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The Evidentiary Practice Of The World Court

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THE EVIDENTIARY PRACTICE OF THE WORLD COURT

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ABSTRACT:

In this chapter, we canvass some key aspects of the evidentiary practice of the World Court, with particular emphasis on recent developments. Our ambition is to provide insight into both the Court's jurisprudential pronouncements on important evidentiary matters, and its institutional culture and practice as regards the management and treatment of evidence. This chapter begins by mapping out the evidentiary framework governing the Court's work, with reference to relevant provisions, before turning to the admissibility of evidence before the Court. Ultimately, this contribution recalls and explores select substantive pronouncements of the Court on matters of evidence.

KEYWORDS:

Public international law; International Court of Justice; evidence; burden of proof; procedure; documentary evidence; witness testimony; international judicial proceedings

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I. INTRODUCTION

The role and place of evidence in international legal proceedings are of fundamental importance for international justice and the rule of law. In many ways, the production and management of evidence constitute the most crucial building blocks in ensuring a just and well-reasoned judicial outcome in a dispute between sovereign States. Unsurprisingly, the subject of evidence before international courts and tribunals and surrounding issues have generated considerable scholarly output over the years, including in relation to specific international legal fields.¹ What is more, the academic literature¹ has also devoted considerable time and space to discussing the various aspects of the evidentiary practice of the International Court of Justice ('Court', 'ICJ' or 'World Court'), be they related to the burden of proof, standard of proof or

¹ See eg, Paul Reichler, 'Problems of Evidence before International Tribunals' in John Norton Moore (ed), *International Arbitration: Contemporary Issues and Innovations* (Leiden and Boston, Martinus Nijhoff, 2013) 47-52; Mary Ellen O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 *Proceedings of the Annual Meeting of the American Society of International Law* 44; Chittharanjan Felix Amerasinghe, *Evidence in International Litigation* (Leiden and Boston, Martinus Nijhoff, 2005); Chittharanjan Felix Amerasinghe, 'Principes en matière de preuve dans le procès international: Principles of Evidence in International Litigation: 15^{ème} Commission' (2002-2003) 70 *Annuaire de l'Institut de Droit international* 139; Rodman Bundy, 'Evidence before International Tribunals in Maritime Delimitation Disputes' in Clive Schofield *et al* (eds), *The Razor's Edge: International Boundaries and Political Geography: Essays in Honour of Professor Gerald Blake* (London, Kluwer Law International, 2002) 173-83; Mojtaba Kazazi and Bette Shifman, 'Evidence before International Tribunals' (1999) 1 *International Law Forum* 193; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence* (The Hague, Kluwer Law International, 1996); Charles Bower, 'Evidence before International Tribunals: The Need for Some Standard Rules' (1994) 28 *The International Lawyer* 47; Durward Valdamir Sandifer, *Evidence before International Tribunals* (revised edn, Charlottesville, NY, University Press of Virginia, 1975); Jens Evensen, 'Evidence before International Courts' (1955) 25 *Acta Scandinavica Juris Gentium* 14; J.C. Witenberg, 'La théorie des preuves devant les juridictions internationales' (1936-II) 56 *Recueil des Cours* 1.

broader procedural questions.² Over the last decade, there has been renewed interest in the Court's approach to evidentiary issues, as it is increasingly confronted with fact-intensive and science-heavy cases. Evidentiary questions have also been central in some scholarly accounts addressing the role of the law of State responsibility in tackling modern security threats such as international terrorism, leading some publicists to formulate proposals for normative and policy reform or deliver critical assessments of the current evidentiary system on the international plane.³ In any event, the principal judicial organ of the United Nations ('UN') remains paramount in applying and developing international legal principles; its many contributions on evidentiary matters warrant further consideration.

In this brief chapter, we canvass some key aspects of the evidentiary practice of the World Court, while placing some emphasis on recent developments on that front. While providing an exhaustive treatment of this subject is simply impossible in only a few pages, our ambition is nonetheless to provide insight into both the Court's jurisprudential pronouncements on important evidentiary matters, and its institutional culture and practice as regards the management and treatment of evidence. This chapter begins by mapping out the evidentiary framework governing the Court's work, with reference to relevant provisions, before turning to the admissibility of evidence before the Court. Ultimately, this contribution recalls and explores select substantive pronouncements of the Court on matters of evidence.

² See eg, Luigi Fumagalli, 'Evidence before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom' in Nerina Boshiero *et al* (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague, Asser Press, 2013) 137-48; Jacques-Michel Grossen, 'A propos du degré de la preuve dans la pratique de la Cour internationale de Justice' in Marcelo Kohen *et al* (eds), *Perspectives of International Law in the 21st Century: Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday* (Leiden and Boston, Martinus Nijhoff, 2012) 258-68; Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (London, British Institute of International and Comparative Law, 2009); Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice' (1999) 1 *International Law Forum* 202; Andrés Aguilar Mawdsley, 'Evidence before the International Court of Justice' in Ronald St. John Macdonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht, Boston and London, Martinus Nijhoff, 1994) 533-50; Manfred Lachs, 'Evidence in the Procedure of the International Court of Justice: Role of the Court' in Emmanuel Bello and Prince Bola Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias: Volume I: Contemporary International Law and Human Rights* (Dordrecht, Boston and London, Martinus Nijhoff, 1992) 265-76.

³ See eg, Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Oxford and Portland, Hart Publishing, 2006) 146-51, 340-48; Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Oxford and Portland, Hart Publishing, 2012) 39-40, 220-26.

