FACT FINDING AND THE WORLD COURT

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ABSTRACT

On December 16, 1963, the General Assembly of the United Nations adopted Resolution 1967 (XVIII) recording its belief that provision for impartial fact finding within the framework of international organizations, and in bilateral and multilateral conventions, could make an important contribution to the peaceful settlement of disputes, and to their prevention. The Resolution noted a considerable body of practice in the use of fact finding methods in international relations, which is available to be studied "for the progressive development of such methods" (6th perambular paragraph).

In the light of this Resolution, the object of this study was to ascertain the nature and the scope of the fact finding powers possessed by the principal judicial organ of the community of nations, the World Court; and their applicability in the various types of proceedings which may be instituted before it.

As a background the major problems inherent in, and the nature and function of, the law of evidence in international judicial proceedings are sketched. An attempt is also made to determine the respective rights and duties of the litigants and the World Court in the matter of the adduction of evidence.

The provisions of the Statute and Rules of the World Court which expressly confer upon it fact finding powers are then examined. A broad competence is seen to be granted the Court to request the production of evidence, and to undertake investigations and enquiries of various kinds into the facts

of the issues submitted to it. The only condition precedent to the exercise of these powers being that the litigant states must have agreed to submit their dispute to the Court for adjudication.

Notwithstanding a paucity of authority, it is also found that the World Court also possesses certain implied fact finding powers stemming not from the instruments of its creation, but from its inherent nature as a judicial tribunal. This implied competence to undertake researches, of its own motion, into the facts of an issue submitted to it supplements the Court's express competence, although a duplication of the power to appoint independent experts is evident.

It is then ascertained whether the World Court can have recourse to all the fact finding powers conferred upon it in the two categories of proceedings, contentious and advisory proceedings, which may be instituted before it. Some limitations on the Court's powers are found to exist in the case of advisory proceedings, these limitations deriving from the nature of the proceedings. With respect to contentious proceedings no limitations were found.

From the preceding examination of the fact finding powers of the World Court it was concluded that it had the potential to discover the absolute truth of any issue submitted to it for decision, with the co-operation of the parties. While some amendments to the Statute and Rules of the Court were suggested, it was felt that any major revisions of the

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Court's powers would have no substantial effect until the jurisdiction of the Court became compulsory.

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CHAPTER 1

INTRODUCTION

1. The Theme

One of the main problems in the law of international judicial institutions is the relationship of state sovereignty and the jurisdiction of international tribunals. Submission to the jurisdiction of a tribunal implies a surrender of sovereignty. The extent of the surrender may be said to be proportionate to the degree of discretion open to the tribunal concerned when deciding a case submitted to it.¹ The present study will deal with an important aspect of this judicial freedom of determination, namely: to what extent can the World Court² seek to discover the truth independently of the evidence and information brought before it voluntarily by the parties?

The primary concern of this study is twofold. First, a survey has been made of the instruments creating, and the practice of, the World Court to ascertain what techniques may be adopted by it, to apprise itself of the true facts of an issue. Secondly, an attempt has been made to analyze the extent to which the Court may seek to establish the truth in the various types of proceedings which may be instituted before it.

1 Lauterpacht, The Development of International Law by the International Court 394 (1958).

2 The term "World Court" is here used to embrace both the International Court of Justice (hereinafter referred to as the I.C.J.) and the Permanent Court of International Justice (hereinafter referred to as the P.C.I.J.) its predecessor.

The author of a recent survey on the use of out-of-court information by the courts of a common law country, Canada,³ suggested there were three techniques by which the trier of fact could obtain evidence to supplement that presented by the parties, so that the truth of a dispute could be better discovered. The techniques were (1) judicial notice,⁴ (2) view by the trier of fact, and (3) the use of independent experts as investigators of fact, or as auxiliary triers of fact.⁵ These techniques are essentially methods by which the tribunal itself may find "extra-curial" material and information, necessary for the just and equitable settlement of a dispute, irrespective of the cooperation of the parties. But, the ensuing discussion of the techniques available to the World Court will encompass a broader field than this. It will include the rights, if any, of the tribunal to request the parties to produce further evidence or explanations, documentary or oral, which may have been withheld from it.

Basically this study deals with a problem in the law of procedure. However, the discussion involves questions fundamental to the work and functions of international judicial tribunals. The principle of the effectiveness of international

³ Schiff, "The Use of Out-of-Court Information in Fact Determination at Trial," 41 Can.B. Rev. 335 (1963).

⁴ "Judicial notice" is used by Schiff to refer to those propositions in a party's case as to which he will not be required to offer evidence being taken for true by the tribunal without need of evidence. Ibid., 338-55.

⁵ Ibid., 337.

law conflicts with the principle that jurisdiction is based on the common will of the parties. Concern for judicial caution runs counter to the regard for the function of international tribunals as organs for the development of the law. The general interest of preserving the independence of the judges in their judicial capacity clashes with the desire of the parties to arrive at the tribunal's assessment of, and solution to, their particular problem. And, the need to give international legal procedure a regulated and formal framework is at variance with the need for the active participation in the proceedings on the part of the tribunal.

As Jenks has so aptly stated:

In every legal system law and procedure constantly react upon each other. Changes in the substantive law call for new procedures and remedies; new procedures and remedies make possible changes in the substantive law. So it is in international law; if we wish so to develop the law as to respond to the challenge of our times our remedies and procedure must be sufficiently varied and flexible for the purpose. 6

The close inter-action of substantive and procedural law is both a major contributory factor to the importance of rules governing the powers of an international tribunal to gather factual evidence, and a strong justification for the submission that these procedural rules deserve perhaps greater attention than has been accorded to them in legal writings.

2. Law and Fact

When considering the power of an international

6 Jenks, The Prospects of International Adjudication 184(1964).

judicial tribunal to call evidence of its own motion the problem will immediately arise, what is the difference between law and fact? Is, for instance, municipal law always merely facts from the standpoint of international law? Are the provisions of a bilateral or multilateral treaty matters of fact or matters of law?

The task of judicial tribunals is essentially the same in municipal and international litigation. That is the tribunal must ascertain the issues in dispute between the parties and determine those issues in favour of one party or the other.⁷ In the course of ascertaining and determining those issues the tribunal must make such findings as to matters of fact as are relevant to the issues and as are permitted by the evidence before it; and further, the tribunal declares the rules or propositions of law which, in the light of findings of fact and of the issues to be decided, justify the way in which the tribunal resolves the issues.

At first sight the difference between law and fact seems a simple one. Whether, for example, the fishing vessels

⁷ But what of advisory proceedings? Article 96 of the United Nation's Charter, and Chapter IV of the I.C.J. Statute, empower the court to deliver advisory opinions to certain organizations. An advisory opinion has been defined as "a formal opinion by ... a court of law ... upon a question of law held by [a competent body] but not actually presented in a concrete case at law": Black's Law Dictionary 75 (4th ed.1951). Advisory opinions thus lack the two elements which characterize "a concrete case at law", namely: (i) rival litigants; and, (ii) a specific actual fact situation out of which their dispute arose. It should be noted that the advisory procedure is not unique to the I.C.J., but is also a common feature of some municipal law systems: see for instance Frankfurter, "A Note on Advisory Opinions," 37 Harv. L. Rev. 1002 (1923-24), and Rubin,

of state A have encroached on the territorial sea of state B is a question of fact; the rules that determine the liability of state A raise a question of law. As opposed to the facts which describe what happened, law deals with the question of what ought to be done about those facts.⁸

But, to draw a line between law and fact in abstracto is well nigh impossible for, as Dickinson has written, questions of law and fact

... are not two mutually exclusive kinds of questions based upon a difference of subject matter. Matters of law grow downwards into roots of fact and matters of fact reach upwards without a break into matters of law. ⁹

A tribunal can only discover the principles of law applicable in a certain case when it knows the material facts, but what facts are material in the dispute is determined by the law. Thus questions of law and fact cannot be too sharply divorced; the borderline is a flexible one in the sense that it varies according to the purpose for which it is to be fixed.

For the purposes of this study the distinction may be drawn from a practical viewpoint. In connection with general rules of international law there is no question of proof.

"The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" 6 McGill L.J. 168 (1958).

⁸ Bohlen, "Mixed Questions of Law and Fact" 72 U. Pa. L. Rev. 111, 112 (1924).

⁹ Dickinson, Administrative Justice and the Supremacy of The Law 55 (1927).

