

BURDEN OF PROOF AND RELATED ISSUES

A Study on Evidence Before International Tribunals

by

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CHAPTER V

RULES OF THE BURDEN OF PROOF AS PRINCIPLES OF INTERNATIONAL LAW

A. General Rules of the Burden of Proof

As discussed in Chapters II to IV above, in international procedure the general aspects of the burden of proof are related to the principal actors of all judicial or arbitral proceedings, i.e., the claimant, the respondent, and the tribunal. On that basis, three general rules, each reflecting a particular aspect of the burden of proof, can be identified in international procedure. As will be discussed below, these general rules mainly concern the allocation of the burden of proof between the parties, including collaboration of parties in matters of evidence, and the contribution of international tribunals in that regard. The issues dealt with in this Chapter include identifying those general rules more expressly, and the question as to which of the rules applied by international tribunals with respect to the burden of proof may be characterized as principles of international procedure.

1. THE RULE ACTORI INCUMBIT PROBATIO

This is the broad basic rule of the burden of proof. According to this rule, which is rooted in Roman law and is applied in different legal systems of municipal law as well as in international procedure, the burden of proof, as a point of departure, is on the "actori." However, the "actori" is the party who alleges a fact, not necessarily always the party who instituted the proceedings. That definition of "actori" provides the rule *actori incumbit probatio* with enough flexibility for its smooth application in the complex international litigations of the world today. In international procedure, the rule *actori incumbit probatio* is not used in the sense of its old rigid Roman law concept, but rather as a comprehensive rule according to which each party has to prove its claim or defence.¹

¹ See, e.g., Christian Dieryck, "Procédure et moyens de preuve dans l'arbitrage commercial (continued...)"

No doubt, there are differences between the methods, modes, standards, and quantum of proof acceptable in different municipal systems, as well as between municipal and international proceedings. As a general principle, however, it is necessary for the party who alleges a fact to prove the truth of its claim, if not accepted by the other party, before the authority which is charged with the duty to adjudicate the dispute. This rule is so well-founded in municipal law that it could easily be concluded to be a generally accepted principle of municipal law which, in accordance with Article 38 of the Statute of the International Court of Justice, is a source of international law.² Indeed, the

(...continued)

international", 2 *Revue de l'Arbitrage* (1988), pp. 267-282, at 275; Keith Highet, "Evidence, the Chamber and the ELSI Case", in: *Fact-Finding by International Tribunals* (R. Lillich ed. 1991), pp. 33-79, at 34; V.S. Mani, *International Adjudication: Procedural Aspects* (1980), p. 203; D. Sandifer, *Evidence Before International Tribunals*, rev. ed., (1975), p. 127:

"The broad basic rule of burden of proof adopted, in general, by international tribunals resembles the civil law rule and may be simply stated: that the burden of proof rests upon him who asserts the affirmative of a proposition that is not substantiated will result in a decision adverse to his contention.";

Dinah L. Shelton, "Judicial Review of State Action by International Courts", 12 *Fordham International Law Journal* (1989), pp. 361-398, at 379:

"Many courts apply the maxim *ei incumbit probatio, qui dicit, non qui negat*: It is for the party who asserts a proposition or a fact to prove it, regardless of whether the party is nominally applicant or respondent." (Footnote omitted.);

H.W.A. Thirlway, "Evidence Before International Courts and Tribunals", in: R. Bernhard (ed.), *Encyclopedia of Public International Law*, Instalment 1 (1981), pp. 58-60, at 59; and J.C. Witenberg, "Onus Probandi devant les juridictions arbitrales", *RGDIP*, Tome LV (1951), p. 327.

² See, e.g., J.F. Lalive, "Quelques remarques sur la preuve devant la Cour Permanente et la Cour Internationale de Justice", VII *Annuaire suisse de droit international* (1950), pp. 77-103, at 78; Alain Redfern, "The Practical Distinction Between the Burden of Proof and the Taking of Evidence—An English Perspective", 10 *Arbitration International* 3 (1994), pp. 317-322, at 321; and Bernard Hanotiau, "Satisfying of Burden of Proof: The Viewpoint of a 'Civil Law' Lawyer", *ibid.*, pp. 341-353, at 342.

practice of international tribunals, in line with that of national fora, shows a constant application of the same concept in cases before them.³

2. THE RULE OF COLLABORATION OF PARTIES IN MATTERS OF EVIDENCE

As explained in Chapter III, the second general rule of the burden of proof concerns the duty of parties in international proceedings to co-operate in order to place the facts related to the disputed issues before an international tribunal. This is a general obligation on parties which is derived from the idea of peaceful settlement of disputes. It assists international tribunals in their efforts to establish the truth of a disputed matter on the basis of all material facts.

While the limits and other details regarding this rule may be subject to argument, the concept itself does not seem to have ever been challenged. In fact the necessity of collaboration of parties has been relied upon in order to justify the flexible application of the rule *actori incumbit probatio*.

In Chapter III examples were mentioned from State practice, international precedents and legal writers' opinion in support of the existence and applicability of this rule in international procedure. On that basis, it is fair to conclude that as a supplement to the rule *actori incumbit probatio* which emphasizes the claimant's role, the rule of collaboration of parties, with emphasis on the respondent's role, is a principle of international procedure.

3. THE AUTHORITY OF INTERNATIONAL TRIBUNALS IN MATTERS RELATED TO EVIDENCE

In international proceedings, judges and arbitrators are to take an active role in the proceedings in matters related to evidence, subject to the condition that it does not affect their impartiality or the important principle of equality of the parties before

³ See, generally, *supra* Ch. II.