *Gage Case*, *Ven.Arb. 1903*, p. 164, at p. 167. ICJ: *Corfu Channel Case* (Merits) (1949), D.O. by Eĕr, *ICJ Reports 1949*, p. 4, at pp. 120, 124, 129.
[7] See Fran.-Mex. Cl.Com. (1924): *Pinson Case* (1928), *Jurisprudence*, p. 1, at pp. 94–5.

international tribunals, it gave a negative answer to the question.[8]

In the first place, the Commission held as follows:—

"The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law,' or 'the general theory of law,' and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with a view of discovering the whole truth with respect to each claim submitted. . . . As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure." [9]

It may, however, be pointed out that, with regard to principles of adjective law in general, the reference in the decision to "'universal principles of law,' or 'the general theory of law,' and the like," relates only to the misuse of these terms to cover "municipal restrictive rules of adjective law or of evidence" and in no way excludes *a priori* the existence of true general principles of adjective law applicable to all legal systems; for the same Commission clearly recognised that "with respect to matters of evidence they [international tribunals] must give effect to common-sense principles underlying rules of evidence in domestic law." [10]

With regard to the incidence of the burden of proof in particular, international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings. In *The Queen Case* (1872), for instance, it was held that:—

"One must follow, as a general rule of solution, the principle of jurisprudence, accepted by the law of all countries, that it is for the claimant to make the proof of his claim." [11]

[8] *Op. of Com., 1927*, p. 35, at pp. 39–40.
[9] *Ibid.*, at p. 39.
[10] See *supra*, p. 308.
[11] 2 *Arb.Int.*, p. 706, at p. 708. (Transl.)
See Lord Phillimore in the Advisory Committee of Jurists for the Establishment of the PCIJ, *Procès-verbaux*, p. 316. Speaking of the "principes du droit commun qui sont applicables aux rapports internationaux," he said: "Another principle of the same kind is that by which the plaintiff must prove his contention under penalty of having his case refused."
Fran.-Germ. M.A.T.: *Firme Ruinart Père et Fils Case* (1927), 7 T.A.M.,

It may, therefore, be asked whether the Mexican-United States General Claims Commission (1923) really maintained that the maxim *onus probandi actori incumbit* did not express a general principle of law or that in any event it was not applicable to international judicial proceedings, thus contradicting *The Queen Case* (1872). The answer would appear to be in the negative. It would seem that the Commission did not use the term "burden of proof" in its usual sense. Thus after saying that "as an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure," the Commission continued:—

"On the contrary, it holds that it is the duty of the respective Agencies to co-operate in searching out and presenting to this tribunal all facts throwing any light on the merits of the claim presented." [12]

From the context of this passage, it is clear that the Commission used the term "burden of proof" in the sense of a duty to produce evidence, and to disclose the facts of the case. But the term is used in a different sense when it is asked on whom the burden of proof falls, or when it is said that the burden of proof rests upon this or the other party.

To illustrate the distinction between these two meanings of the term, the *Taft Case* (1926), decided by the German-United States Mixed Claims Commission (1922) may be mentioned. In this case, the claimants alleged that their ship the *Avon* had been sunk by a German submarine. On behalf of the claimants, "all available evidence tending however remotely to establish the loss of the *Avon* through an act of war has been diligently assembled and presented by able counsel," while on behalf of

p. 599, at p. 601: The Tribunal, "in the absence of any contrary provision of the Treaty, can only rely on the usual principle that lays the burden of proof on the plaintiff" (Transl.).

Greco-Turk. M.A.T.: *Banque d'Orient Case* (1928), 7 T.A.M., p. 967, at p. 973.

See also cases cited *infra passim*.