II. THE EVIDENTIARY FRAMEWORK BEFORE THE COURT AND RELEVANT PROVISIONS

From a more traditionalist standpoint, the Court's pronouncements are not only a way to peacefully resolve disputes between States, but they also strive to establish an accurate historical record, be it of the negotiation history between two States in the context of a maritime delimitation case or boundary dispute, the drafting history of a particular international convention, or the background facts to an armed conflict relevant to a dispute before the Court. In that light, the role of evidence before the Court becomes central in establishing a faithful historical record, in addition to assisting the Court in ascertaining the facts relevant to its legal decision with a view to reaching a just and well-reasoned outcome. After all, it should be recalled – and stressed – that the principal judicial organ of the UN is not only a court of first instance but also of last instance. According to Article 60 of the Statute of the Court, '[t]he judgment is final and without appeal'.⁴ Invariably, in each case brought to it, the Court is called upon to sift through vast evidentiary records, establish the factual complex related to the proceedings and, ultimately, reach well-supported and just conclusions both on the facts and the law, thereby peacefully settling the disputes of which it is seized.

At the outset, it must be emphasised that the Court differs in some regards from domestic tribunals, in that the rigidity of evidentiary rules found in some municipal legal systems has not been transposed integrally to the international legal order. Quite the contrary, the rule of thumb for evidentiary matters before the Court is flexibility. The Statute of the Court is correspondingly cursory in the wording of Article 48, simply providing that the Court shall 'make all arrangements connected with the taking of evidence'. In principle, there are no highly formalised rules of procedure governing the submission and administration of evidence before the Court, nor are there any restrictions about the types of evidentiary materials that may be produced by parties appearing before it.

⁴ The Statute of the Court is available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

In short, in deciding the cases submitted to it, the overarching objective of the Court is to obtain all relevant evidence pertaining to both facts and law that may assist it in ruling on issues of substance, as opposed to providing a judicial outcome grounded primarily on technical and/or procedural rationales. The Court's predecessor institution, the Permanent Court of International Justice ('PCIJ'), had identified this as its dominant judicial philosophy as early as 1932 in the *Free Zones of Upper Savoy and the District of Gex* case. In that regard, it proclaimed that 'the decision of an international dispute of the present order should not mainly depend on a point of procedure'.⁵

Interestingly, the current Statute of the Court is modelled after the Statute of its predecessor, which saw the light of day in 1920. This explains why several of the statutory guidelines concerning evidence carried over from the previous institution to the new Court in 1946. Together, these institutions provide over 90 years of accumulated evidentiary practice, which is a testament to the foresight of the framers of the UN Charter with respect to institutional continuity. That said, it should be emphasised that despite the inspiration drawn from the PCIJ's Statute by the ICJ's Statute – supplemented by the Rules of Court – the genesis of the provisions on evidence in those instruments actually derives from the draft rules of procedure for international arbitration of the Institute of International Law of 1875, the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, and the accumulated evidentiary practice of international courts of arbitration.⁶

It goes without saying that the Court disposes of a wide margin of latitude not only in requesting evidentiary elements, but also in assessing the evidence in each dispute submitted to it, while considering both the relevant rules of international law and the specific facts and circumstances of each case.⁷ While the resulting procedural and evidentiary model governing the Court's work is in many ways *sui generis* and tailored to the singular mission of the Court as

⁵ *Case of the Free Zones of Upper Savoy and the District of Gex*, 1932 PCIJ (ser A/B) No 46 (7 June) at 155.

⁶ See Aguilar Mawdsley, above note 2 at 534 and 541; Lachs, above note 2 at 265.

⁷ See, generally Maurice Kamto, 'Les moyens de preuve devant la Cour internationale de Justice à la lumière de quelques affaires récentes portées devant elle' (2006) 49 *German Yearbook of International Law* 259.

the principal judicial organ of the UN, it nonetheless draws inspiration from both the Anglo-Saxon legal tradition and continental systems of civil law.

By way of example, the active search for evidence carried out by the Court is reminiscent of the continental judicial culture whereas the introduction of affidavit evidence finds its roots in the common law tradition, thereby resulting in the absence of any rigid hierarchy of different types of evidence before the Court.⁸ Indeed, both the PCIJ and the ICJ have assessed affidavit evidence (i.e. sworn statements) in disputes brought before them, including in oft-cited cases such as *Mavrommatis* and *Corfu Channel*.⁹ Equally important are the vast-ranging powers conferred upon the Court, enshrined in Article 62 of the Rules of Court, to call witnesses and direct the parties to provide evidence. In fact, the scope of powers generated by the wording of this provision is best illustrated by quoting the text itself:

[t]he Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose.¹⁰

This includes – always with the aim of attaining the objective truth – the possibility of the Court arranging ‘for the attendance of a witness or expert to give evidence in the proceedings’.

The Rules of Court – particularly Articles 57 and 58 – lay down a fairly robust evidentiary framework with respect to the submission and admission of oral evidence. In contrast, the practical effect of these provisions is somewhat tempered by Article 60 of the Rules of Court, which prescribes succinctness and finiteness of oral statements, and by Article 61, which enables the Court to manage the administration of evidence and to question the parties. By virtue of Article 49 of the Court’s Statute, ‘[t]he Court may, even before the hearing begins, call

⁸ See eg, Valencia-Ospina, above note 2 at 204.

⁹ For further discussion, see Jean-Flavien Lalive, ‘Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice’ (1950) 7 *Annuaire suisse de droit international* 77, 79.

¹⁰ The Rules of Court are available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0>.

upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal'. In fact, the Court has availed itself of the power conferred upon it by this provision on several occasions.¹¹ Moreover, Article 50 of the Statute confers vast fact-finding powers upon the Court, which allows it to entrust 'any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.¹² It should also be mentioned that the statutory and procedural framework governing proceedings before the Court enables parties to call witnesses – including expert witnesses – which may in turn be cross-examined.