Jura novit curia. In the Brazilian Loans Case the Permanent Court of International Justice stated that:

The Court ... is a tribunal of international law,
and ... in this capacity is deemed to know what
the law is 11

But if a state relies upon something special unto itself
such as a treaty right or regional rule of international law,
this party obviously takes a chance if it does not submit
enough material upon which to lay the foundation of its right. 12
The tribunal will, however, take into account more specific
rules if it is aware of them. 13 Therefore questions of law, as
opposed to questions of fact, need not be raised by the parties
themselves; the tribunal can, and should, examine them proprio
14 motu.

However, the problem of distinction may still arise
if the tribunal must rely on elements, discovered through its
own researches, which are in the border area between law and
fact as, for instance, when it has to adjudge a historic
title to certain territory. These elements, it is suggested,
will be outside the direct application of the principle of
jura novit curia and must therefore be established. Hence, as

10 This is a well known principle of judicial procedure in municipal law which has received recognition by international judicial tribunals. See Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 229-301(1953).

11 P.C.I.J., Sec.A, No. 20/21, 124(1929). Cf. Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Ser. A/B, No. 46, 138(1932), Corfu Channel Case (Merits), [1949] I.C.J. Rep. 4, 51-56.

12 E.g. Asylum Case, [1950] I.C.J. Rep. 9, 74.

13 See in this regard Judge Basdevant in the Case of Certain Norwegian Loans [1957] I.C.J. Rep. 9, 74.

14 Bin Cheng, op.cit.supra note 10, at 299.

regards the material on which the tribunal bases its decision, this material must have been presented during the proceedings otherwise it should be considered as constituting a breach of the principle audiatur et altera pars which is one of the¹⁵ general principles of law recognized by civilized nations.

By the principle audiatur et altera pars the parties to the dispute are guaranteed juridicial equality in their capacity as litigants and an impartial settlement of their¹⁶ dispute. Consequently the parties have the right to hear, and to reply, to all the evidence and material on which the tribunal bases its decision. And this right must extend to evidence procured by the tribunal of its own initiative, whether or not such evidence alters the basis of the claim, if there is to be no doubt as to the sufficiency and regular-¹⁷ity of the proceedings.

¹⁵ This is established by Bin Cheng, op.cit.supra note 10, at 290-98.

¹⁶ These may be said to be the two cardinal characteristics of any judicial process.

¹⁷ In the Corfu Channel Case (Merits) [1949] I.C.J. Rep.4, the parties were given the opportunity to comment on the experts' report. Both parties availed themselves of this right: see infra., 35.Cf. Legal Status of Eastern Greenland, P.C.I.J., Ser.C., No. 66(1933); P.C.I.J., Ser. A/B, No. 53(1933). One of the parties wished to introduce fresh documents in its oral rejoinder. The court by its decision, while reserving the right to refuse the fresh documents also "reserves the right to furnish the Danish agent with an opportunity to make observations on the fresh documents produced by Norway in her oral rejoinder", P.C.I.J., Ser.C, No. 66, 2615(1933); P.C.I.J., Ser A/B, No.53, 25-26 (1933). See also Art. 48 P.C.I.J. Rules of Court, P.C.I.J., Ser. D, No.1, 31 (4th ed. 1940) (hereinafter cited as the P.C.I.J. Rules), and Art. 48 I.C.J. Rules of Court, I.C.J., Ser. D, No. 1, 54 (2nd ed. 1947) (hereinafter cited as the I.C.J. Rules).

CHAPTER 2

NATURE AND FUNCTION OF THE LAW OF EVIDENCE IN
PROCEEDINGS BEFORE THE WORLD COURT

As conducive to a broader understanding of the subject matter which it is designed to treat, it seems well to make a few observations of a general character as to the nature and function of the law of evidence in the international judicial process.

Two factors have been of decisive influence on the law of evidence in international judicial proceedings. These are (1) the presence before the World Court of sovereign states as litigants; and (2) the problems faced by both counsel and tribunal in the obtaining of evidence.

International judicial proceedings derive a distinctive character from the fact that the parties are sovereign states.¹⁸ Because the parties are sovereign states the consequences of an error by a tribunal, or of a failure on its part to ascertain the facts relating to a decision, may be frequently more far reaching in effect than in municipal litigation. The decision of a tribunal may affect the territorial integrity of a state,¹⁹ or involve a finding which would give

¹⁸ Article 34 (1) of the I.C.J. Statute provides that "only states may be parties in cases before the Court." See also Art. 34 of the P.C.I.J. Statute, P.C.I.J., Ser. D, No.1, 13 (4th ed. 1940) (hereinafter cited as the P.C.I.J. Statute).

¹⁹ E.g. Case concerning the Right of Passage over Indian Territory, [1960] I.C.J. Rep. 4; Temple of Preah Vihear Case, [1962] I.C.J. Rep. 6.

rise to international responsibility on the part of one of
 20
 the litigants. As Sandifer has noted:

The vital interests of states directly concerning the welfare of thousands of people may be adversely affected by a decision based upon a misconception of the facts. The maintenance of friendly relations between the states involved may well depend upon the fairness and thoroughness of the proceedings through which a decision is reached. 21

The importance of arriving at the facts of a dispute, which flows from this composition of the parties, has been acknowledged by the World Court. While recognizing that the facts, the existence of which they must determine, may be
 22
 of any kind, the Court has stressed that "it is the facts, clear facts, which must be taken into account" in the deter-
 23
 mination of any dispute. Or, as expressed by the International Court of Justice in the Asylum Case,

... the only important question to be considered here is the objective existence of the facts, and it is this which must determine the decision of the Court. 24

Despite the insistence of the Court that its decisions be based on all relevant facts of any dispute the realization

20 E.g. Chorzow Factory Case, P.C.I.J., Ser.A, No. 17(1928); Oscar Chin Case, P.C.I.J., Ser. A/B, No. 63(1934); Corfu Channel Case (Merits), [1949] I.C.J. Rep.4.

21 Sandifer, Evidence Before International Tribunals 3(1939).

22 Serbian Loans Case, P.C.I.J., Ser.A, No. 20, 19(1929); referred to in the Southwest Africa Case (Preliminary Objections), [1962] I.C.J. Rep. 319, 423, with approval. Clearly among others disputes concerning pure matters of fact may be brought before the Court, for the states concerned may agree that the fact to be established would constitute a breach of international law; see Serbian Loans Case, P.C.I.J., Ser. A, No.20, 19(1929).

23 Temple of Preah Vihear Case, [1962] I.C.J. Rep.6,67.

24 [1950] I.C.J. Rep. 266, 287.

of this end is fraught with problems. One of the major difficulties in international adjudication is that of obtaining complete and satisfactory evidence notwithstanding, in some instances, the best intentions of counsel, nor the collaboration of the parties. The constantly recurring complaint of tribunals is that they are compelled to act on the basis of meagre and incomplete evidence the veracity of which may itself be in doubt. Further, counsel and agents have not infrequently been faced with nearly insuperable obstacles in the collection of evidence.²⁵

The problems which may arise in the collection of accurate and authentic evidence are well illustrated by the difficulties which confronted the Government of Czechoslovakia in obtaining evidence for the proceedings before the Permanent Court of International Justice in the case of Appeals from Certain Judgements of the Hungro-Czechoslovak Mixed Arbitral Tribunal.²⁶ The Court could obtain an idea of the difficulties which had handicapped the representatives of the Czechoslovak Government in their search for evidence, it was declared, by examining the documents annexed to the appellant's memoir, since papers of an auxilliary nature related to them could not be found and others of primary importance could not be discovered. The Czechoslovak Government had been forced to request the Court to invite the Royal Hungarian Government to produce certain important documents which had only lately been

²⁵ Sandifer, op.cit.supra note 21 at 15.

²⁶ P.C.I.J., Ser. C, No. 72 (1931).

discovered in certain libraries or which remained in the
 hands of the latter Government.²⁷

Many factors contribute to the difficulties faced by tribunals and counsel in the acquisition of evidence, and it is well to mention those which have received most frequent attention although they may not have arisen in proceedings before the World Court.

(1) As a result of the principle of territorial sovereignty it is not possible for the representatives of one state to enter into the territory of another for the purpose of collecting evidence required to support its case before the tribunal; at least, not without the consent of that other state. It was declared by the International Court of Justice in the Corfu Channel Case that the fact of

... this exclusive territorial control exercised by a state within its frontier has a bearing upon the methods of proof available to establish the knowledge of that state as to [the events complained of]. By reason of this exclusive control the other state, the victim of the breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. 28

The scope of the problem created by a state's right to exclusive control of the territory subject to its jurisdiction should not be underestimated. The problem is implicit in every dispute arising from an act, or acts, perpetrated within or without the territory of the claimant state where the evi-

27 Ibid., 510.

28 (Merits) [1949] I.C.J. Rep. 4, 18.

dence, on which it desires to base its claim, is not to be found within its own jurisdiction. In such circumstances the claimant state may only obtain this material and information with the concurrence of the state within whose jurisdiction it is perceived to lie.