[12] *Op. of Com. 1927*, p. 35, at p. 39. The following passages from the same decision are to the same effect: "The Parties before this Commission are sovereign Nations who are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them" (p. 40). "Article 75 of the said Hague Convention of 1907 affirms the tenet adopted here by providing that the parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the case" (p. 40).

the defendant, "a full disclosure has been made to the Commission by the German Agent" of the activities of German submarines operating at the material time in the vicinity of the *Avon's* projected course. In his conclusion the Umpire held, however, that:—

"Weighing the evidence as a whole . . . , the claimants have failed to discharge the burden resting upon them to prove that the *Avon* was lost through an act of war." [13]

Thus although both parties had scrupulously observed the duty of disclosing all material facts relative to the merits of the claim, it was held that the claimants had failed to discharge their burden of proof. Burden of proof, however closely related to the duty to produce evidence, therefore implies something more.[14] It means that a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.

The real intention of the Mexican-United States General Claims Commission (1923) may be gathered from what it went on to say, after the above quoted passage:—

"The Commission denies the 'right' of the respondent merely to wait in silence in cases where it is reasonable that it should speak. . . . On the other hand, the Commission rejects the contention that evidence put forward by the claimant and not rebutted by the respondent must necessarily be considered as conclusive. But, when the claimant has established a prima facie case and the respondent has afforded no evidence in rebuttal the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting. While ordinarily it is encumbent [*sic*] upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be. . . . In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent government, the

[13] *Dec. & Op.*, p. 801, at p. 805.

[14] The Mex.-U.S. G.C.C. (1923) itself seems also to have accepted this view, since, despite the fact that it identified the principle it enunciated with Art. 75 of the Hague Convention of 1907, it said that that Convention contained no provision as to burden of proof (*loc. cit.*, p. 40).

failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision." [15]

This, then, is not so much a denial of the validity of the maxim *onus probandi actori incumbit* as a general principle of law, but rather a statement that in proper cases the Commission might be satisfied with prima facie evidence whenever the allegations, if unfounded, could be easily disproved by the opposing party. Strictly speaking, however, this is a question of the quantum of evidence required to sustain an allegation or a claim, and not of the burden of proof.

That the Commission in the *Parker Case* (1926) was not speaking of burden of proof, and that in practice it admitted the validity of the general principle *onus probandi actori incumbit* may also be gathered from its decision in the *Pomeroy's El Paso Transfer Co. Case* (1930). In this case, although the deciding Commissioner was of the opinion that:—

"The Mexican Agency has not fully complied, in regard to evidence, with the duties imposed upon it by this arbitration as defined by the Commission in paragraphs 5, 6, 7 of its decision in the case of *William A. Parker*," [16]

he disallowed the claim because:—

"In this case it appears that the evidence submitted by the claimant government is not sufficient to establish a prima facie case." [17]

Indeed, the Commission on several occasions held that:—

"The mere fact that evidence produced by the respondent government is meagre, cannot in itself justify an award in the absence of concrete and convincing evidence produced by the claimant government." [18]

This is all that is meant by the general principle of law that the burden of proof is upon the claimant.

[15] *Loc. cit.*, pp. 39–40.
[16] *Op. of Com. 1931*, p. 1, at p. 4.
[17] *Ibid.*, at p. 7.
[18] *Melczer Mining Co. Case* (1929), *Op. of Com. 1929*, p. 228, at p. 233. See also *Archuleta Case* (1928), *ibid.*, p. 73, at p. 77; *Costello Case* (1929), *ibid.*, p. 252, at p. 264.

Thus, in spite of appearance to the contrary, the *Parker Case* (1926), when properly understood, does not deny the validity and applicability of the general principle *onus probandi actori incumbit* in international judicial proceedings. In the first place, when the Tribunal denied the existence of any general legal principles governing the incidence of the burden of proof, it was not using the term in its commonly accepted meaning. Moreover, the Tribunal in practice applied the principle *onus probandi actori incumbit*.

