

Evidence before International Courts and Tribunals

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1. The Function and Feature of the Rules of Evidence in the Judicial Process

The course taken by the rules of evidence in their application in the judicial process would be more clearly visible if, at the outset, a general description of their content and a delimitation of the subject-matter of their sphere of application is made.

Rules of evidence are those which have to do with judicial investigations into factual questions and, for the most part, with investigations where there is a dispute. These rules govern the method of ascertaining an unknown and generally a disputed, factual matter in courts of law.¹ But they do not regulate the process of reasoning and argument. This may take place after all the 'evidence' has been obtained or when all the facts have been admitted except such as are deducible by reasoning from these admitted facts. But when 'evidence' is offered, this indicates an attempt to prove, otherwise than by mere reasoning from what is already known, a factual matter to be used as a basis for inference for another factual matter; as when a court is presented with a tangible object which may furnish a ground of inference, and as when it is offered the testimony of a person as a means of proof for the fact in issue.²

Evidence, then, can be defined as any factual matter which is furnished to a court of law otherwise than by reasoning, as the basis of inference in ascertaining some other factual matter; and the law of evidence is the totality of the rules which regulate the furnishing of this factual matter.

The province of the law of evidence is, therefore, threefold: 1. It prescribes the manner of production or elicitation of evidence; 2. It lays down the qualifications for the admission of evidence, i.e., the determination of whether evidence, once available, may in fact be considered by the court or

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1 See E.M. Morgan, *Some Problems of Proof Under the Anglo-American System of Litigation*, 1956, p.3.

2 Cf. M. Planiol-G. Ripert, *Treatise on the Civil Law*, Vol.2 (11th ed. Trans. By Louisiana State Law Institute, 1959), p.32.

tribunal; and 3. It determines the probative value of the evidence which has been admitted.³

The principles of the law of evidence which are applicable in cases before international courts and tribunals do not differ, in their objective, from the principles of the law of evidence which are applicable in cases before municipal courts. In spite of this, a comprehensive body of detailed rules of evidence cannot be said to have developed in the practice of international courts and tribunals in a manner comparable to the scope of the subject in municipal legal systems. The reasons for this are varied. In the first place, the nature of cases submitted for international adjudication is usually such that few questions of fact, necessitating evidentiary support, are involved, the issues rather concerning the significance of facts which are generally admitted, or the assessment of the legal implications flowing therefrom. Secondly, the historical and social factors which have contributed to the adoption in municipal law of certain rules which evaluate evidence for reliability and potentially exclude it, are generally absent at the international level. Thirdly, the different nationalities, legal backgrounds, regional origins and experiences of arbitrators or judges of international courts and tribunals make it difficult for there to be a common denominator in this area.⁴

By and large rules of evidence applied in international proceedings operate in such a way as to allow considerable latitude to international courts and tribunals in adopting the course which appears most likely in the circumstances to ensure justice. The result is that such courts and tribunals usually admit anything offered without prejudice to a subsequent decision on its admissibility and probative value.

The reason for this flexibility was considered by the International Court of Justice in *Corfu Channel* (merits) case.⁵ The Court noted that states exercise exclusive territorial control within their frontiers and thus the claimant state is not usually in a position to "furnish direct proof of facts giving rise to responsibility".⁶ This is equally true of claimants before other international courts and tribunals.

3 Cf. Phipson on Evidence, 13th ed.1982, by J.Buzzard-R. May- M.N.Howard, p.1.

4 See C.N. Brower, "The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence", in *Fact-Finding Before International Tribunals*, ed. By R.B. Lillich, 1992, pp.147-148.

5 I.C.J. Reports, 1949.

6 *ibid*, p.18.

2. The Extent of the Judicial Powers of International Courts and Tribunals over Facts and Evidence.

International courts and tribunals must ascertain the facts upon which questions brought before them are based. Generally, where facts are agreed upon by the parties, no problem arises. However, the party who asserts a fact will always have the onus of producing evidence to corroborate it because there is a possibility that the other party will contest it. This concept of *onus probandi*, which originates from Roman law, remains valid in international law⁷ as it does in municipal legal systems albeit in different variations.⁸

The powers of international courts and tribunals in connection with the ascertainment of facts are wide. This is true of institutionalized courts as it is of ad-hoc tribunals. There is extensive provision for various forms of evidence and the way in which such evidence can be produced or procured. Thus, international courts and tribunals can make all arrangements connected with the taking of evidence; they can call upon the parties to produce evidence, can procure evidence in localities away from the seat of the court or tribunal, and can commission enquiries or expert opinions.

Particular questions arise in connection with the exercise of these powers by international courts and tribunals and it is aspects of these questions that will be addressed here.