(2) In the absence of express provision in the rules of procedure empowering a tribunal not only to compel the attendance of witnesses, but also to impose penalties for perjury, extreme difficulties may be encountered in obtaining the presence of witnesses before a tribunal, or in procuring deposition, and in ensuring the testimony presented is true.

(3) Again, in the absence of an express provision authorising the tribunal to order the production of all documents relevant to a dispute, important material and information may be withheld from it, as occurred in the Corfu Channel Case.

(4) The factors of distance and time also present problems in the accumulation of satisfactory evidence. The distances which have to be traversed in obtaining the necessary evidence are not infrequently very great. In such cases reliance must be placed largely, if not entirely, on evidence taken ex parte by the interested party with no possibility of checking

29 Neither the Rules of Court of the P.C.I.J. or I.C.J. confer the right to subpoena witnesses or to punish for perjury. But see for example the Rules of Court of the Court of the European Communities, reproduced by Valentine, The Court of Justice of the European Communities 483-544 (1965).

30 For an account of the difficulties which may be encountered see Anderson, "Production of Evidence by Subpoena before International Tribunals," 27 A.J.I.L. 498(1933), and Jessup "National Sanctions for International Tribunals," 20 Am.B.Ass.J. 56 (1934).

31 See infra, 27-29.

its accuracy and credibility at the time of the proceedings.
The long period of time frequently elapsing between the events giving rise to the dispute and the submission of the dispute for adjudication is a major cause of difficulty.³³ The result of the delay is that evidence which might easily have been obtained at that time is lost. Possible witnesses may die, or it may be necessary to take their statements ex parte long after the event. Documents are lost, misplaced or destroyed, and cannot be replaced or must be replaced by documents of doubtful authenticity. And counsel may find it difficult to piece together a story which would have been common knowledge to their predecessors of a previous generation.³⁴

(5) A further fruitful source of difficulty in obtaining needed evidence arises from the complex conditions provoking the conflicting claims submitted to judicial settlement. This is especially so in disputes involving questions of vital national interests,³⁵ or arising out of an international war.³⁶

³² On this point see Crandall, "Principles of International Law Applied by the Spanish Treaty Claims Commission," 4 A.J.I.L. 806, 806-807 (1910).

³³ Fortunately the majority of cases presented to the P.C.I.J. and the I.C.J. represent an exception to this.

³⁴ On this point see McKernan, "Special Mexican Claims," 32 A.J.I.L. 457, 462-63 (1938).

³⁵ It is well to mention here that a difficulty peculiar to claims commissions is the notorious negligence of claimants in furnishing material to substantiate their claims. Because of the nature of the claims and the limited time generally available to prepare the claims counsel and agents must rely largely on the claimants for information.

³⁶ E.g. North Atlantic Coast Fisheries Arbitration, 11 R.I.A.A. 167; Diversion of the Waters from the Meuse, P.C.I.J. Ser.A/B, No. 70 (1937).

³⁷ E.g. Alabama Arbitration, 1 Moore, International Arbitrations 495.

Very aware of the status of the litigants, the necessity to base its decision on all the relevant material and information in any dispute, and the problems which may arise in the collection of such material and information, the World Court has refused to adopt strict technical rules of evidence in relation to either the admission and evaluation of evidence, or the burden of proof; in fact, technical rules of evidence are frowned upon. This attitude is concisely stated by M. Huber, President of the Permanent Court of International Justice, in a memorandum on the subject of the revision of the Rules of Court, where he declared:

[The Court] must not run the risk of a case between two states being decided on the basis of a purely formal administration of justice. 38

The practice of the Court makes it clear that it has a wide freedom to decide whether particular evidence should be admissible or not; and once admitted, as to the weight that shall be attached to it. The Court has been very liberal in the admission of evidence submitted to it at any time before the submission of the case to the Court for decision. In the judgement of the Permanent Court of International Justice in the case of the Free Zones of Upper Savoy and the District of Gex the Court declared, in overruling the demand of the Swiss Government that the Court reject as inadmissible certain submissions made by the French Government at a late stage in the oral proceedings, that the

38 P.C.I.J., Ser. D, No. 2 (add.) 101-102 (1926).

... decision of an international dispute of the present order should not mainly depend on a point of procedure. 39

Again, in the case concerning German Interests in Polish Upper Silesia, the Court stated in its judgment that "it was entirely free to estimate the value of the statements made by the parties."⁴⁰ In applying this rule it accepted the uncontested statement made in the applicant's (Prince Lichnowsky) case, and his declaration opting for German nationality, as sufficient proof of the Prince's nationality. This was done over the demand by Poland that these assertions be substantiated by documentary proof. In its judgment on the question of jurisdiction in the Chorzow Factory Case the Court asserted that it could not take account of declarations, admissions or proposals made by the parties in direct negotiations, the negotiations having led to no agreement, although evidence of these matters had been admitted during the proceedings.⁴¹

Thus, no rule of evidence finds greater support in the proceedings of the World Court, and the instruments of its creation, than the one that the Court is not bound to adhere to strict rules of judicial evidence. This is borne out by the statement of M. Huber in 1925 where he asserted that as the statute did

... not contain a trace of a formal and rigid system of evidence it would be inadmissible for the

39 P.C.I.J., Ser. A/B, No. 46, 155-56 (1932).

40 P.C.I.J., Ser. A, No. 7, 72-73 (1926).

41 P.C.I.J., Ser. A, No. 9, 19 (1928).

Court to create such a regime through its rules The attitude taken by the Court ... seems thus absolutely to conform to the exigencies of the jurisdiction exercised by it: the Parties may present any proof that they judge useful, and the Court is entirely free to take the evidence into account to the extent that it deems pertinent. 42

With respect to the burden of proof the practice of the Court supports the contention that the burden lies upon the real claimant, identified according to the substantive issues of the case, and not upon the plaintiff state from the purely procedural standpoint.⁴³ The state which is asserting the right to act in a certain way, or is relying upon an exception to take it outside a general prohibition imposed by international law on a certain action, carries the burden of proof in respect of these claims. In any one case the burden of proof will fall at times upon the "plaintiff" state, and at times upon the "defendant" state, according to the various issues between the parties.⁴⁴ From this it can be deduced that the maxim onus probandi actori incumbit is only applicable at the international level if the term actor is understood as referring to the real claimant.

Thus, in the case concerning the Legal Status of Eastern Greenland Norway, in effect, was in the position of

42 P.C.I.J., Ser. D, No. 2 (add.) 249, 250 (1926).

43 Rosenne, The International Court of Justice 408-10 (1957). See also Lauterpacht, op.cit.supra note 1, at 362-67, and Winterberg, "Onus Probandi Devant de Juridictions Arbitrales" 55 Rev. Gen. de Droit Int'l. Public 321 (1951).

44 In certain cases the burden of proof may be determined by presumptions. See Bin Cheng, op.cit.supra note 10, at 304-306, and Sandifer, op.cit.supra note 21, at 98-100.

defendant as the proceedings were instituted by Denmark. Norway however, argued that in the legislative and administrative acts, on which Denmark relied as proof of the exercise of her sovereignty, the word "Greenland" was used not in the geographical sense, but only as designating the colonized areas of the west coast. The Permanent Court of International Justice ruled, concerning this contention, that this was "a point as to which the burden of proof lies on Norway."⁴⁵ In the ⁴⁶Asylum Case, Columbia as applicant invoked a customary rule of international law which, not being general international law, may be regarded as a question of fact, and as outside the principle of jura novit curia.⁴⁷ The International Court of Justice laid down the general principle that

... the party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. ⁴⁸

While, in the Minquiers and Ecrehos Case, both parties were subject to an equal burden of proof in establishing their respective titles to the islands in question, the Court being called upon to "appraise the relative strength of the opposing claims."⁴⁹

⁴⁵ P.C.I.J., Ser. A/B, No. 54, 49 (1933). See also Rights of United States Nationals in Morocco, [1952] I.C.J. Rep. 200, 212-13, and Bin Cheng "Rights of United States Nationals in the French Zone of Morocco" 2 I.C.L.Q. 354 (1953).

⁴⁶ [1950] I.C.J. Rep. 266.

⁴⁷ See supra, 5-6.

⁴⁸ [1950] I.C.J. Rep. 266, 276; and see Corfu Channel Case (Merits), [1949] I.C.J. Rep. 4.

⁴⁹ [1953] I.C.J. Rep. 47, 67; and see Temple of Preah Vihear Case, [1962] I.C.J. Rep. 6.