In fact, testimonial evidence – including in the form of expert witnesses – was very much a part of two recent oral proceedings before the Court: First, in the dispute concerning *Whaling in the Antarctic* opposing Australia and Japan, which was heard from late-June to mid-July 2013; and second, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, which was heard in March and early-April 2014. What is more, these two proceedings involved intricate factual complexes – in one case the consideration of highly scientific evidence and in the other alleged violations of the *Genocide Convention* during the conflict in the Balkans – along with important stakes for both the interpretation of the *Genocide Convention* and the protection of the environment and conservation of living resources. In many ways, the former case constituted an additional illustration of the Applicant's willingness to submit a fact-intensive and science-heavy dispute to the Court for adjudication, thereby entrusting it with the assessment of sophisticated evidentiary records, much in the vein of the scientifically complex case concerning *Pulp Mills on the River Uruguay*.¹³

¹¹ See eg, case concerning *Rights of Nationals of the United States of America in Morocco*, *I.C.J. Pleadings*, vol II at 431; *Corfu Channel case*, *I.C.J. Pleadings*, vol IV at 428 and vol V at 255; *Case of the Monetary Gold Removed from Rome in 1943, Order of November 3rd, 1953*, *I.C.J. Reports 1953*, p 44; the *Ambatielos case*, *I.C.J. Pleadings* at 346 and 566. For further discussion, see Shabtai Rosenne and Yaël Ronen, *The Law and Practice of the International Court, 1920-2005* (vol III, 4th revised edn, Leiden, Martinus Nijhoff, 2006) 1120 and *ibid*, chapter 21, para III.324 n 129.

¹² For different views on the Court's fact-finding function in different eras, see Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6 *The Law and Practice of International Courts and Tribunals: A Practitioner's Journal* 119; Daniel Joyce, 'Fact-Finding and Evidence at the International Court of Justice: Systemic Crisis, Change or More of the Same?' (2007) 18 *Finnish Yearbook of International Law* 283; Neil Alford Jr, 'Fact Finding by the World Court' (1958) 4 *Villanova Law Review* 38.

¹³ For further discussion on the Court's treatment of scientific evidence, see Anna Riddell, 'Scientific Evidence in the International Court of Justice – Problems and Possibilities' (2009) 20 *Finnish Yearbook of International Law*

The dispute brought to the Court in 2008 concerning *Aerial Spraying (Ecuador v Colombia)* had similarly involved voluminous scientific and testimonial evidence (primarily in the form of highly complex scientific reports and witness statements), which the Court had begun to absorb and digest in preparation of the oral hearings up until the case was withdrawn by Ecuador, just a few weeks prior to the commencement of those hearings. In a welcome development, the Parties settled the case prior to the hearings, while also openly acknowledging the Court for its hard work and dedication in the case, which they considered to have been indispensable in reaching their settlement.

The Court rendered its judgment on 31 March 2014 in the abovementioned case concerning *Whaling in the Antarctic*.¹⁴ As the judgment demonstrates, this precedent constitutes further and incontrovertible proof that the Court can deal with vast amounts of highly technical and scientific evidence in a cogent and methodical fashion, invariably delivering judgments of exemplary rigour characterised by their analytical clarity. Similarly, on 3 February 2015 the Court delivered its judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. Unsurprisingly, the voluminous testimonial evidence adduced in the context of the Parties' written and oral submissions, which included some *in camera* witness sessions during the oral hearings, again played an important role in establishing the factual record before the Court.

While parties appearing before the Court are afforded a wide margin of freedom as regards the submission of evidence, the Statute nonetheless requires that all evidentiary elements the parties intend on using to support their claims be presented in the course of the written proceedings, and according to the modalities prescribed by the Rules of Court. This essentially means that those documents must be annexed to the written pleadings. Thus, the overarching guideline – perhaps in an effort to replace or replicate some aspects of the 'discovery' process sometimes followed in domestic judicial settings – is that of full disclosure

229; Juan Sandoval Coustasse and Emily Sweeney-Samuels, 'Adjudicating Conflicts Over Resources: The ICJ's Treatment of Technical Evidence in the *Pulp Mills Case*' (2011) 3 *Goettingen Journal of International Law* 447.

¹⁴ For the text of the judgment, see *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, Judgment, *I.C.J. Reports 2014*, p 226.

of the evidence at the written stage of the proceedings.¹⁵ In some instances, a party may attempt to produce a new evidentiary element after the conclusion of the written proceedings, during the oral phase, or refer during its oral statement to the contents of a document that has not been produced during the written proceedings. The Court is increasingly confronted by this type of litigation strategy.

In that regard, the Rules of Court are rather straightforward, at least in principle: ‘After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party’. Unsurprisingly, the Rules of Court enable the Court to authorise the production of such documents after hearing the parties. In the second scenario considered earlier, whereby reference is made by a party to the contents of a previously unproduced document, such evidentiary item may be admitted if it ‘is part of a publication readily available’.

This last *cas de figure* arose in one of the Court’s most recent judgments on sovereignty and maritime delimitation opposing Nicaragua and Colombia, dealing both with sovereignty over certain maritime features located in the Western Caribbean Sea and the delimitation of an international maritime boundary in that area. In its judgment of November 2012, the Court pointed out that the Parties had provided judges’ folders during the oral proceedings, as is customary in litigation before the World Court.¹⁶ Referring to its Statute, the Court further noted that Nicaragua had included two documents in one of its judges’ folders which had not been annexed to the written pleadings and were not ‘part of a publication readily available’.¹⁷ Consequently, the Court decided not to allow those documents to be produced or referred to during the hearings.¹⁸

¹⁵ For further discussion on the concept of ‘discovery’ in international legal proceedings, see generally: Ali Marossi, ‘The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals’ (2009) 26 *Journal of International Arbitration* 511; Martin Davies, ‘Evidence, Documents and Preliminary Discovery in International Litigation’ (1996) 26 *University of Western Australia Law Review* 286; David Robinson, ‘Compelling Discovery and Evidence in International Litigation’ (1984) 18 *The International Lawyer* 533.