Another point raised by the *Parker Case* (1926) may also be mentioned. The Commission said:—

"The absence of international rules relative to a division of the burden of proof between the parties is especially obvious in international arbitrations between governments in their own right, as in those cases the distinction between a plaintiff and a respondent often is unknown, and both parties often have to file their pleadings at the same time." [19]

To this the *Chevreau Case* (1931) provides a ready answer. The case which was between France and Great Britain concerned alleged unlawful arrest and improper treatment of a French national.

"The Arbitrator, before examining these various grievances, deems it his duty to make some observation concerning the burden of proof. While the British Government asserts that the burden is upon the French Government as the plaintiff, the latter maintains that in the present case there is neither plaintiff nor defendant. In this connection, it calls attention to an Order issued on August 15, 1929, by the Permanent Court of International Justice, where it was said that, the case in issue having been submitted by a *compromis*, there was neither plaintiff nor defendant. But on that point, in the opinion of the Arbitrator, there is a misunderstanding. The Order only refers to a question of procedure and decides nothing in regard to questions relating to the burden of proof. The matter is complicated, and if Article 3 of the *compromis* imposes upon both Parties the duty of 'determining to the satisfaction of the Arbitrator the authenticity of all points of fact offered to establish or disapprove responsibility,' that provision, in the Arbitrator's opinion, is not intended to exclude the application of the ordinary rules of evidence.

[19] *Loc. cit.*, p. 40.

It only shows that there can also be a duty to prove the existence of facts alleged in order to deny responsibility." [20]

Thus, despite the fact that there was no procedural distinction between the plaintiff and defendant, the burden of proof was laid upon France, who was the claimant in fact.[21]

That, in any given case, it is possible to determine the effective positions of the parties without reference to questions of procedure is shown by the *Corfu Channel Case* (Jurisdiction) (1948), where, without considering the form in which the case was submitted, the International Court of Justice held that:—

" There is in fact a claimant, the United Kingdom, and a defendant, Albania." [22]

The *Corfu Channel Case* was first brought before the Court by a unilateral application of the United Kingdom (May 22, 1947). When the Albanian Preliminary Objection to the Court's jurisdiction was rejected by the Court on March 25, 1948, the two parties notified the Court on the same day of the conclusion of a Special Agreement. That Special Agreement formed the basis of subsequent proceedings before the Court in that case.[23] But the respective positions of the parties as regards burden of proof was not thereby altered. As far as the British claim was concerned, the burden of proof was undoubtedly laid upon the United Kingdom.[24] The Court expressly held that the mere fact that an act contrary to international law had occurred in Albanian territory did not shift the burden of proof to Albania.[25]

Indeed, it may be said that the term *actor* in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved. The ultimate distinction between the claimant and the defendant lies in the fact that the claimant's submission requires to be substantiated, whilst that of the defendant does not.

It may in fact happen that the claimant is procedurally the defendant, as in the *United States Nationals in Morocco Case*

[20] P.C.A.: 2 UNRIAA, p. 1113, at pp. 1124–25.
[21] *Cf.* PCIJ: *Oscar Chinn Case* (1924), A/B 63. See particularly, p. 81.
[22] *ICJ Reports 1947–1948*, p. 15, at p. 28.
[23] (Order of March 26, 1948), *ibid.*, p. 53, at p. 55.
[24] (Merits), *ICJ Reports 1949*, p. 4, at pp. 13 *et seq.*
[25] *Ibid.*, p. 18.