Coupled to this division of the burden of proof, between the claimant and defendant state in accordance with the facts which they respectively allege, is the duty of the Court to use every available means for discovering the true facts of a dispute.⁵⁰ Winterberg has contended that this is one of the two principles complementary to the fundamental norm regarding the division of the burden of proof. He asserts that the Court is not only competent, but is also obliged to participate, itself, in the ascertainment of the facts; it must play an active role. The second complementary principle is found in the corresponding duty of the parties to co-operate with the Court in this search for the truth by furnishing documents, witnesses, and other evidence on request.⁵¹

In only one case, the Oscar Chin Case,⁵² before the World Court can authority for this rather extreme position be found.⁵³ The British Government, in this case, had requested the Court to order an inquiry, in particular on the effect of the Belgian measures upon other private transport enterprises on the Congo, including Belgian concerns, after 1931.⁵⁴ However, in view of its finding that the facts had been sufficiently

⁵⁰ Winterberg, supra note 43. Cf. Sandifer op.cit.supra note 21 at 97-98, and Scelle, Report on Arbitral Procedure, I.L.C. Doc. A/CN 4/18, paras. 64, 71.

⁵¹ Winterberg, supra note 43, at 331, 335, 339.

⁵² P.C.I.J., Ser. A/B, No. 63 (1934).

⁵³ But see the boundary arbitration between French Guiana and Brazil, where the Swiss Federal Council, in its decision as arbitrator, declared that "the arbitrator holds he is not bound to confine himself to the contentions of the parties and the sources of evidence which they invoke.... It is the duty of the arbitrator ... to ascertain the truth by all the means which are at his disposal." This passage is reproduced in Commentary on The Draft Convention on Arbitral Procedure, I.L.C. Doc. A/CN. 4/92, 58 (1955).

⁵⁴ P.C.I.J., Ser. A/B, No. 63, 69 (1934)

proved in the documents for it to determine that the Belgian measures were not in breach of any international obligation, the Court stated

... there is no occasion to order the enquiry suggested at the beginning of the hearing by the Agent for the Government of the United Kingdom. 55

This finding was met by some stringent comments from Judge Van Eysinga, one of the dissenting judges. After stating that there had never been a case before the Court where the facts had been in dispute to the same extent, he stressed that the Court was not tied down to any system of taking evidence; that its task was to co-operate in the objective ascertainment of the truth. 56

The Court cannot omit to use any means which may enable it to ascertain the objective truth, as regards the obtaining of evidence; the Statute provides that the Court shall take active steps and not adopt a passive attitude. 57

Apart from Judge Van Eysinga's statement, there is very little other support for Winterberg's proposition that there is a positive duty on the Court to discover the truth by all the means at its disposal. Neither the practice of the Court, 58 nor the provisions of the instruments of its

55 P.C.I.J., ser. A/B, No.63, 88(1934). Cf. Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Ser.A/B, No.46, 162(1932).

56 P.C.I.J., Ser. A/B, No.63, 146 (1934).

57 Ibid., 147.

58 The Court has, in several cases, declined to make use of experts notwithstanding the requests of the parties to that end. See infra note 90.

creation, notwithstanding Judge Von Eysinga's interpretation of the Statute, recognizes or places the Court under any such duty. At the most the Statute gives the Court a discretionary right to participate actively in the collection of evidence if it deems such participation expedient and necessary; the Court may request the production of further evidence,⁵⁹ it may order an enquiry or expert opinion,⁶⁰ but it does not have to do either. Thus, it is suggested that this alleged duty can be meaningful only in very general terms. It cannot amount to more than an obligation to exercise judicially a discretion as to the appropriate procedural methods for finding the facts⁶¹ in a particular case.

That a ... decision could be vitiated on some such ground as essential error merely because the [Court] had decided against employing available means to gather evidence of its own motion is an untenable position. ⁶²

From this general outline of the law of evidence in international judicial proceedings it is obvious that the World Court has a very wide scope for the ascertainment of the truth in the absolute sense. In ascertaining the facts concerning the conflicting claims of the parties before it the Court is not hindered by technical rules relating to either, the competence, relevance and materiality of the evidence, or the burden of proof. Despite this freedom from

⁵⁹ See infra, 26-31.

⁶⁰ See infra, 31-41.

⁶¹ White, the Use of Experts by International Tribunals 9 (1965).

⁶² Ibid.

restrictive and technical rules, however, problems, created in some instances by the parties themselves, and in others by events beyond the control of the parties, will arise in the attainment of that absolute truth. To enable the Court to overcome these problems, it has been claimed that the Court is not limited to a mere consideration of the information and material presented to it by the parties; but that it is obliged to undertake, of its own motion, enquiries and investigations of various kinds into the facts of any issue submitted to it. It is the nature and extent of these various enquiries and investigations which will be considered in the following sections of this study.

CHAPTER 3

FACT FINDING - EXPRESS COMPETENCE

In assessing the competence with which the World Court is imbued to pursue the facts of a dispute, two sides of the coin of competence must be discussed. On the one hand, it is necessary to ascertain what express powers have been conferred on the Court to undertake or order enquiries and investigations of various kinds into the facts of a dispute. And, on the other hand, it is requisite to determine whether the Court possesses an implied discretionary power to pursue such enquiries and investigations in the absence of express provisions to this end in its rules of procedure.

The express powers of the World Court, a permanent international judicial tribunal, to play an active role in the collection of factual evidence, although ultimately derived from the agreement of states embodied in the instruments creating it and conferring rule making powers upon it, are laid down and known in advance by the parties in any subsequent proceedings. The states may, or may not, have participated in the drafting of the original documents setting up the Court; in any event they are unable to authorise the Court to depart in any major extent from the rules of procedure.

⁶³ This also applies to cases brought before the I.C.J. by special agreement for provisions contemplating the amendment of stipulated legal procedures upon the request of the parties see Art. 39 (official language) and Art. 46 (hearing in public) of the I.C.J. Statute. See also Art's. 39 and 46 P.C.I.J. Statute.

A purported conferment, or denial, of the power to seek out the facts by any method the Court deems fit, absent such provision in the existing rules, would certainly be a departure. The Court, as a permanent tribunal, and the parties to proceedings before the Court, are confined to the powers found in the Court's statute and the procedural rules drawn up under the rule making article in the Statute.⁶⁴

This position of the World Court may be contrasted with that of an ad hoc judicial tribunal. The competence and powers of an ad hoc tribunal to discover the truth independently of evidence adduced by the parties, derives directly and immediately from the consent of the parties as expressed in the compromis or arbitral agreement under which it was established. Thus at each stage of the arbitral process assurances exist for the protection of the parties flowing from the relatively close control which they exercise over the proceedings. These assurances are found not only in the provision of the compromis itself,⁶⁵ but also in legal rules applicable to the conduct of hearings before the tribunal whether they are derived from the compromis, the rules drawn up by the tribunal under a rule making power conferred upon it, or general principles⁶⁶ of international law applicable to such hearings. Carlston

64 Article 30(1) provides "the Court shall frame rules for carrying out its functions. In particular it shall lay down rules of procedure." See also Art. 30, P.C.I.J. Statute.

65 Notably in the articles governing the composition of the tribunals and the extent of its jurisdiction.

66 Carlston, The Process of International Arbitration 260 (1946). He also refers to the assurances concerning the mode of rendering the award and the form and substance of the award. See also Simpson & Fox, International Arbitration 147-54 (1959), and Bin Cheng, op.cit.supra note 10, at 257 et seq.

has made the point that the parties are able to limit, by agreement, the competence and the powers of the tribunal they are creating and to ensure that the applicable rules of procedure are sufficiently flexible for the satisfactory resolution of the dispute submitted to it.

In embarking upon an arbitration a state may rely on the principle that the tribunal will be required to confine itself to the sphere of action defined in the compromis and to conduct itself with due regard for law and universally accepted rules of procedure. Yet withal international arbitration is an infinitely flexible process; its procedures can ever be adapted to the demands made upon it. The form and type of procedure can always be adjusted to the complexity and volume of the litigation to be submitted for decision. 67

It is clear from the foregoing, that the principle that the jurisdiction of an international tribunal flows directly from the consent of the parties has been subjected to a process of refinement insofar as the World Court is concerned, facilitated without doubt, by its permanence. Where as the totality of an ad hoc tribunal's jurisdiction derives directly from the express consent of the parties creating it, this is true only of the "principal" jurisdiction of the Court.⁶⁸ That is, whether the Court has jurisdiction to adjudicate on the merits of a claim will depend solely on the formulation of the issues by the parties, and their agreement to submit

67Carlston, op.cit. supra note 66, at 260. Again in the same work Carlston states "procedural rules should be carefully adapted to the requirements of each arbitration as it arises so that it may be consummated, speedily, economically, and justly," ibid., 4.