¹⁶ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Judgment, *I.C.J. Reports* 2012, p 624 at 632, para 13.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

It is also interesting to underscore that the Court recently adopted a new practice direction for States appearing before it in relation to this type of evidence, with a view to governing the introduction of new, or previously unproduced, audio-visual or photographic material at the oral proceedings stage.¹⁹ Among other things, the new Practice Direction IXquater directs the requesting State – that is to say, the State intending on producing the new evidentiary item or referring to the previously unpublished material – to make its intention sufficiently known, and in advance of the date on which it wishes to present the material. The provision further requires the requesting State to provide reasons for the request and directs it to comply with other modalities spelled out in the new practice direction.

III. ADMISSIBILITY OF EVIDENCE – SELECT EXAMPLES

As regards admissibility of evidence, generally, the Statute and Rules of Court do not lay down any major restrictions. In principle, the permissive nature of the evidentiary framework governing proceedings before the Court allows parties to submit virtually any form or type of evidence they see fit, with the caveat that the Court enjoys unfettered freedom in weighing it against the circumstances of each case and by reference to relevant international legal rules.²⁰ Amongst limited exceptions of inadmissible evidence before the Court, unlawfully obtained proof may obviously be excluded from the purview of what is acceptable, as was emphasised by the Court in its seminal *Corfu Channel* decision.²¹ In 1946, two British warships struck mines

¹⁹ See the Court's Press Release titled 'The Court adopts Practice Direction IXquater for use by States', dated 11 April 2013, available at <http://www.icj-cij.org/presscom/files/6/17296.pdf>.

²⁰ See eg, Aguilar Mawdsley, above note 2 at 539.

²¹ On the practice of the Court and international tribunals – with some reference to the *Corfu Channel* case – as regards the question of admissibility of evidence unlawfully obtained, see eg, W. Michael Reisman and Eric Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication' (1982) 76 *AJIL* 737. For a more recent book-length treatment of fraudulent evidence before international tribunals, with special reference to four ICJ cases, see W. Michael Reisman and Christina Skinner, *Fraudulent Evidence before Public International Tribunals: The Dirty Stories of International Law* (Cambridge, Cambridge University Press, 2014). In particular, chapters 3, 4, 5 and 8 of this recent monograph address evidentiary issues related to the *Corfu Channel*, *Tunisia/Libya*, *Nicaragua v United States*, and *Qatar v Bahrain* cases. Interestingly, the parties' conduct as regards evidentiary matters in the case concerning *Military and Paramilitary Activities in and against Nicaragua* has been divisive in the literature. In one instance, it pitted an eminent former Member of the Court against a distinguished counsel over the production and presentation of evidence in that case. Both individuals were involved in the original proceedings related to that case. See Stephen Schwebel, 'Celebrating a Fraud on the Court' (2012) 106 *AJIL* 102; Paul Reichler, 'The *Nicaragua* Case: A Response to Judge Schwebel' (2012) 106 *AJIL* 316;

while passing through the Corfu Channel between Albania and Greece, resulting in the destruction of the ships and significant loss of life. The United Kingdom submitted the dispute to the Court against Albania and contended that Albania had incurred international responsibility for the mines laid in the strait, primarily because it had failed to warn the Applicant State of the presence of those mines. Subsequently, British minesweepers scoured the Corfu Channel without the assent of Albania, ultimately attempting to produce the mines it had collected in its sweeping operation before the World Court as evidence of Albania's responsibility. In this regard, the Court characterised the United Kingdom's justification for its own conduct as a 'special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task'.²²

The Court rejected this line of defence, thereby inevitably equating the 'alleged right of intervention' with the 'manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses', and ultimately expounding that this line of reasoning 'cannot, whatever be the present defects in international organizations, find a place in international law'.²³ The Court went on to point out that '[i]ntervention [was] perhaps still less admissible in the particular form it would [have] take[n]' in the case before it, revealing itself alive to the concern that 'from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself'.²⁴ The Court remained equally unpersuaded by the United Kingdom's attempts to classify its conduct as falling under the rubric of 'self-protection or self-help'. In this regard, the Court emphasized that '[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations'.²⁵ While the Court acknowledged that Albania had completely failed in fulfilling its duties after the explosions and had engaged in dilatory tactics through its diplomatic notes, which both constituted extenuating circumstances as regards the

Stephen Schwebel, 'The *Nicaragua* Case: A Response to Paul Reichler' (2012) 106 *AJIL* 582; Paul Reichler, 'Paul Reichler's Rejoinder' (2012) 106 *AJIL* 583.

²² *Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p 4 at 34.

²³ *Ibid.*, at 35.

²⁴ *Ibid.*

²⁵ *Ibid.*

United Kingdom's conduct, the Court nonetheless deemed it necessary 'to ensure respect for international law' and 'declare that the action of the British Navy constituted a violation of Albanian sovereignty'.²⁶ It should be recalled that, ultimately, the Court admitted the evidence obtained through conduct that violated international law given that, in the case at hand, Albania had failed to raise any objections as to the admissibility of the proof obtained.²⁷ However, as mentioned above, the Court did so while admonishing the United Kingdom for its unlawful actions. Understandably, this jurisprudential precedent has prompted some leading scholars to conclude that the Court did not purport to lay down an exclusionary rule as to the admissibility of evidence obtained unlawfully.²⁸

Thus, the Court does not operate on the basis of any preliminary evidentiary filter to weed out inadmissible evidence at the outset; rather, the Court possesses a wide margin of appreciation in ascribing different weight to different evidentiary elements originating from varied sources. This component of the Court's judicial function is set into motion once the evidence has been entered into the written record. As a result, the issues of the weight to be attributed to, and evaluation of, the evidence in any given case before the Court replaces the perhaps more familiar rules on the admissibility of evidence prevalent before most domestic tribunals.