(1952), between France and the United States.[26] In that case, the United States was in fact in the position of a claimant, in that it claimed special rights and privileges in the French Zone of Morocco and alleged that certain acts of the Moroccan authorities were contrary to such rights and privileges. France, in denying the existence of these rights and privileges and maintaining the legality of the acts of the Moroccan authorities, was in fact in the position of a defendant; for she could rely on the principle that neither restrictions on sovereignty nor international responsibility are to be presumed.[27]

For political reasons, however, the French Government, in order to bring the dispute before the Court, took the initiative and applied to the International Court of Justice under the Optional Clause, thus abandoning, as it said in its Memorial,[28] its logical position as defendant and placing itself, from the procedural standpoint, in the position of a plaintiff. Thereupon, the United States claimed that the burden of proof lay upon France because the latter had assumed the position of plaintiff, and because of " the nature of the legal issues involved." [29]

This, however, was not the view taken by the Court. What the Court in fact did in its judgment was to examine each of the United States claims, and rejected them to the extent to which they were not supported by treaties which the United States was entitled to invoke against Morocco.[30] The United States also adduced " custom and usage " as a basis for some of its alleged special rights and privileges. The Court here specifically laid the burden of proof upon the United States and rejected the allegation for want of sufficient evidence of such a custom binding upon Morocco.[31] In the operative part of the judgment, the Court referred to only one of the Submissions of the French Government. But, even in this case, its rejection of the French Submission that the Decree of December 30, 1948, issued by the French Resident General in Morocco, was lawful, was in fact only a favourable decision on the United States Submission that the Decree violated the treaty rights of the

[26] *ICJ Reports 1952*, p. 176. See the present writer's " Rights of United States Nationals in the French Zone of Morocco," 2 I.C.L.Q. (1953), p. 354.
[27] See *supra*, pp. 305–6.
[28] *ICJ Pleadings*, 1 *Morocco Case*, pp. 29–30.
[29] *Ibid.*, p. 180; *ICJ Reports 1952*, p. 176, at p. 180.
[30] *Cf. ICJ Reports 1952*, p. 176, at pp. 212–13.
[31] *Ibid.*, at pp. 200, 202.

United States derived from the Act of Algeciras of 1906 and its treaty of 1836 with Morocco. Thus, notwithstanding its procedural position of respondent, the burden of proof was laid upon the United States, the claimant in fact.

There may, however, be cases where there is genuinely no distinction between claimant and defendant. Thus in the case of a territorial dispute, both parties put forward rival claims. It will then be incumbent upon each party to substantiate its contention. In the *Palmas Case* (1928), the Arbitrator held that:—

" Each party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute." [32]

This is not, however, an exception to the general principle that the burden of proof falls upon the claimant, but is due to the fact that both parties are in the position of claimants before the tribunal.

Taking into consideration that the *actor*, whether termed claimant or plaintiff, is to be determined according to the issues involved rather than the incidents of procedure, what has been said above shows that there is in substance no disagreement among international tribunals on the general legal principle that the burden of proof falls upon the claimant, *i.e.*, " the plaintiff must prove his contention under penalty of having his case refused." [33] *Actore non probante reus absolvitur.*

The burden of proof so far discussed relates to the proof of the factual basis of the claim as a whole, although in a single action, there may be several claims, as well as counter-claims. This may be called the ultimate burden of proof.[34] The term burden of proof may, however, also be used in a more restricted sense as referring to the proof of individual allegations advanced by the parties in the course of proceedings. This burden of proof may be called procedural. As has been seen at the beginning of the present Chapter, in this sense of the term, the burden of proof rests upon the party alleging the fact, unless the truth of the fact is within judicial knowledge or is presumed by the

[32] P.C.A.: 2 H.C.R., p. 83, at p. 90.
[33] *Supra*, p. 327, note 11.
[34] *Cf.* A. T. Denning, " Presumptions and Burdens," 61 L.Q.R. (1945), pp. 379–83.

Tribunal. In the absence of convincing evidence, the Tribunal will disregard the allegation.[35]

In conclusion, it may be said that the aim of a judicial inquiry is to establish the truth of a case, to which the law may then be applied. While the greatest latitude is enjoyed by international tribunals in the carrying out of their task, their activity is nevertheless governed by certain general principles of law based on common sense and developed through human experience. These principles create certain initial presumptions, guide the weighing of evidence and determine the incidence of the burden of proof.

[35] *Supra*, pp. 307 *et seq.*