3. Institutionalized International Courts

The instruments setting up international courts of an institutional nature have conferred broad powers upon these courts in matters concerning evidence. In the context of adjudicating questions between states, the Statute of the International Court of Justice, which has remained unchanged in all relevant respects since it became effective in 1921, envisages certain powers necessary to secure adequate evidence for the Court's determination of factual issues.

The Rules of the Court of the International Court of Justice state that "the Court may at any time call upon the Parties to produce such evidence or to give such explanation as the Court may consider to be necessary for the elucidation of any aspect of the matter in issue or may itself seek other information for this purpose."⁹ The Court may act on its own motion, but in the first instance it asks

7 See D. Sandifer, *Evidence Before International Tribunals*, (rev. Ed. 1975), pp.132-141; S. Rosenne, *The Law and Practice of the International Court*, (2nd rev. Ed. 1985), p.580.

8 For the operation of this concept in municipal law, see I. Szaszy, *International Civil Procedure*, 1967, pp.247-253.

9 Art.62, parag.1 of the 1978 Rules.

the parties to produce the required evidence. The Court may also, if necessary, "arrange for the attendance of a witness or expert to give evidence to the proceedings."¹⁰ Thus, additional possibilities are available to the Court to search for the circumstances of the case and to obtain whatever information is necessary. These possibilities are available throughout the proceedings and even after their termination, when additional information may be sought. The Court can thus find the opportunity to intervene even if the parties, or one of them, act in such a way as to avoid the presentation of certain evidence relevant in the case. This is an important power which the Court possesses in order to be able to find the truth.

Another possibility which is available to the International Court of Justice in ascertaining the truth in the given case is questioning the agents, counsel and advocates. This may be done by the Court as a whole as well as by an individual judge who has a right to put a question, but "before exercising it he should make his intention known to the President, who is made responsible by Article 45 of the Statute for the control of the hearing."¹¹ Often, the question is put to both parties simultaneously, thereby paving the way to the discussion of an important but hitherto unexamined incidence of the case.

One important means of procuring evidence of facts is the calling of witnesses and experts.¹² Parties may call these from a list which is submitted to the Court in accordance with the rules.¹³ These experts and witnesses are examined by the party which has called them, but they can also be questioned by counsel or agent of the other party. In the latter case, the Court has adopted the principle of cross-examination, a feature of the common law judicial procedure. There is no restriction as to the questions that may be put; here the Court is guided by the consideration that as much light as possible should be thrown upon the issues examined by the Court.¹⁴

Witnesses and experts have been occasionally used.¹⁵ In this connection, special mention must be made of cases concerning the law of the sea. In the Corfu Channel case¹⁶ the International Court of Justice requested an expert

¹⁰ *ibid.* Parag.2.

¹¹ Cf. Art.61, parag.2 and 3 of the 1978 Rules of the Court.

¹² See in general, G.M. White, *The Use of Experts by International Tribunals*, 1965.

¹³ Art.63 of the Rules of the Court, cf. Art. 57.

¹⁴ See M.Lachs, "Evidence in the Procedure of the International Court of Justice: Role of the Court", in *Essays in honour of Judge Elias*, Vol.1, ed. by E.G. Bello and B.A.Ajibola, 1992, p.265 at p.273.

¹⁵ See R.Y. Jennings, "International Lawyers and the Progressive Development of International Law", in *Theory of International Law at the Threshold of the 21st Century: Essays in honour of K.Skubiszewski*, ed. By J.Makarczyk, 1996, p.413 at p.416.

¹⁶ *Merits*, Judgment, I.C.J. Reports, 1949.

opinion and appointed a Committee of Experts for the purpose of collecting and assessing complex evidence and, in a subsequent stage, sought the opinion of two new experts as to the accuracy of the British claim concerning damages for the loss of one warship and for the damage caused to another.¹⁷ In the more recent Tunisia/Libya case¹⁸ the Court heard the testimony of a geomorphologist in connection with whether the continental shelf north of the Tunisia-Libya boundary line at a certain point was to be considered a natural prolongation to the east of the Tunisian landmass or to the north of the Libyan landmass. In the Libya/Malta case¹⁹ the Court paid scant regard to extensive geological and geomorphological evidence, favoring, instead, a geographical solution based upon the law as reflected in the recent Law of the Sea Convention.²⁰

The extent to which an international court should rely upon witness or expert information is a question of discretion. There have been instances where such information, which is supplied in support of the respective claims by the parties, have been inconsistent. In such instances, the court might have to call upon an expert for its own purposes in order to make a final determination of the dispute, not only as between the parties but between their experts.²¹

The Statute of the International Court of Justice contains a provision in Article 44 to the effect that whenever steps are to be taken to procure evidence on the spot, the Court shall apply direct to the government of the state concerned. Neither the practice of the International Court of Justice nor that of its predecessor offer substantial information on the application of this provision and the view must be that, insofar as the provision falls short of providing any compulsive measures, in the absence of municipal legislation giving effect to it, this provision is of slight empirical value.