It follows that forms of evidence typically excluded in domestic judicial proceedings, such as hearsay evidence (*preuve par oui-dire*), are not inadmissible before the World Court although the Court ascribes little or no weight to such evidentiary elements. As regards hearsay evidence, for instance, the Court indicated in its oft-cited judgment in the *Military and*

²⁶ *Ibid.*

²⁷ For academic commentary on this aspect of the case, see eg, N.H. Shah, 'Discovery by Intervention: The Right of a State to Seize Evidence Located within the Territory of the Respondent State' (1959) 53 *AJIL* 595, 606; Thomas Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon Press, 1995) 336. For further discussion of possible reasons why the Court admitted the evidence, see Markus Benzing, 'Evidentiary Issues' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed, Oxford, Oxford University Press, 2012) 1234-75, 1243.

²⁸ See eg, Kazazi, *Burden of Proof*, above note 1 at 206. See also: Hugh Thirlway, 'Dilemma or Chimera? – Admissibility of Illegally Obtained Evidence in International Adjudication' (1984) 78 *AJIL* 622, 641 (opining that the approach espoused by the Court in *Corfu Channel* was 'both rational in itself and more in harmony with the fundamental nature and powers of international tribunals than any exclusionary rule would be').

Paramilitary Activities in and against Nicaragua case that, '[n]or is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight'.²⁹ In the abovementioned *Corfu Channel* decision, the Court emphatically set aside hearsay evidence on the basis that it amounted to 'allegations falling short of conclusive evidence'.³⁰

Similarly, the primary instruments governing the Court's treatment of evidence do not distinguish between public and private documents, nor do they impose a so-called 'best evidence rule' under which, where possible, original documents would have to be produced in lieu of photostats or certified copies.³¹ It follows that no official hierarchy is established in the Court's evidentiary framework between different types of evidence. As a consequence, the submission of oral evidence is in no way excluded or limited by the documentary evidence, while the Court remains unfettered in its ability to determine the probative value of any type of evidence presented to it.

By way of example, the Court is often called upon to weigh the evidentiary value of reports prepared by official or independent bodies, which provide accounts of relevant events. This is particularly true in fact-intensive disputes, such as those taking root against the backdrop of armed conflict, as was the case in both the *Bosnian Genocide* case, opposing Bosnia Herzegovina and Serbia and Montenegro, and the *Armed Activities* case, opposing the Democratic Republic of the Congo ('DRC') and Uganda. In the *Bosnian Genocide* case, the Court indicated that the probative value of this type of evidence will hinge:

²⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p 14 at 42, para 68. On the implications of the case concerning *Military and Paramilitary Activities in and against Nicaragua* for evidentiary practice in international law, see Paul Reichler, 'The Impact of the Nicaragua Case on Matters of Evidence and Fact-Finding' (2012) 25 *Leiden Journal of International Law* 149.

³⁰ *Corfu Channel*, above note 22 at 17. See also: Rosenne and Ronen, above note 11 at 558 (highlighting that the Court will typically exclude hearsay evidence, which they describe as 'evidence attributed by the witness or deponent to third parties of which the Court has received no personal and direct confirmation', and further adding that '[s]tatements of this kind will be regarded as "allegations" falling short of conclusive evidence').

³¹ See eg, Aguilar Mawdsley, above note 2 at 540.

among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts).³²

It is not unusual for the Court to attribute *prima facie* weight to factual statements made by the principal organs of the UN, although the actual weight afforded to such items may vary. As a result, such evidence may well be afforded '*prima facie* superior credibility' since it may originate in the statement(s) of what the Court has termed a 'disinterested witness' in the *Military and Paramilitary Activities in and against Nicaragua* case, that is to say 'one who is not a party to the proceedings and stands to gain or lose nothing from its outcome'.³³ What is more, those types of reports or factual statements emanating from UN organs are often produced by UN commissions of inquiry, peacekeeping missions or other subsidiary organs, and are inspired by direct knowledge and involvement with the situation on the field or stem from an international consensus of States regarding the occurrence of certain events. Those evidentiary items are sometimes instrumental in bolstering the Court's findings of fact.

For instance, factual statements made by the principal UN organs, particularly evidentiary items submitted to the Court by the UN Secretary-General, were afforded considerable weight in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.³⁴ Similar treatment was granted to comparable pieces of evidence in the abovementioned *Bosnian Genocide* case, with the Court drawing extensively from a report submitted to the General Assembly by the Secretary-General entitled 'The Fall of Srebrenica'. Having noted the privileged vantage point of the Secretary-General in

³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p 43 at 135, para 227.

³³ *Military and Paramilitary Activities in and against Nicaragua*, above note 29 at 43, para 69.

³⁴ See generally: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p 136. For further scholarly discussion of the weight to be afforded by the Court to factual qualifications made by principal organs of the UN, see Katherine Del Mar, 'Weight of Evidence Generated through Intra-Institutional Fact-finding before the International Court of Justice' (2011) 2 *Journal of International Dispute Settlement* 393.

preparing a comprehensive report some time after the relevant events had transpired, the Court went on to declare that '[t]he care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it ... the Court has gained substantial assistance from this report'.³⁵

By contrast, the *Armed Activities* case provided a more mixed precedent of evidence assessment by the Court. In bolstering its factual findings, especially the determination that there was 'clear evidence of the fact that Uganda established and exercised authority in Ituri as an occupying Power', the Court relied, among other documents, on the Sixth Report of the Secretary-General on the UN Mission in the DRC that confirmed that the Uganda People's Defence Force ('UPDF') 'was in effective control in Bunia (capital of Ituri district)'.³⁶ Along similar lines, the Court cited 'reports from credible sources', including the Third Report of the Secretary-General on the UN Mission in the DRC, to bolster its finding that 'massive human rights violations and grave breaches of international humanitarian law were committed by the UPDF on the territory of the DRC'.³⁷ In other parts of its judgment, the Court also invoked Security Council pronouncements to support its findings as to the UPDF's military operations and movements in the DRC, which it saw as violating both the sovereignty of that State and the prohibition on the use of force enshrined in the UN Charter.³⁸ This evidentiary practice by the Court – namely to refer to both preambular and operative paragraphs of Security Council resolutions – is somewhat common, having cemented the reasoning for its factual assertions in other portions of this judgment and in other decisions as well.

