Evidence before the International Court of Justice

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Introduction

The Statute of the International Court of Justice deals with evidence in only cursory terms. Article 48 provides that the Court shall “make all arrangements connected with the taking of evidence”. This provision was carried over verbatim from the Statute of the Permanent Court of International Justice (PCIJ), and appears to be derived from similar provisions in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. As the cases before the PCIJ primarily concerned the application of treaties, that Court was in a position to establish and rely on facts that were not in dispute between the parties, obviating, in most cases, the need for detailed rules of evidence.

The Statute of the present Court has remained virtually unaltered in terms of evidence, and the current Rules of Court, adopted in 1978, continue this liberal regime: the parties enjoy great freedom in relation to the production of evidence, as does the Court in evaluating it. Article 48 of the ICJ Statute is supplemented by a handful of general provisions, both in the Statute and the Rules of Court, which give the Court a great deal of autonomy and flexibility in dealing with evidentiary matters.

Nature of the ICJ Evidentiary System

Although the Court has been said to have taken the best from the accusatorial/adversarial and the inquisitorial systems of evidence, the drafters of the earliest sets of Rules of the PCIJ expressed the view that the broad and liberal system of evidence created by the Statute was closer to the English system, based on the freedom of the parties to present their own evidence. When the litigants are sovereign States, it is perhaps only logical for them to have the main initiative and responsibility in regard to the production of evidence. While the Court is authorized to seek particular evidence, either at the request of a party or of its own motion, and to question witnesses and experts, its primary function is to supervise the taking of, and to decide as to the admissibility, relevance and weight of evidence.

Like its predecessor, the PCIJ, the Court is often in a position to base its decision on undisputed facts. While a domestic trial court is deemed to know the law and can therefore confine itself almost entirely to making findings of fact (leaving it in many cases to one or more appellate instances to rule on the

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ultimate legal repercussions of those predetermined facts) the International Court of Justice must find both law and fact in a single instance, and is often called upon to establish the existence of the rules of international law on which its decisions are based.

**Burden and Standard of Proof**

In allocating the burden of proof, the Court follows the basic rule of *actori incumbit probatio*: that the party putting forth a claim is required to establish the requisite elements of law and fact. This may be rendered more difficult, in those cases brought before the Court by Special Agreement, by the absence of an identifiable plaintiff/defendant relationship, but the basic approach remains that each party bears the burden of proving the facts on which it relies in making its case. In the *Minquiers and Ecrehos* case,\(^1\) for example, the Special Agreement between France and the United Kingdom asked the Court to determine which country had sovereignty over certain rocks and islets. The Special Agreement further provided that the written proceedings be “without prejudice to any question of the burden of proof”.\(^2\) In its judgment the Court held that as both parties claimed sovereignty, each was required to “prove its alleged title and the facts upon which it relies.”\(^3\) Judge Levi Carneiro elaborated on this basic rule in his separate opinion, stating that “it is for the Party interested in restricting the application of an established rule or of a recognized fact to prove that such a restriction is valid.”\(^4\)

The concept of an identifiable or quantifiable standard of proof emanates from the common law system, with its “beyond a reasonable doubt” in criminal proceedings and the more lenient “by a preponderance of the evidence” in civil proceedings. The international regime appears to reflect the civil law system, in which all that is needed is that the court be persuaded, without reference to a specific standard. Certain aspects of the Court’s practice require a prima facie showing of particular matters, such as the existence of a jurisdictional basis for the indication of provisional measures.\(^5\) Interestingly, the only guidance offered

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2. *Id.* at 49.
3. *Id.* at 52.
4. *Id.* at 99.