The Rules of Court of the International Court of Justice do not prescribe any specific procedures in respect of the application of the Article 44 of the Statute. Article 62 of the Rules of Court, which is adopted in 1978, merely affirms the Court's power to call upon the parties to produce such evidence or explanation as the Court may consider necessary for the elucidation of any aspects of the matters in issue, or to seek any other information for this purpose. Under this article, the Court may also, if necessary, "arrange for the attendance of a witness or expert to give evidence in the proceedings."

17 See Annex 2 to the Judgment, *ibid.* 258-60.

18 *Continental Shelf*, I.C.J. Reports, 1982.

19 *Continental Shelf*, I.C.J. Reports, 1985.

20 *ibid.* 30-38.

21 See Lachs, *op.cit.* p.273.

Article 62 of the Rules of Court is a modified version of Article 59 of the 1972 Rules.²² In contradistinction to the older version, Article 62 of the 1978 Rules does not contain a reference to Article 44 of the Statute. The reason for this omission is not clear; it is assumed that it is "redundant to make a cross-reference to a provision in the Statute, and therefore binding on all members of the United Nations and other states parties to the Statute."²³

Another innovation is the inclusion in the 1978 Rules of Court of the provision which is embodied in Article 66. This provision governs the competence of the Court to decide at any time "either proprio motu or at the request of a party, to exercise its functions with regard to the obtaining of evidence or locality to which the case relates, subject to such conditions as the Court may decide upon." Under this provision, the Court may exercise its competence only after ascertaining the views of the parties.

It is difficult to evaluate the practical significance of the foregoing provisions of the Rules of Court in view of the fact that they have rarely been utilized. One assumption is that Article 66 is directed, in particular, at facilitating the taking of evidence by the International Court in loco.²⁴ If this be the case, the power of the Court to obtain personal, first hand knowledge about the relevant aspects of the subject-matter of the disputes by a visit to the place or places concerned (*descente sur les lieux*) will have a clearer basis than Article 44, paragraph 2 of the Statute.²⁵ A connection is maintained between Article 66 of the Rules and Article 44 of the Statute in that the "necessary arrangements" for the discharge of the Court's functions under the former article must be made in accordance with the general provision of the latter.

In loco visits which are conducted on behalf of international proceedings are rare in the practice of the International Court. On one occasion on which such a visit took place, it was conducted pursuant to Article 50 of the Statute. In the Corfu Channel case (Merits), communications were sent to the governments of Albania and Yugoslavia about the journey which the Court's experts were instructed to undertake in various localities in the territories of these two countries.²⁶ The experts instructed by the Court with the task of giving an opinion, were asked to make on the land and in waters adjacent to these places any investigations and, so far as possible, any experiments which they

22 Adopted on 10 May 1972. See Acts and Documents, No.2. Art.59 repeats the provision of Art.54 of the 1946 Rules.

23 See Rosenne, *Procedure in the International Court*, 1983, p.135.

24 See G. Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice*, 1983, p.425.

25 Cf. J. Evensen, "Evidence Before International Courts", *Nordisk Tidsskrift For International Ret*, Vol.25 (1955), p.44 at p.56.

26 See I.C.J. Yearbook 1949-1950, p.91.

considered useful with a view to verifying the circumstances involving certain explosions in Albanian waters and the damage and loss of human life resulting therefrom.

The action taken by the experts represented a direct application of Article 50 of the Statute²⁷; it was an on-the-spot visit pursuant to an order of the International Court²⁸ and was not a *descente sur les lieux* by the Court itself.²⁹ Under this article, "The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion." The application of this article rests upon the discharge of the collateral obligation incurred by the states which are parties to the Statute. States which are bound by the Statute are obliged to allow any activity of the International Court conducted under Article 50.³⁰

One of the most substantial requests made to-date to the International Court of Justice involving a visit by the Court to the localities connected with the subject-matter of the proceedings was rejected without any reason being given by the Court. On 30 March 1965, the Government of South Africa made a proposal to the International Court of Justice calling for an inspection *in loco* by the Court, or a sub-committee of judges appointed by it, in South-West Africa, the Republic of South Africa, the applicant states, namely Ethiopia and Liberia, and "one or two additional sub-Saharan states of the Court's own choosing" as a means of assisting the Court "in coming to a just conclusion on the factual aspects of the case."³¹ The case was based on the applicants' contention that the Government of the Republic of South Africa had violated its fundamental obligation under the Mandate, i.e. the obligation to promote to the utmost the material and moral wellbeing and the social progress of the inhabitants of the Territory of South-West Africa. To substantiate its proposal, the counsel for the Government of South Africa pointed out that it was "almost impossible for visitors from outside Africa to view and evaluate wellbeing and progress in an African territory like South-West Africa fairly and in a proper perspective unless they have had an opportunity of observing comparable standards and conditions in other parts of Africa" and that "inspection by the Court, or its committees of practical attempts, achievements, standards and conditions in the Applicant States.... could therefore be of considerable assistance to the Court in

27 See F. Pocar, *L'Assistenza Giudiziaria Internazionale in Materia Civile*, 1967, p.307.

28 See I.C.J. Reports, 1949, pp.21, 151. Cf. J.F. Lalive, "Quelques remarques sur la preuve devant la Cour Permanente et la Cour Internationale de Justice", *Annuaire suisse de droit international*, Vol.7(1950), p.77 at p.101.