Furthermore, relying again on the Sixth Report of the Secretary-General on the UN Mission in the DRC mentioned earlier among other evidence, the Court found that it was confronted with 'persuasive evidence that the UPDF incited ethnic conflicts and took no action

³⁵ *Bosnian Genocide* case, above note 32 at 137, para 230.

³⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, I.C.J. Reports 2005, p 168 at 230, paras 175-76.

³⁷ *Ibid* at 239, para 207.

³⁸ See eg, *Ibid* at paras 92-165.

to prevent such conflicts in Ituri district'.³⁹ On the basis of similar documents, the Court further considered that it was faced with 'convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control'.⁴⁰ However, in another portion of its judgment, the Court did not afford any weight to various evidentiary items, including a report generated by the Secretary-General on the UN Mission in the DRC in finding that the *Mouvement de libération du Congo* had not been instituted by Uganda, observing that document's 'reliance on second-hand reports'.⁴¹

In sum, various kinds of evidence may be introduced by parties appearing before the Court, subject to both the evidentiary parameters we have outlined earlier and the Court's wide margin of appreciation in determining the probative value of each item of evidence. As such, maps, photographs, small scale models, *bas relief*, recordings, films, video tapes and, more generally, all audio-visual techniques of presentation are admissible in the evidentiary realm of the World Court. Interestingly, Norway presented a relatively large-scale *bas relief* of Norway during the oral proceedings in the *Anglo-Norwegian Fisheries* case; a similar piece of evidence was also introduced in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. In the abovementioned *Anglo-Norwegian Fisheries* case, Norway introduced a model of a trawler, fully equipped with a trawl and other fishing equipment; in the *Preah Vihear Temple* case – on which the Court heard the Parties again in April 2013, 52 years later, this time in the context of a request for interpretation – the judges that heard the original case in 1961 attended a private screening of a film about the dispute, as evidence, with representatives of the Parties; in the *Gabčíkovo–Nagymaros Project* case, the use of video cassette evidence was permitted by the Court; similarly, the use of aerial photographs and satellite-generated imagery as evidence is also very common in proceedings before the Court, as illustrated by the recent proceedings in the *Maritime Dispute* between Peru and Chile and in the *Territorial and Maritime Dispute* between Nicaragua and Colombia.⁴²

³⁹ *Ibid* at 240, para 209.

⁴⁰ *Ibid* at 240, para 210.

⁴¹ *Ibid* at 225, para 159.

⁴² See eg, Evensen, above note 1 at 53-54; Aguilar Mawdsley, above note 2 at 547 (also pointing out that the Netherlands introduced a *bas relief* and a model of lock-gate as evidence in the *Diversion of Water from the River*

Needless to say, maps play an important role in the evidentiary strategies put forward by parties appearing before the Court, especially in boundary disputes and maritime delimitation cases.⁴³ That said, such evidentiary items are typically insufficient, in and of themselves, to establish a party's claim as to sovereignty over a certain land territory or maritime feature(s). In its judgment in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the Court recalled that according to its 'constant jurisprudence, maps generally have a limited scope as evidence of sovereign title'.⁴⁴ In bolstering its conclusion, the Court quoted from its 1986 decision in the *Frontier Dispute* between Burkina Faso and Mali, stressing that 'of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights'.⁴⁵

IV. SELECT SUBSTANTIVE PRONOUNCEMENTS BY THE COURT ON EVIDENTIARY MATTERS

This last observation leads into the last section of our chapter, which shall devote some attention to select substantive pronouncements made by the Court on the subject of evidence. At the outset, we should point out that the rule of thumb with respect to the burden of proof before the Court – often reiterated in its jurisprudence – resembles that found in most domestic judicial proceedings on civil matters: A party alleging a fact typically bears the burden of proving it, while the usual standard of proof tends to align with 'proof by a preponderance of the evidence'.⁴⁶

Meuse case before the PCIJ, and that aerial photographs were introduced by Nauru in its case against Australia concerning *Certain Phosphate Lands in Nauru*).

⁴³ For further scholarly discussion of the role of maps in frontier disputes, see Maurice Kamto, 'Le matériau cartographique dans les contentieux frontaliers et territoriaux internationaux' in Emile Yakpo and Tahar Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague, Kluwer Law International, 1999) 371-98.

⁴⁴ *Nicaragua v Colombia*, above note 16 at 661, para 100.

⁴⁵ *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, *I.C.J. Reports 1986*, p 554 at 582, para 54.