68 For a discussion of the term "principal" jurisdiction see 1 Rosenne, The Law and Practice of the International Court 318-19 (1965).

the dispute to the Court for decision. Even in the last resort, where there is no such agreement, it is from the various formulations of the parties that the Court must determine whether or not they have agreed that it should decide the matters in dispute.⁶⁹

But, all other matters, which the Court may be called upon to deal, in connection with, or derived from, the decision on the merits are considered to fall within the Court's "incidental" jurisdiction. The characteristic feature of this "incidental" jurisdiction is that it depends, "not upon the specific consent of the parties," but upon the existence of some objective fact such as the existence of proceedings before the Court.⁷⁰ This does not mean that the exercise by the Court of its incidental jurisdiction is entirely divorced from any question of consent. It is obvious that if the Court lacks all jurisdiction to deal with a case on the merits, because of the absence of consent, it automatically follows that it will also lack all incidental jurisdiction.⁷¹ The point is that the converse is also true. Once the parties have consented merely to the exercise by the Court of its primary jurisdiction the Court will immediately become competent to exercise its incidental jurisdiction. Thus, perhaps, instead of

69 Ibid., 319.

70 Ibid., 422-23.

71 Treatment of U.S. Aircraft and Crews in Hungary [1954] I.C.J. Rep. 99, 103. Cf. Aerial Incident of 4th September 1954 Case, [1958] I.C.J. Rep. 158, 160.

using the term "incidental" to characterize this aspect of the Court's jurisdiction, "inherent" would be more apt.

What the objective facts are, and the conditions, for the exercise of any particular aspect of this incidental jurisdiction are laid down in the Statute and Rules of the World Court, and in general principles relating to the administration of justice. Suffice it to say, for the purposes of this study, that once a case is submitted to the Court for decision the Court automatically becomes entitled to exercise all the rights and powers, including those authorizing it to play an active role in the collection of evidence, incidental to its jurisdiction, to enable it to render a just and equitable decision, not withstanding the objections of the parties.⁷²

The nature and extent of the express powers given the World Court to obtain material and information to supplement that adduced by the parties will now be discussed. Whether the Court possesses an implied rule making power, which extends to give it competence to call evidence and initiate inquiries of its own motion, will emerge in a later part of this study.⁷³

1. Documentary Evidence

Article 49 of the Statute of the International Court of Justice, adopted without amendment from the Statute of the Permanent Court of International Justice,⁷⁴ provides

⁷² See infra, 50-63

⁷³ See infra, 63-70

⁷⁴ See Art. 49 P.C.I.J. Statute.

inter alia, that:

The Court may, even before the hearing begins call upon the agents to produce any document Formal note shall be taken of any refusal.

Not many examples of the exercise of this power exist; and in only one instance has a party refused to produce the documents requested by the Court.

In the case of Appeals from Certain Judgments of the Hungro-Czechoslovak Mixed Arbitral Tribunal the Permanent Court of International Justice was invited, by the Czechoslovak Government, to request the production by the Royal Hungarian Government, of certain documents of importance to the former's case.⁷⁵ The request was duly complied with and the documents produced. Admittedly, the request for production was made on the invitation of Czechoslovakia, one of the parties, but it is still nevertheless an exercise by the Court of the discretionary power conferred on it by Article 49; the Court was acting of its own motion. The Court is not bound to order the production of documents, but it may do so irrespective of the desires of the parties. Nor are the parties to proceedings before the Court conferred the right to demand the discovery and inspection of documents.

The other instance in which the production of documents was requested by the Court was in the Corfu Channel Case.⁷⁶ A specific request was made to the Agent for the United

⁷⁵ P.C.I.J., Ser. C, No. 72 (1931).

⁷⁶ (Merits) /1949/ I.C.J. Rep.4.

Kingdom to produce a document concerning which, on the ground of secrecy, a witness had refused to answer questions.⁷⁷ The document was not produced, the Agent pleading secrecy, and the Court took note of the refusal. In the course of its judgment the International Court of Justice made reference to the British refusal to produce the document. Because of the refusal, the Court said,

... it is not possible to know the real content of these naval orders. The court cannot however draw from this refusal to produce the orders any conclusions differing from those to which the actual events give rise. The ... Agent stated that the instructions in these orders related solely to the contingency of shots being fired from the coast - which did not happen. If it is true, as the commander of the Volage said in evidence, that the orders contained information concerning certain positions from which the British warships might have been fired at, it cannot be deduced therefrom that the vessels had received orders to reconnoitre the Albanian coastal defences. Lastly, as the Court has to judge of the innocent nature of the passage, it cannot remain indifferent to the fact, though two warships struck mines there was no reaction on their part, or on that of the cruisers that accompanied them. 78

It is clear from this comment that the mere refusal of a state to produce documents is not in itself reason for the Court to give judgment against it. Nor can the Court refuse to adjudicate on a dispute, disregarding other evidence of a decisive nature, solely on the basis of a state's failure to comply with a request for production. The refusal is just another factor which must be taken into account in

77 4 Corfu Channel Case - I.C.J. Pleadings, 428 (1949-50).
 5 Corfu Channel Case - I.C.J. Pleadings, 255 (1949-50).

78 (Merits), [1949] I.C.J. Rep. 4, 32.

considering the weight to be attached to that party's case.

In theory the necessity for the exercise of the power to request the production of documents, relied on by a party during the proceedings, cannot arise. Article 43(2) places the parties under an obligation to submit to the Court "all documents and papers in support" of their case.⁷⁹ But this article does not take into account the contingencies that either the documents may be in the hands of the opposition,⁸⁰ who has not relied on them, or a third state, or the documents may be of a secret nature.

With respect to the last contingency it should be noted that nowhere in the Court's judgment, in the Corfu Channel Case, was the right of a party to withhold documents on the ground of secrecy, or privilege, sanctioned.⁸¹ It has been suggested that if a party was faced with the necessity of producing secret documents it could request, as was its right, that the Court declare the proceedings closed to the public.⁸² But, this suggestion has not yet been put into practice.

There is one further instance in which it is possible that the Court may request a party relying on certain documents to produce them. During discussions by the Permanent Court of International Justice, concerning the obligation to

79 See Art. 43(2) P.C.I.J., Statute.

80 This was the position in the case of Appeals from Certain Judgments of the Hungro-Czechoslovak Mixed Arbitral Tribunal, P.C.I.J., Ser. C, No. 72(1931).

81 (Merits), [1949] I.C.J. Rep.4.

82 P.C.I.J., Ser. D, No.2(add.), 127 (1926).

present all documents in support, it was suggested that it was not necessary for a party to produce the whole of a lengthy document, consisting of separable portions, provided that each portion represents a thought, or a fact, complete in itself and not dependent on the context from which it was taken.⁸³ From this it can be discerned that should a party rely on an extract, or a portion, of a document which out of context, misrepresented the true nature or meaning of the document, the Court may request the production of the whole. This situation has not yet arisen although the Permanent Court of International Justice in one instance,

... in view of the importance of strict accuracy in the text of documents filed with the Court, ... decided ... to draw the attention of the agents to certain inaccuracies in documents which had been submitted to it. 84

One writer has referred to the Court's right to request the production of documents as being

... limited to documents which have been referred to, or relied upon, in the pleadings of the other party without being produced and which are in the exclusive possession of that party. 85

The practice of the Court has shown that its right to discovery encompasses a broader field than this. Not only can it request the production of all documents relied on by a

83 P.C.I.J., Ser. D, No.2 (3d add.), 101 (1936).

84 P.C.I.J., Ser. E., No.8, 261 (1932). For a lengthy exchange of views between the Danish and Norwegian Agents during the proceedings in the case concerning the Legal Status of Eastern Greenland with reference to allegations by the latter that Denmark had submitted with her case a number of incomplete and misleading quotations, see P.C.I.J. Ser.C, No.63, 992-95, 1003 (1933), P.C.I.J., Ser. C, No.67, 3291-94, 3556-58 (1933).

85 Sandifer, op.cit.supra note 21, at 73.

party, but it may also exercise this right to obtain the production by one party of documents relied on solely by the other.

2. Enquiries and Expert Evidence

The Statute of the World Court contemplates the use, in proceedings before the Court, both of expert witnesses called by the parties, either of their own motion or at the invitation of the Court, and of enquiries and opinions by commissions of experts appointed by the Court. This section⁸⁶ is devoted to a consideration of the latter use of experts.