29 See Sandifer, *op. cit.* p.346; *cf.* remarks by W.Koo, in the Temple of Preah Vihear case, I.C.J. Reports, 1962, p.100.

30 See H. Kelsen, *The Law of the United Nations*, 1951, p.476.

31 See I.C.J. Pleadings, South-West Africa, VolVIII, pp.271,280.

evaluating the policies and practices of the South African Government in South-West Africa." According to the counsel for the Government of South Africa, this was not "a matter of introducing policies and their application in the African States for adjudication by this Court;" it was "a matter of assisting the Court in properly fulfilling its task in regard to adjudication and evaluation of the policies applied in South-West Africa." It seemed highly reasonable, therefore, "to expect of the Applicant Governments, which are asking the Court to make this adjudication, that they should render such assistance to the Court by making possible such a visit to their territories."³²

These contentions by South Africa were strongly contested by the applicant states. The latter, questioning the desirability of "seeing African reality as distinct from just reading or hearing about it,"³³ argued that it was the legal aspects of the issue which were to be determined by the Court and that in so far as the factual aspects were concerned they were given due consideration in the "voluminous pleadings which, for more than four years, have been prepared, collated and are now submitted in unusually bulky form."³⁴

For similar reasons the applicant states rejected an alternative proposal by South Africa for a local inspection by a committee of the International Court, rather than the full Court. The agent for the applicant states argued that the exercise of judicial function by a committee of the Court elsewhere than at the seat of the Court would not be very useful: "the result could only be that those Members of the Court who did not have the opportunity to obtain first-hand appreciation of African reality would perforce have to reach conclusions about the matter from reading or hearing about it from others, however respected."³⁵ It was further argued that "Even if... such a procedure ... of a committee of the Court conducting the inspection for the purpose of witnessing African reality would satisfy the requirement of firsthand knowledge, apparently not for that purpose necessary to be appreciated through visual evidence, a still more formidable obstacle would arise after the processes of observation and appreciation have taken place. Upon Respondent's premise that personal inspection of the African reality is a precondition to a full appreciation, how could the Court, or any Court, appropriately record, or explain, the part which such personal inspection has played in arriving at its judgment?"³⁶

The decision of the International Court of Justice not to accede to the application by the respondent state for an inspection in loco is not entirely consistent with the rationale of its earlier decisions. In a public hearing on 14

32 *ibid.*, pp.279-280.

33 *ibid.* p.278.

34 *ibid.* Vol.IX, p.53.

35 *ibid.* p.15.

36 *ibid.*

May 1965, the Court, in response to a request made by the applicants in relation to the calling of evidence by the respondent, had stated that the Statute and the Rules of Court envisaged a right to be exercised by the party in contentious proceedings to produce all evidence before the Court by the calling of witnesses and experts, and a party had to be allowed to exercise that right as it thought fit.³⁷ In a further decision on 24 May 1965 the Court indicated the procedure according to which it would hear the evidence of witnesses and experts.³⁸ From 18 June to 14 July 1965, South Africa called the witnesses and experts subject to the procedure indicated by the Court.³⁹ In view of the International Court's willingness to elicit additional evidence in the South-West Africa case, had the Court adopted a positive attitude towards the respondent's application for an inspection in loco, this would have been completely in line with its earlier attitude in hearing South Africa's witnesses and experts.

The reluctance of the International Court of Justice to accede to a request for a site visit was also manifest in the Land, Island and Maritime Frontier Dispute between El Salvador and Honduras.⁴⁰ In this dispute, a request was made to the Court at the oral hearings that it consider exercising its functions with regard to obtaining evidence in loco. The Court, however, considered that it would not be necessary to exercise its functions under Article 66 of the Rules of the Court and proceed to an in loco inspection.⁴¹

The first site visit that the International Court of Justice has undertaken in fulfillment of its judicial function was in connection with a major hydroelectric dam project on the Danube. This was a case referred to the Court in 1993 by agreement between Slovakia and Hungary.⁴² It concerned a treaty concluded in 1977 for the construction of a dam project on the Danube at various localities in Slovakia and in Hungary. The court was asked to decide whether Hungary was entitled to suspend and subsequently abandon its part of the project; whether the then Czechoslovakia was entitled to proceed with a "provisional solution" involving damming the river at another location; and the legal implications of Hungary's notification of the termination of the treaty.