⁴⁶ In its jurisprudence, the Court has often reiterated the general rule according to which a party that alleges a fact in support of its claims is expected to prove the existence of that fact. See eg, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, *Merits, Judgment*, *I.C.J. Reports 2010*, p 639 at 660, para 54; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, *Judgment of 5 December 2011*, *I.C.J. Reports 2011*, p 644 at 668, para 72; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, *Judgment*, *I.C.J. Reports 2010 (I)*, p 14 at 71, para 162; *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, p 61 at 86, para 68. On the burden of proof and the evidentiary practice of the Court, see also Sir Arthur Watts, 'Burden of Proof, and Evidence before the ICJ' in Freidl

While this evidentiary principle was reaffirmed in the *Diallo* case, the Court nonetheless qualified its application by declaring that ‘it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances’.⁴⁷ The Court went on to clarify that the onus will vary based on the type of facts required to ensure the resolution of the case; in other words, the subject-matter and the nature of each dispute submitted to the Court will inform and ultimately dictate the determination of the burden of proof in any given case.⁴⁸ It should be recalled that in the *Diallo* case, the Republic of Guinea was arguing that Mr. Diallo – its national – had suffered several fundamental human rights violations while in the DRC. However, strict adherence to the abovementioned rule would have engendered significant evidentiary hurdles to the Republic of Guinea’s case in establishing these violations, which were equated with ‘negative facts’ given that they had occurred in the Respondent’s State, and the DRC was therefore better situated to adduce evidence about its compliance with the relevant obligations.

The Court provided further clarification as regards the modulated application of the burden of proof in situations involving the establishment of negative facts, while affording equal consideration to the corresponding implications for the case of the DRC. The Court declared that:

... where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove the negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the Respondent is unable to prove the performance of a

Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals* (London, Cameron May, 2000) 289-301.

⁴⁷ *Ahmadou Sadio Diallo*, above note 46 at 660-61, para 54.

⁴⁸ *Ibid.*

procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.⁴⁹

This type of scenario was not completely novel for the Court. In the past, it had been confronted with similar situations where one of the parties appearing before it had exclusive access to important evidentiary elements but refused to produce them in light of security concerns or other reasons. For instance, in the seminal *Corfu Channel* case, the Court resolved this dilemma by having recourse to flexible inferences of fact against the State which had refused to produce the evidence in question;⁵⁰ by contrast, in the *Bosnian Genocide* case the Court declined to do so, thereby confirming that its approach to circumstantial evidence and adverse inferences will vary depending on the subject-matter and circumstances of each dispute brought to it.⁵¹

When parties invoke domestic law before the Court, such item is typically equated with a fact to be proven by the party alleging its existence, notwithstanding the Court's ability to satisfy itself, of its own initiative, of the existence of such fact. This evidentiary practice is firmly rooted in the jurisprudence of the Court's predecessor institution, with the PCIJ having articulated several key aspects of procedural law which still govern the work of the present-day Court. Of particular importance was the PCIJ's pronouncement in the case concerning *Certain*

⁴⁹ *Ibid* at 660-61, para 55.

⁵⁰ In that case, the Court underscored the following:

'[T]he fact of this exclusive territorial control exercised by a 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 fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized 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.'

See *Corfu Channel*, above note 22 at 182.

⁵¹ For a general discussion on this subject, see Michael Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13 *Chicago Journal of International Law* 123; Chittharanjan Felix Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation' (2004) 3 *The Law and Practice of International Courts and Tribunals* 395.

German Interests in Polish Upper Silesia, when it underscored that '[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.⁵² Echoing these remarks three years later in the *Brazilian Loans* case, the PCIJ further pointed out that it was constrained to apply domestic law when the circumstances so warranted, but that it was not obliged to possess knowledge of the various municipal laws of States; rather, it would have to secure this knowledge when the circumstances of a case compelled it to apply municipal law. More importantly for our purposes, the PCIJ stressed that 'this it must do, either by means of evidence furnished to it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken'.⁵³

By contrast, there is a presumption – *jura novit curia* – that the Court knows international law and how to apply it, despite the usual efforts deployed by disputing parties appearing before the Court to demonstrate that relevant international legal principles support their own claims, or should be construed in a certain way. One manifestation of this principle was encapsulated aptly in the famous *Lotus* case, with the PCIJ observing:

that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement.⁵⁴

⁵² *Case concerning Certain German Interests in Polish Upper Silesia, Merits*, 1926 PCIJ (ser A) No 7 (25 May) at 19.

⁵³ *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, 1926 PCIJ (ser A) No 21 (12 July) at 124.

⁵⁴ *The Case of the S.S. 'Lotus' (France v Turkey)*, 1927 PCIJ (ser A) No 10 (7 September) at 31.

Needless to say, this principle – namely that the Court is expected to know international law – is equally applicable to proceedings instituted before it on a different jurisdictional basis than by way of special agreement (*compromis*).

Similarly, the Court may take judicial notice of well-established facts – *faits notoires* or ‘matters of public knowledge’ – thereby obviating the need for parties appearing before it to prove such types of facts. Such scenario presented itself in the *Tehran Hostages* case, where the Court was called upon to pronounce on the international responsibility of Iran after an American embassy in Iran was taken over, ransacked and its personnel sequestered by Iranian student militants. The Court declared that ‘[t]he essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries’.⁵⁵ It went on to hold that ‘[t]he information available ... [was] wholly consistent and concordant as to the main facts and circumstances of the case’.⁵⁶ This exact passage was referenced again by the Court six years later in its judgment in the *Military and Paramilitary Activities in and against Nicaragua* case. However, in that instance the Court remained alive to the fact that this type of evidence should be approached with ‘particular caution’, pointing to the risk that ‘[w]idespread reports of a fact may prove on closer examination to derive from a single source’.⁵⁷ This observation echoed remarks formulated earlier by the Court in that same judgement to the effect that such evidence should be treated with ‘great caution’; in short, the Court construed such evidentiary items ‘not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact’.⁵⁸ It should be stressed that the Court’s conclusion on this front remained unaffected by the fact that such evidence might ‘seem to meet high standards of objectivity’.⁵⁹

⁵⁵ *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p 3 at 9, para 12. After all, one must always bear in mind the conclusion reached by Max Huber in the *Island of Palmas* case, in which he considered that no evidence was required to establish the existence of the Treaty of Utrecht of 1714, which was of public notoriety. See *The Island of Palmas Arbitration*, 4 April 1928, 2 *Reports of International Arbitral Awards* 829, 842.