Article 50 of the Court's Statute provides that the Court may entrust, at any time,

... 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. 87

There is one precondition which has to be fulfilled by the Court before it can order an inquiry or expert opinion.

88

Article 57 of the Rules of Court provides that the Court is first obliged to hear the parties on the matter although, from the wording of the article, it is not bound to take account of the objections, if any, which may be made. Then, in making the order, the Court must state the number and mode of appointment of the persons to hold the enquiry or

86 The powers of the Court over experts called by the parties are discussed infra, 41-45.

87 See Art. 50 P.C.I.J. Statute.

88 See Art. 57 P.C.I.J. Rules.

the experts and the procedure to be followed by them.

This power, although discussed on several occasions
⁹⁰ by the Court, has been invoked in only two cases, the Chor-
⁹¹ zow Factory Case and the Corfu Channel Case.⁹² In the latter
 case recourse was twice had to experts by the Court, but in
 different circumstances in each instance.

In the Chorzow Factory Case the Permanent Court
 of International Justice ordered an inquiry into the value
 of an expropriated undertaking for the purpose of determining
 the compensation due. In the Court's own words, the object of
 the inquiry was to enable it

... to fix with a full knowledge of the facts, in
 conformity with the principles laid down in Judg-
 ment No. 13, the amount of the indemnity to be
 paid by the Polish Government under the terms of
 ... Judgment No. 13. ⁹³

The terms of reference, for the three experts appointed, were
 to ascertain the estimated value of the undertaking, including
 stocks at the moment of taking possession by the Polish Gov-
 ernment, or its present value.⁹⁴ Two questions were put to
 the experts, the object of which was to determine the amount
 of compensation due for unlawful expropriation in circumstances

89 Art. 57(1) I.C.J. Rules; Art. 57(1) P.C.I.J. Rules.

90 E.g. Oscar Chin Case, P.C.I.J., Ser.A/B, No.63(1934);
Phosphates in Morocco Case, P.C.I.J., Ser.C, No.84, P.C.I.J. Ser.
 C, No.85(1938); Anglo-Iranian Oil Co. Case - I.C.J. Pleadings 360
 (1952); Nottebohm Case (Second Phase), 1955 I.C.J. Rep.9.

91 P.C.I.J., Ser.A, No.17 (1928).

92 (Merits) [1949] I.C.J. Rep.4.

93 Order of September 13, 1928, P.C.I.J., Ser.A, No.17, 99 (1928).

94 Judgment ibid., 52.

in which restitution was impossible.⁹⁵ However, the parties reached a settlement out of Court before the experts terminated their enquiry.

The outstanding instance of the use of experts was in the Corfu Channel Case.⁹⁶ In this case the United Kingdom claimed inter alia, that Albania was legally responsible for the destruction and damage of two British warships during passage through the Corfu Channel.⁹⁷ The Channel had previously been swept for mines and the United Kingdom "suspected that this was the work of Albania".⁹⁸ It was with regard to the allegations of the United Kingdom that the International Court of Justice made use of independent technical experts.

These experts were brought in at two stages of the proceedings: (i) to give an opinion on certain factual questions, and to state what conclusions, if any, could be drawn from the facts as they found them; and (ii) after the Court had pronounced on the international responsibility of Albania, to examine the estimates of damage submitted by the United Kingdom.

The order initiating the first enquiry⁹⁹ referred to the relevant articles in the Court's Statute and Rules, and

95 Order of September 13, 1928, ibid., 99.

96 (Merits), [1949] I.C.J. Rep. 4.

97 (Preliminary Objection), [1947-1948] I.C.J. Rep. 15, 17.

98 Briefly, The Law of Nations 422 (6th ed. Waldock 1963).

99 [1947-48] I.C.J. Rep. 124.

then "to the fact that, certain points having been contested by the parties" made it necessary to obtain an expert opinion. There followed eight specific and detailed points upon which the experts' opinion was requested. The order then continued in paragraphs VI and VII to provide:

VI. The Experts shall bear in mind that their task is not to prepare a scientific or technical statement of the problems involved, but to give the Court a precise and concrete opinion upon the points submitted to them.

VII. The Experts shall not limit themselves to state their findings; they will also as far as possible, give the reasons for these findings in order to make their true significance apparent to the Court. If need be they will mention any doubts or differences of opinion amongst them.

These provisions may well have been included because of the lively contest as to the facts which had taken place, and of the degree of reliance which the Court was obliged to place
100
on circumstantial evidence.

The experts submitted their first report in January 1949, and it was duly communicated to the parties by the Court. The Albanian Government, however, was dissatisfied with the report, alleging gaps and uncertainties which could
101
compromise the final decision of the Court. A letter from the Yugoslav Government, who requested the Court to treat the letter as a notification of collaboration and not as any act of intervention, also claimed the report contained uncertainties,

100 See Lauterpacht, op.cit.supra note 1, at 88-89.

101 This may be discerned from the letter of January 4, 1949, sent by the Yugoslav Government to the Court, 5 Corfu Channel Case - I.C.J. Pleadings 253 (1949-50).

gaps, and certain inaccuracies. In the letter, Yugoslavia offered to let the experts carry out certain investigations on the spot to rectify their errors and omissions if the Court were to consider this useful and necessary.¹⁰²

As was the case the Court did find it useful and necessary for the experts to visit the area and carry out observations on the spot. The decision, directing the experts to visit the locality in question, requested them to make investigations on land and in the adjacent waters, and to conduct any experiments which they might consider useful with a view to verifying, completing and, if necessary, modifying, the answers in their January report.¹⁰³

In due course the experts filed the new report. It was communicated to the parties who submitted their observations on it.¹⁰⁴ Several members of the Court put questions to the experts arising out of the report, and a hearing was held in which the experts gave their replies.¹⁰⁵

The importance of the expert report in assisting the Court to reach a decision, on the question of the responsibility of Albania, is well illustrated in the portion of its judgment which dealt with the visibility of any mine laying

102 Ibid.

103 [1949] I.C.J. Rep. 21.

104 For the observations see 5 Corfu Channel Case - I.C.J. Pleadings 93, 115 (1949-50).

105 [1949] I.C.J. Rep. 152-62, 163-69.

operations from the Albanian coast. The Court set itself the task of examining, by indirect evidence, Albania's knowledge of the mine laying in her territorial waters, apart from any connivance on her part. It was said that:

The proof may be drawn from inferences of fact 106 provided they leave no room for reasonable doubt.

Two sets of facts which corroborated one another were considered: the first related to the attitude of Albania, both before and after the disaster; the second concerned the feasibility of observing mine laying from the Albanian coast. On the latter set of facts the experts' report was of assistance to the Court. 107 The Court in considering these facts quoted from the report:

The Experts consider it to be indisputable that if a normal lookout was kept ... and if the lookouts were equipped with binoculars as has been stated, under normal conditions for this area, the mine laying operations ... must have been noticed by these coastguards. 108

The Court's conclusion on this point was that it

... cannot fail to give great weight to the opinion of the experts who examined the locality in a manner giving every guarantee of correct and impartial information. 109

The second occasion on which the Court resorted to the use of experts in the Corfu Channel Case was in relation to assessing the amount of reparation due from Albania to the United Kingdom. As the Albanian Government

106 Ibid., 18.

107 Ibid., 20.

108 Ibid., 21.

109 Ibid.

refused to co-operate on either the question of the quantum of damages, or the appointment of experts to assess the quantum of damages, the Court itself designated experts to examine the estimates submitted by the United Kingdom.¹¹⁰ The experts, so appointed, agreed with the British estimate in respect to one ship, but reached a higher estimate for the second. The Court, however, declared itself unable to award¹¹¹ more than the sum claimed.

The questions submitted to the experts in the Corfu Channel Case pertained directly to the main issues between the parties, namely, what means had been used to lay the minefield, and whether this could have been done without the knowledge of the Albanian Government. White has suggested that the use of experts may be equally appropriate in relation to matters raised by way of defense to an admitted responsibility.¹¹² That is, although a state may not dispute its liability at international law, it may rely on other factors to modify the nature, or amount of reparation due. This was the position adopted by Greece in the Société Commerciale de Belgique Case.¹¹³ The dispute between Belgium and Greece concerned the execution of certain arbitration awards given in favour of a Belgian Company in 1936. While admitting the awards were binding on her, Greece pleaded financial inability

110 Ibid., 238.

111 Ibid., 249. For the experts' report see ibid., 258-60.

112 White, op.cit.supra note 61, at 114.

113 P.C.I.J., Ser. A/B, No.78 (1939).

to make the payments due to the Company. Neither Belgium nor Greece requested an expert inquiry into the latter's financial position nor did the Court in its judgment consider such a course necessary. The Court stated that the awards were definitive, obligatory, and had the force of ¹¹⁴ res judicata, and therefore it could do nothing. However, a dissenting Judge, Judge Van Eysinga, asserted that the case involved "a question of ascertaining a fact," the financial situation of Greece. And, that the ascertainment of this fact required an expert report, for the Court could not simply adjudicate on the basis of what the two parties presented to it, notwithstanding their statement that this question should remain outside the scope of the proceedings. ¹¹⁵

The proposition stated by Judge Van Eysinga, namely that the Court is competent to order an expert enquiry under Article 50, despite the fact that the parties have intimated that they do not wish the matter to enter into the proceedings, can not be questioned insofar as the World Court is concerned. This right is conferred on it by Article 57(1) of the Rules of Court. If the issue is raised by the pleadings, as it was in the Societe Commerciale de Belgique Case, the Court is not restricted to the evidence adduced by the parties. It is free to consider other facts which, it may determine, are relevant and necessary to the decision of the issues.