From the outset, Slovakia had considered that the Case concerning the Gabčíkovo-Nagymaros Project was particularly suited to an in loco visit by the Court. Such a visit, it was thought, would facilitate Members of the Court in perceiving the project in the material sense. Without seeing the area, the Court

37 *ibid.* Vol.VIII, p.42.

38 *ibid.* p.46.

39 *ibid.* pp.46, 70. The procedure was based upon Arts. 43 and 51 of the Statute and arts. 49, 50 and 53 of the Rules of Court.

40 I.C.J. Reports, 1992.

41 *ibid.* pp.351, 361, 362.

42 Text of the agreement in International Legal Materials, Vol.32 (1993), p.1293.

would find it more difficult to appreciate the effects of the various actions taken by the contesting states in the relevant period, which the Court had been asked to address in the compromise referring the dispute before it.

In this case, the Court's exercise of its authority under Article 66 of the Rules of Court was first requested shortly before the termination of the written proceedings by means of a letter to the Court from the Slovak agent. A copy of this letter was transmitted to the Hungarian agent, who responded by stating that Hungary would cooperate in the arrangement of a visit should the Court consider the case suitable for one. The Court's position was that it would conduct the visit following a protocol to be made between the parties laying down the procedure for the visit.⁴³

There are certain features which would distinguish this procedure from the Court's previous practice. In the first place, in previous cases, suggestions for in loco visits had been made during the oral hearings (South-West Africa; Land, Island and Maritime Frontier Dispute). This practice seemed unsuitable in view of the practical impediments faced by the Court in the present case. Second, in previous cases, suggestions for visits had been made unilaterally. In this connection, it is to be noted that when parties objected to a suggested visit, the visit did not take place (South-West Africa). In the Corfu Channel case, there was no objection to the suggestion that a party of experts visit the relevant places. In the present case, Slovak initiative resulted in a joint suggestion made to the Court and, subsequently, in a protocol by the parties as to the procedure of the visit.

The Court's decision to carry out a visit in loco was based upon Articles 44 and 48 of its Statute and Articles 31 and 66 of its Rules. In this connection, an interesting question would be whether, during the visit, the Court could take steps of action in a way which is not envisaged by the protocol.⁴⁴

The power of the Court to issue orders for the conduct of a case and to make all arrangements connected with the taking of evidence under Article 48 of its Statute is unaffected by a change of the venue from the Hague to the territory of a state involved in a dispute before it.⁴⁵ This consideration would find support under Article 66 of the Rules of Court. It can also be supported by Article 22 of the Statute, which, after stating that the seat of the Court shall be at the Hague, provides that "This, however, shall not prevent the Court from

43 See P. Tomka-S.S. Wordsworth, "The First Site Visit of the International Court of Justice in Fulfillment of its Judicial Function", *American Journal of International Law*, Vol.92(1998), p.133 at p.135.

44 cf. *ibid.* p.138.

45 *ibid.*

sitting and exercising its functions elsewhere whenever the Court considers it desirable." The Court's power to exercise its functions, therefore, appears to be independent of its location.⁴⁶ This, however, raises the further consideration of whether the Court can be regarded as "sitting" during a visit in loco. Happily, this consideration was not pertinent in the present case.

The International Court of Justice, under Article 63, paragraph 2 of its 1978 Rules of Court, may take the necessary steps either at the request of one of the parties or proprio motu, for the examination of witnesses otherwise than before the Court itself. The provision of this article is similar to that contained in article 61 of the 1972 Rules which, in turn, is a repetition of the provision of Article 56 of the 1946 Rules.

The legislative history of Article 63, paragraph 2 of the 1978 Rules does not provide a clear indication as to the scope of application of the provision of this article. Neither does the judicial practice provide the pertinent indication. This provision, which was originally embodied in Article 49 of the 1931 Rules of Court of the Permanent Court of International Justice, was never applied by the Permanent Court.⁴⁷ During the Permanent Court's Ninth Meeting for the preparation of the 1936 Rules, opinions were expressed as to the propriety of including in the text of Article 49 a reference to the specific means by which the examination of witnesses elsewhere than before the Court could be effected.⁴⁸ Opinions were also expressed in respect of whether Article 49 of the 1931 Rules enabled the Permanent Court to empower some of its members to take evidence in places away from the seat of the Court.⁴⁹ It was suggested that this possibility existed under Article 50 of the Statute whereby the examination of witnesses in the nature of an inquiry could be entrusted to the members of the Court.⁵⁰

The International Court of Justice has not, so far, resorted to the provision which is now embodied in Article 63, paragraph 2 of its 1978 Rules. However, certain suggestions can be made regarding the possible application of the provision.