⁵⁶ *Tehran Hostages* case, above note 55 at 10, para 13.

⁵⁷ *Military and Paramilitary Activities in and against Nicaragua*, above note 29 at 41, para 63.

⁵⁸ *Ibid* at 40, para 62.

⁵⁹ *Ibid*.

In the wake of increasingly fact-intensive cases, with particular focus on scientific evidence, there has been renewed interest in questions related to the burden of proof before the Court. Such an issue arose in the case concerning *Pulp Mills on the River Uruguay*. In that case, the Court was confronted with a considerable amount of contradictory factual allegations, which both Parties sought to support with particularly abundant information. Argentina contended that the relevant Statute adopted a precautionary approach according to which ‘the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment’.⁶⁰ Argentina argued further that the onus should be shared by both Parties as prescribed by the Statute under review, which divided the burden of persuasion amongst the parties; that is to say that one should prove that the plant is innocuous while the other should demonstrate that it is harmful. In response, the Court relied again on its *jurisprudence constante* and reaffirmed the importance of the principle of *onus probandi incumbit actori* in the following manner: ‘it is the duty of the party which asserts certain facts to establish the existence of such facts’.⁶¹

In short, this meant that the Applicant – Argentina in this specific case – was expected to first submit the relevant evidence to substantiate its claims. However, the Court continued, ‘[t]his [did] not ... mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute’.⁶² The Court further expressed that, while a precautionary approach may deem a relevant prism through which one could contemplate the relevant statutory provisions, this legislative framework did not operate a reversal of the burden of proof, nor did it place it equally on both Parties.⁶³

⁶⁰ *Pulp Mills*, above note 46 at 70, para 160.

⁶¹ *Ibid* at 71, para 162. See also, above note 46-49 and accompanying text; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, p 12 at 31, para 45; *Bosnian Genocide* case, above note 32 at 128, para 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1984*, p 392 at 437, para 101.

⁶² *Pulp Mills*, above note 46 at 71, para 163.

⁶³ *Ibid* at 71, para 164.

With respect to the expert evidence put forward, the Court stressed that it had ‘given most careful attention to the material submitted to it by the Parties’ before recalling that it was its ‘responsibility ... after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate’.⁶⁴ In short, the Court’s approach in that case aligned with its own evidentiary practice, which typically involves it making ‘its own determination of the facts, on the basis of the evidence presented to it, and then’ applying ‘the relevant rules of international law to those facts which it has found to have existed’.⁶⁵ Consequently, the Court rejected those evidentiary items it found ‘insufficient’, for instance when deciding not to attribute ‘the alleged increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill’.⁶⁶ Similarly, the Court remained unconvinced that there existed ‘sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora’, or that ‘convincing evidence’ had been adduced to establish that Uruguay had breached certain provisions of the relevant Statute, which embodied other substantive obligations.⁶⁷

In the *Armed Activities* case discussed earlier, the Court provided further substantive guidance on the evidentiary parameters within which it carries out its judicial mandate. In particular, it underscored that it ‘will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source’.⁶⁸ Moreover, the Court indicated that it ‘prefer[s] contemporaneous evidence from persons with direct knowledge’ of the facts or realities on the ground.⁶⁹ It similarly emphasised that it would ‘give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them’, thereby echoing the remarks it offered almost twenty

⁶⁴ *Ibid* at 72, para 167-68.

⁶⁵ *Ibid* at 72-3, para 168.

⁶⁶ *Ibid* at 97-8, para 254.

⁶⁷ *Ibid* at 91, para 228 and 100, para 262.

⁶⁸ *Armed Activities* case, above note 36 at 201, para 61.

⁶⁹ *Ibid*.

years earlier in the *Military and Paramilitary Activities in and against Nicaragua* judgment.⁷⁰ Along similar lines, the Court in the *Armed Activities* case went on to say that it would ascribe weight to evidence ‘that ha[d] not, even before this litigation, been challenged by impartial persons for the correctness of what it contain[ed]’.⁷¹ Finally, special attention should also be afforded, the Court continued, to ‘evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature’.⁷²

V. CONCLUSION

In this brief contribution, we have attempted to demonstrate that the Court’s evidentiary practice is rather flexible when compared to that espoused by most domestic courts and tribunals. That said, the World Court nonetheless applies a great degree of caution when handling certain evidentiary items, rigorously scrutinising all evidence put before it and balancing relevant evidentiary standards against the facts, circumstances and subject-matter of each case. The Court’s practice is equally forward-looking as regards the introduction of new modes of producing evidence, thereby embracing new technology and innovative ways of establishing factual records. A rich fact-finding judicial tradition emerges from its jurisprudence: While an applicant State appearing before the Court will typically be called upon to substantiate its claims with available evidence, the other party is by no means exempted from assisting the Court in fulfilling its judicial function. Rather, the idea of evidentiary collaboration between the parties and the Court⁷³ – supplemented by a productive dialogue between the bench and the agents and counsel of the parties, sometimes actuated through the submission of testimonial evidence before the Court – ensures that the principal judicial organ of the UN can carry out its

⁷⁰ *Ibid*; *Military and Paramilitary Activities in and against Nicaragua*, above note 29 at 41, para 64.

⁷¹ *Armed Activities* case, above note 36 at 201, para 61.

⁷² *Ibid*.

⁷³ See eg, Witenberg, above note 1 at 97; Lachs, above note 1 at 267 (both underscoring that parties to a dispute have the duty to prove their claims and a corresponding obligation to cooperate with the international judiciary in this regard).

noble duties in the most effective and impartial way. That is to say, the search for objective truth, the peaceful settlement of disputes, and the promotion of the international rule of law.