¹¹⁴ Ibid., 178.

¹¹⁵ Ibid., 182.

It has emerged from the preceding discussion of the use of experts that the expert has in general a straight forward job, namely to assist the Court in the establishment, and/or elucidation, of facts within the terms of the reference given him by the Court. The expert is there to assist "in ferreting out" the facts.

The necessity for, and the importance of, the Court's authority to order independent inquiries into, and expert opinions on, the facts of a case is well illustrated by Lauterpacht's comment that:

A substantial part of the task of judicial tribunals consists in the examination, and weighing, of the relevance of facts for the purposes of determining liability and assessing damages. As the Corfu Channel Case showed, the Court is in a position to perform that task with exacting care.¹¹⁶

This quotation also brings out a point essential to the role of an expert appointed by the Court. The expert is there solely to assist in finding facts where the circumstances of a case render it necessary or expedient. He cannot usurp the judicial function of the Court - he cannot identify which facts are relevant or significant, nor examine and weigh them for the purposes of determining liability and assessing damages.

However, there is nothing to prevent the parties agreeing to submit their dispute to a tribunal composed of technical, non-legal, experts as happened in the final stage

¹¹⁶ Lauterpacht, op.cit.supra note 1, at 48. See also Dillard, "A Tribute to Philip C. Jessup and some Comments on International Adjudication" 62 Colum.L.Rev. 1138, 1145 (1962).

of the Free Zone of Upper Savoy and the District of Gex Case.--
 France and Switzerland agreed to appoint three experts, in
 the economic and finance field, to draw up revised regula-
 tions for the exchange of goods between the regions concerned. 117
 But, in the absence of an express agreement, conferring upon
 the experts a judicial function, a decision by the Court, based
 on the finding of fact, and/or the opinion, in the experts' re-
 port, would constitute a delegation by the Court of its judi-
 cial function. Such conduct by the Court, it has been sugges-
 ted, would be ground for the refusal by one or both parties
 to carry out the award. 118

In view of the wide power of the World Court to
 order enquiries and expert opinions on any point of fact
 which may be raised in the pleadings, it may be asked: what
 safeguards exist to protect the fundamental right of the
 parties to comment on, or reply to, all the evidence brought
 before the Court? The answer is to be found in the Rules of
 Court, Article 57(3) of which provides that:

Any report or record of any enquiry and any expert
 opinion shall be communicated to the parties. 119

In practice, this provision has been interpreted as confer-
 ring on the parties the right to see the results of the in-
 quiry or the experts' opinion immediately it is submitted to
 the Court. The parties are thus in a position to assess the

117 P.C.I.J. Ann.Rep., Ser.E, No. 10, 106 (1934).

118 White, op.cit.supra note 61, at 165.

119 See Art. 57(2) P.C.I.J. Rules.

significance of the report in relation to their own case and to comment on it. In the Corfu Channel Case, for instance, the parties were given the opportunity to comment on the experts' first report in their oral reply and rejoinder.¹²⁰ For the second report, following the inquiry on the spot, the Court's order gave the parties the right to file written observations on any new statement which the report might contain.¹²¹

3. Testimonial Evidence¹²²

Recourse to testimonial evidence in international judicial proceedings is rare.¹²³ The Statute and Rules of the World Court merely provide a framework for the calling of witnesses and experts, and the taking of depositions. Although neither instrument confers on the Court power to subpoena and compel the attendance of witnesses or experts,¹²⁴ administer oaths,¹²⁵ nor punish for perjury, there are nevertheless three methods open to the Court by which it can obtain testimonial evidence.

¹²⁰ This right of the parties was not expressly included in the order of December 17, 1948; the Registrar was merely under a duty to communicate the report to the parties. See [1947-48] I.C.J. Rep. 124, 127.

¹²¹ [1949] I.C.J. Rep. 21.

¹²² I.e. Evidence by means of witnesses as distinguished from documentary evidence.

¹²³ See Hudson, International Tribunals 94 (1944) and 2 Rosenne, op.cit.supra note 68, at 572.

¹²⁴ Each witness and expert is required by Art. 53 of the I.C.J. Rules to make a declaration before giving testimony. See also Art. 53 P.C.I.J. Rules.

¹²⁵ For the effective administration of testimonial proof a tribunal must have the power, it is suggested, to (1) compel the attendance of witnesses; (2) compel the giving of evidence

The first method is that where the parties have voluntarily called witnesses or experts in support of their cases,¹²⁶ the President and Judges of the Court may put questions to them.¹²⁷ The Rules, as suggested above, do not convey with any precision precisely what system should be adopted for the examination by the Court of such witnesses or experts. However, it appears that the accepted procedure is that the witness or expert is first questioned by the agent who has called him, then by the opposition, followed by the President and Judges. The agent, producing the witness or expert, having the right to put further questions to the witness or expert, and to add technical evidence on completion of the¹²⁸ "cross-examination".

Next, the Court is empowered "to request the parties to call witnesses or experts". If the attendance of the witness or expert cannot be obtained, by the party requested to produce testimonial evidence, either through the former's refusal to attend, or his presence within a third state, the provisions of Article 44 of the Statute may be invoked.¹²⁹ This article authorizes the Court, of its own initiative, to apply directly to the Government within whose jurisdiction the

by the witnesses; and (3) punish for perjury.

¹²⁶ Art.49 I.C.J. Rules makes provision for the calling of witnesses by the parties. See also Art.49 P.C.I.J. Rules.

¹²⁷ See Art.51 I.C.J. Statute and Art.53 I.C.J. Rules, and also Art.51 P.C.I.J. Statute and Art.53 P.C.I.J. Rules.

¹²⁸ This procedure was followed in the Corfu Channel Case: see 3 Corfu Channel Case - I.C.J. Pleadings 427 (1949-50). For an example of technical explanations, see 4 Anglo Norwegian Fisheries Case - I.C.J. Pleadings 64 (1951).

¹²⁹ Art.54 I.C.J. Rules. See also Art.54 P.C.I.J. Rules.

witness is to be found to secure his appearance.

The third and final method open to the Court to obtain testimonial evidence is by taking

The necessary steps for the examination of witnesses and experts otherwise than before the Court itself. 131.

The exercise of this right, by its very nature, necessitates recourse to Article 44 of the Statute - the Court must obtain the permission of the State, within whose jurisdiction the witness or expert is residing, to hold the commission to take the testimony it requires.

Although the parties themselves have called witnesses and experts to substantiate their allegations on several occasions,¹³² the Court has never had to order the taking of testimonial evidence "otherwise than before the Court itself"; and, only once has the Court requested the parties to call witnesses or experts.

In the case of German Interests in Polish Upper Silesia the Court, requiring certain information of a technical nature, invited the parties to call persons able to furnish explanations and information in this connection.¹³³ Though the parties chose the witnesses they were heard not as part of the presentation of their respective cases, but as a means

130 See also Art. 44 P.C.I.J. Statute.

131 Art. 56 I.C.J. Rules. See also Art. 56 P.C.I.J. Rules.

132 E.g. Corfu Channel Case/1949/ I.C.J. Rep. 4; Anglo-Norwegian Fisheries Case/1951/ I.C.J. Rep. 116; Temple of Preah Vihear Case/1962/ I.C.J. Rep. 6; Southwest Africa Case, /1966/ I.C.J. Rep. 4.

133 P.C.I.J., Ser. A, No. 7, 96 (1926); P.C.I.J., Ser. C, No. 11, 29 (1926).

by which the Court furnished itself with the additional information. After the evidence was given the parties were allowed to examine the witnesses called by the other party.¹³⁴

To ensure that the testimonial evidence presented achieves a high degree of accuracy, a transcript of the evidence of each witness and expert is taken, and then made available to him in order that mistakes may be corrected under the supervision of the Court.¹³⁵ This record is then afterwards signed by the witness or expert.