In the first place, it is implicit in this provision that it covers the circumstances in which the International Court is satisfied that oral evidence cannot be taken before it during the oral proceedings. In cases where a party seeks to bring to the attention of the Court statements by persons located in its own territory or in some other territory, such statements can be adduced in

46 *ibid.*

47 See P.C.I.J., Ser.D, No.2 (3rd add.), p.825.

48 *ibid.* pp.219-222.

49 *ibid.* p.222.

50 *ibid.* p.225.

evidence in the documents of the written proceedings. If a party decides after the written proceedings that it is useful to have the evidence of other persons, this then becomes a matter falling within the scope of the rules concerning witnesses in the oral proceedings and may necessitate a recourse to Article 63, paragraph 2 of the Rules of Court.

Under Article 63, paragraph 2 of the 1978 Rules, the International Court of Justice, or the President if the Court is not sitting, must take the necessary steps for the examination of witnesses "otherwise than before the Court itself." This implies that the Court is authorized to take testimony outside its own forum. It is suggested, although there is no judicial practice to confirm it, that the examination of witnesses outside the international forum can be effected pursuant to letters rogatory issued by the International Court. This would mean a devolution of powers, a judicial process whereby the International Court would relinquish its powers in favour of a municipal court with regard to the performance of the act of taking the relevant testimony.

Letters rogatory issued by the International Court would be addressed to a particular court or to any competent court in the state of execution. Under Article 14, paragraph 2, of the Statute they must first be transmitted to the government of the state of execution. The letters would include statements about the nature of the international proceedings for which the testimony is required together with any other information deemed useful in regard to the proceedings, and would contain the name, description and address, so far as known, of the person whose testimony is required. If necessary, letters rogatory would be accompanied by a list of interrogatories to be put to witnesses. Insofar as the execution of letters rogatory is concerned, the same procedure and the same means of compulsion would be employed as would be employed for the examination of witnesses in municipal proceedings⁵¹, provided that if a special procedure was requested by the International Court, that would have been employed to the extent that it was not prohibited by the law of the state of execution.

An important question is whether there could be certain circumstances under which a municipal court could refrain from giving effect to letters rogatory which are addressed to it by the International Court. States which are bound by the Statute are obliged to allow any activity of the International Court administered under Article 44, paragraph 2 of the Statute. The application of this article, however, is dependent in large measure upon the rules of municipal law. In the absence of municipal rules affecting the execution of letters rogatory

51 See J.C. Witenberg, "La Théorie des Preuves Devant les Juridictions Internationales", *Recueil des Cours*, Vol.56(1936 II), p.1 at p.75.

emanating from the International Court, the provision embodied in Article 44, paragraph 2 of the Statute is of limited practical value.⁵²

The circumstances in which letters rogatory cannot be executed because of municipal legal impediments must be distinguished from the circumstances in which the execution becomes impossible for factual reasons, namely because of the absence of the person whose testimony is required, or because of the inability to locate him. If, for any reason, letters rogatory could not be executed, the International Court would have to be informed about the reason for non-execution.

The International Court of Justice is the sole assessor of all evidence produced before it. A municipal court entrusted with the execution of letters rogatory issued by the International Court would have no power to evaluate or otherwise decide upon the validity of the evidence to be thus obtained. The municipal court executing the letters rogatory would communicate to the International Court a statement of the facts and the manner of the execution together with a record of the examination of the witness. The probative value of the testimony is determined by the International Court itself.

On one notable occasion the International Court of Justice rejected a request by the applicant party which, had it been accepted, would have provided a unique occasion on which the Court would have had to take the testimony of certain witnesses in the form of depositions.

In the South-West Africa case the agent for the applicant states, Liberia and Ethiopia, requested the International Court, in the event that the respondent state, South Africa, wished to produce any evidence the production of which was permitted by the Court, to order or otherwise decide that the respondent instead on calling witnesses to testify personally, embody the evidence of any such witnesses in a deposition or written statement properly authenticated which should then constitute a full and complete statement of the evidence which such witness would have adduced if he appeared in Court personally.⁵³ In a letter addressed to the agent for South Africa, the agent for the applicant states sought the consent of the respondent state to procedures which he proposed should be followed. It was indicated in the letter, dated 5 May 1965, that the applicants would waive all right to be present during the taking of the depositions or the preparation of the statements for any purpose including the purpose of cross-examination, and would also waive all right to examine the witnesses who might appear personally before the Court. These were confirmed by the

52 See M.O. Hudson, *The Permanent Court of International Justice*, 1943, p.200.

53 *South-West Africa, Second Phase, Judgment*, I.C.J. Reports, 1966, p.9.

applicants' agent in a public hearing of the International Court when he reiterated that "The Applicants would waive any right they otherwise might have, pursuant to the rules, practice, or pleasure of the Court, not to be present at the taking of such depositions, not to request the right of examination in the form of interrogatories or otherwise."⁵⁴

The request made by the applicants was substantiated by the fact that the testimony of witnesses had already been recorded in the voluminous written pleadings of South Africa and that a prolonged oral proceeding would be a waste of time. The International Court, however, adopted a negative attitude. Having considered the request of the applicant states, the Court took the view that "the Statute and Rules contemplated a right in the party in contentious proceedings to produce all evidence before the Court by the calling of witnesses and experts, and a party must be left to exercise that right as it thought fit, subject, of course, to the provisions of the Court's Statute and Rules."⁵⁵

The view taken by the Court appears to be the result of the Court's desire to adhere in its proceedings to the principles which would allow the Court the utmost flexibility in procuring and evaluating the evidence, as much as the result of the circumstance that neither the Statute nor the Rules of Court provided a clear basis on which the applicants request could have been given effect. The latter consideration is supported by the submission of the agent of the applicant states who, in making the request, relied upon "the inherent power of the Court and the inherent nature of the judicial process with respect to the administration of the Court."⁵⁶

4. Ad-Hoc International Tribunals

i. The Use of Depositions

Ad-hoc international tribunals have made frequent use of depositions to procure testimonial evidence by witnesses. According to Sandier the reason for this is a pragmatic one: in most cases international tribunals do not have time to hear witnesses.⁵⁷ "Frequently the witnesses are numerous and scattered, living long distances from the seat of the tribunal, so that bringing them before the tribunal would be excessively expensive even if the tribunal had authority to compel them to attend."⁵⁸

54 I.C.J. Pleadings, South-West Africa, Vol.IX, p.24.

55 *ibid.* Vol.VIII, p.42.

56 *ibid.* p.28.

57 See Sandifer, *op.cit.* p.313.

58 *ibid.*

In international proceedings the procedure for the taking of depositions resembles the municipal procedures based on common law principles. The procedure involves the statement of a witness under oath, obtained in question and answer form with opportunity given to the opposing party to be present and to cross-examine, with all this reported and transcribed.

A deposition is usually taken by a judge or a subcommission of the international tribunal or by any person delegated by the international tribunal in accordance with the constituent instrument of that tribunal as well as with any special instructions which the tribunal is empowered to promulgate.⁵⁹ Resort can be had to a municipal court for the execution of a deposition, but only when the witness is recalcitrant. In such cases the international tribunal must make an application to a municipal court for the use of compulsive measures against the recalcitrant witness.

Depositions are taken on the basis of a list of interrogatories or cross-interrogatories which may accompany the request for the taking of depositions.⁶⁰ The interrogatories are propounded to the witness by the person taking the deposition.⁶¹ If the request is not accompanied by such a list, it is presumed that the interrogatories or cross-interrogatories can be propounded orally by the representatives of the litigating parties who are present at the taking of the deposition, since it might not be anticipated what information or testimony is necessary to bring out.

The testimony procured in a deposition is returned to the international tribunal following the authentication of the deposition by the signature of the person before whom the testimony was taken.⁶²

The rules of an international commission which was set up under the terms of an arbitration treaty between Great Britain and the United States, dated 1 July 1863⁶³, highlights the procedure which is generally adopted by international tribunals in obtaining the testimony of witnesses. The arbitration concerned the claims of two British organizations, the Hudson's Bay Company and the Puget's Sound Agricultural Company, whose interests were affected by a boundary division pursuant to a treaty between Great Britain and the United States.⁶⁴ The rules of procedure adopted by the International Commission provided that all testimony, unless specially ordered, would be in writing and on oath which would be administered by a person authorized under the *lex loci*

59 *ibid.*

60 See Witenberg, *op.cit.* p.77.

61 See Sandifer, *op.cit.* pp.313-314.

62 Cf. Witenberg, *op.cit.* p.80.

63 Text in C.Parry, *Consolidated Treaty Series*, Vol.128, p.19.

64 Treaty of 15 June 1846, text in *ibid.* Vol.100, p.39.

actus to take depositions. All depositions were required to be filled with the clerks from time to time as they were taken and, in view of the number expected to be taken, specific instructions were laid down about the manner in which they would be transcribed.⁶⁵ The International Commission, pursuant to the rules it applied, ordered that communications be issued for taking testimonial evidence in the States of California and Oregon, the Territory of Washington and Vancouver Island; that such communication be addressed to any judge or clerk of a court of record, United States court commissioner or notary public; that the witnesses produced by either party be examined and cross-examined *viva voce*; that all objections to evidence and all other matters of law and fact be reserved, and that the evidence together with all the documents and a report of all such objections be returned to the Commission "with all convenient diligence".⁶⁶

Ad-hoc international tribunals may sometimes adopt a restrictive attitude when enacting their rules of procedure for the taking of testimonial evidence outside their forum. Thus, by an order of 4 April 1872, the American-British Commission which sat under the Treaty of 8 May 1871 between the United States and Great Britain⁶⁷ provided that in taking depositions the commissioners could put any such interrogatories to witnesses as the parties' counsels would direct, and take the answers thereto which the witnesses would give in their original language. But the commissioners could not undertake to determine the propriety of the interrogatories or to refuse to put them to the witnesses. Where an objection was made to an interrogatory or to an answer, the commissioners merely "state the fact".⁶⁸

A procedure involving extensive use of interrogatories was applied, more recently, in the Gut Dam Arbitration between the United States and Canada. On 25 March 1965, the two states signed an agreement which provided for an international arbitral tribunal, known as the 'Lake Ontario Claims Tribunal', for the disposition of claims arising from damage to the property of the United States nationals caused allegedly by Canada's construction of the Gut Dam in the St. Lawrence River.⁶⁹ Under Article 11 of the Rules of Procedure of the Tribunal, the Government of Canada was allowed to obtain factual information from the claimants and other "fact witnesses" by submitting written interrogatories through the United States agent "without unduly delaying the proceedings, in conformity with proper arbitral practice, and avoiding the

65 See J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, Vol.1, 1898, pp.241-242.

66 *ibid.* p.242.

67 Text in Parry, *Consolidated Treaty Series* Vol.143, p.145.

68 Moore, *op.cit.* Vol.3, 1898, p.2207.

69 See the Dept. of State Bulletin, Vol.52 (1965), p.643.

possible tensions inherent in the examination of fact witnesses and claimants.”⁷⁰

During the course of the proceedings the Canadian Government communicated to the United States agent more than 150 sets of interrogatories to be forwarded to the claimants and other witnesses. The answers were transmitted back to the Canadian Government to enable it, in sufficient time, to incorporate the received information into its ‘Answers to the Memorial’ for each claim.⁷¹ In exceptional cases where the answers to the interrogatories were received after the Canadian Government had filed its answer, the Canadian agent filed a supplementary answer to which procedure no objection was raised by the United States.⁷²

ii. Visits to the Scenes

In contrast to institutionalized international courts, international courts of an ad-hoc nature have frequently conducted visits to the scenes connected with the disputes. An examination of the practice of ad-hoc international tribunals indicates that on most occasions the visits have been made in connection with boundary disputes. The boundary arbitrations in which the tribunals have had the opportunity to obtain personal information in loco include the St.Croix River Arbitration under Article 5 of the Jay Treaty of 1794 between Great Britain and the United States⁷³; the arbitration of 23 September 1874 between Italy and Switzerland in respect of the delimitation of the boundary in Alpe de Cravairola⁷⁴, and the arbitration of 14 March 1908 between Norway and Sweden for the delimitation of the sea-limit in relation to the Grisbadar Rocks.⁷⁵ In the Argentine-Chile boundary case, a technical commission was appointed by the Arbitral Tribunal to undertake a visit to all accessible points in the territory in dispute which were material to a solution.⁷⁶ In the Beagle Channel arbitration between the same parties, the Arbitral Tribunal, at the request of Argentina and Chile, accompanied by the Registrar and Liaison Officers from both sides, visited the Beagle Channel region and inspected the islands and waterways concerned. Every possible assistance and facility were rendered by the naval

70 See the Report of the Agent of the United States before the Lake Ontario Claims Tribunal, in *International Legal Materials*, Vol.8 (1969), p.127.

71 *ibid.* p.128.

72 *ibid.*

73 See Moore, *op.cit.* Vol.1, 1898, p.1.

74 See A.de la Pradelle-N.Politis, *Recueil des Arbitrages Internationaux*, Vol.3, 1954, p.464.

75 See Art.8 of the Arbitration Convention, in Parry, *Consolidated Treaty Series*, Vol.206, p.280 at p.282.

76 See *Reports of International Arbitral Awards*, Vol.9, p.29.

authorities of both sides and by the individual representatives of the states parties who took part in the visit.⁷⁷

On a number of other occasions ad-hoc international tribunals have had to take expeditionary missions in the territories of the contesting states to obtain evidence in loco about matters which did not necessarily relate to boundary disputes. In the case of the *Claim of Walter Fletcher Smith v. The Compania Urbanizadore*⁷⁸ concerning the validity of the expropriation by Cuba of the property of a United States citizen resident in Havana, the arbitrator, acting under terms of the Agreement of Arbitration between the United States and Cuba, proceeded to Cuba, examined the property in question, took the testimony of all witnesses produced before him and made an inspection of the records of all local tribunals which had acted upon the case.⁷⁹

77 See *International Legal Materials*, Vol.17 (1978), p.641.

78 See the decision of 2 May 1929, in *Reports of International Arbitral Awards*, Vol.2, p.915.

79 *ibid.* p.917.