It is obvious that the general rule in respect to the obtaining of testimonial evidence is that a party undertakes to produce his own witnesses as well as those whom the Court wishes to hear. As was stated by Judge Anzilloti:

[R]eliance must above all be placed in the willingness and ability of the parties to furnish the Court with the necessary evidence.... The Court [must approach] the parties; and only if a party were unable to produce a witness ... was the procedure mentioned in Article 44 of the Statute to be resorted to. ¹³⁶

Although the deficiency in the power of the Court in relation to the obtaining of testimonial evidence has not been heretofore the occasion of any difficulty, it might very well put the Court in an embarrassing situation. For in addition to the fact that it makes the compulsory attendance of witnesses dependent upon the good faith of the states con-

¹³⁴ P.C.I.J., Ser. C, No. 11, 29 (1926).

¹³⁵ Art. 60(2) I.C.J. Rules. See also Art. 60(2) P.C.I.J. Rules which differs slightly to the I.C.J. Rules.

¹³⁶ P.C.I.J., Ser. D, No. 2 (3d. add.), 240-41 (1936).

cerned, it is to be noted that few states seem to have legislation which would enable them to produce witnesses to testify before the Court.

4. Third Party Evidence

The Court, by Article 34(2) of its Statute, subject to and in conformity with its Rules,

... may request of public international organisations information relevant to the cases before it, and shall receive such information presented by such organisations on their own initiative. 137

This provision is supplemented by certain provisions in the Rules of Court. By Article 57(3) thereof, the Court may, at any stage of the proceedings before the termination of the hearing, either proprio motu or at the request of one of the parties, request a public international organization to furnish information relevant to a case before it, deciding also whether the information shall be presented orally or in writing. Article 57(4) prescribes that where an organization wishes to supply information of its own initiative it shall do so in memorial form. The Court, in such circumstances, reserves the right to request that the information be supplemented, either orally, or in writing, in the form of answers to any questions it may see fit to formulate.

The phrase "public international organization" is not defined. It is suggested however, that on the one hand it refers only to inter-governmental agencies, but on the

137 There was no equivalent provision in the P.C.I.J. Statute.

other hand is not limited to Specialized Agencies. With respect to Specialized Agencies attention may be called to the provision which appears in the "Relationship Agreements",¹³⁸ of which the following, from International Labour Organization Agreement, is typical:

The International Labour Organisation agrees to furnish any information which may be requested by the International Court of Justice in pursuance of Article 34 of the Statute of the Court.¹³⁹

These clauses oblige the Specialized Agencies concerned to supply the information requested by the Court, and thus "transform the facultative provisions of Article 34(2) ...¹⁴⁰ into an obligatory one".

Unfortunately no instance of the application of these provisions has occurred.¹⁴¹ In the Corfu Channel Case,¹⁴² the Anglo-Iranian Oil Co. Case,¹⁴³ and the Southwest Africa¹⁴⁴

¹³⁸ I.e. the agreements which establish the status of the Specialized Agencies.

¹³⁹ I.L.O. Agreement, Art. IX(1), Agreements between the United Nations and the Specialized Agencies and the International Atomic Energy Agency, U.N. Doc. ST/SG/14(1961). See also F.A.O. Agreement Art. IX(1); UN.E.S.C.O. Agreement Art. XI(1); I.C.A.O. Agreement Art. X(1); W.H.O. Agreement Art. X(1); I.R.O. Agreement Art. X(1); I.T.U. Agreement Art. VII(1); W.M.O. Agreement Art. VII(1); I.M.C.O. Agreement Art. X(2). Ibid. No such clause appears in the agreements with the I.B.R.D., I.M.F., I.D.A., and U.P.U., ibid.

¹⁴⁰ 1 Rosenne, op.cit. supra note 68, at 287.

¹⁴¹ Although no equivalent provisions to those discussed are to be found in the Rules or Statute of the P.C.I.J., that Court adopted a procedure very similar to that contemplated by the Rules and Statute of the I.C.J. in the Monastery of St. Naoum Case, P.C.I.J., Ser. B, No. 9 (1924).

¹⁴² (Preliminary Objections) [1947-1948] I.C.J. Rep. 15.

¹⁴³ [1952] I.C.J. Rep. 93.

¹⁴⁴ (Preliminary Objections) [1962] I.C.J. Rep. 319.

and Northern Cameroons¹⁴⁵ cases important questions involving the construction of the United Nations Charter were argued between the parties, but no request for information was made to that organisation. In the Rights of U.S. Nationals in Morocco Case, the articles of the agreement creating the International Monetary Fund were cited, but again no request¹⁴⁶ for information was made. There was some indication in¹⁴⁷ the Aerial Incident of 27 July 1955 Case that the Court might request the International Civil Aviation Organization¹⁴⁸ for assistance, but no request was made as the Court found it was without jurisdiction to decide on the merits of the issue.

However, should the occasion arise, there can be no question that the Court would request the organization concerned for information. Nor would the organization be limited to supplying information on the interpretation or application of the instruments of its creation; it would be obliged to supply all the information and material within its possession relevant to the question in dispute should the Court so request. Nor is it likely that the use of such information by the Court would infringe the parties' right to a fair and impartial adjudication of their dispute as the Court is authorized to allow the parties "to comment in writing on the in-

145 [1963] I.C.J. Rep.15.

146 [1952] I.C.J. Rep.200.

147 [1959] I.C.J. Rep.127.

148 I.C.A.O. Doc.C-WP/2609 of 21 February 1958, para. 5.

formation thus furnished" by the organizations.

5. Miscellaneous Provisions

There are two further provisions, of the instruments creating the World Court, which require consideration in connection with the Court's express powers to find facts. The first is Article 54 of the Rules of Court which provides, inter alia, that:

The Court ... may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement. 150

In view of the fact that the Court has been granted specific powers to request the production of documents and witnesses, to initiate enquiries, and to obtain information from third parties, whether they be experts or public international organizations, the authority conferred by Article 54 must be regarded as a general residuary power which may be invoked to fill any gaps left in the Court's knowledge of the facts after recourse has been had to these other means of fact finding. However, it is difficult to foresee what "other evidence" there could be that would not be disclosed by one or more of the specific techniques of fact finding provided for in the Statute and Rules. 151

Secondly, Article 49 of the Court's Statute empowers it to call upon the agents of the parties, at any time before

149 Art.57(4) I.C.J. Rules.

150 See Art.54 P.C.I.J. Rules.

151 Perhaps such "other evidence" may encompass such things as documents relevant to the dispute which are not relied on by either party, and exhibits.

49.

the conclusion of the hearing, to supply explanations.¹⁵² This provision is supplemented by Article 52 of the Rules which authorises the Court to put questions to agents and counsel¹⁵³ during the hearing for the purpose of obtaining explanations. No indication is given as to the matters on which explanations may be invited, but the practice of the Court supports the contention that explanations may be requested with regard to both matters of law and matters of fact. In the Monetary Gold Case the Court relied on Article 49 in making an interlocutory order in connection with a preliminary question¹⁵⁴ going to its jurisdiction. In the Ambatielos Case the provision¹⁵⁵ was used to request a party to supply additional facts. And, in the Anglo-Norwegian Fisheries Case Article 52 of the Rules was relied on by the Court to obtain explanations¹⁵⁶ of a technical nature from the Norwegian agent.

The relevance of these latter provisions to the topic under consideration is limited, for it is very unlikely that the facts of any particular dispute will be within the personal knowledge of counsel or agent. Their importance lies in the fact that the Court is able to request explanations on any points which, in its opinion, require clarification, thus enabling it better to appreciate the full significance of the material and information presented to it.

152 See Art. 49 P.C.I.J. Statute.

153 See Art. 52 P.C.I.J. Rules.

154 [1953] I.C.J. Rep. 44.

155 Ambatielos Case - I.C.J. Pleadings 346, 566 (1953).

156 4 Anglo-Norwegian Fisheries Case - I.C.J. Pleadings 474 (1951).

CHAPTER 4

FACT FINDING - IMPLIED COMPETENCE

That international judicial tribunals, both permanent and ad hoc, possess implied rule making power would not seem to be doubted. Even in the absence of express authority, a tribunal may assume the power to promulgate rules of procedure as an incident of its judicial responsibility.¹⁵⁷ Apparently, it has been assumed by international tribunals that they have a power analogous to that of municipal courts to determine their own rules of procedure, subject to any limitations upon their authority in the instrument of creation.¹⁵⁸ Ralston has said that

From the very nature of things ... courts have the right to adopt ordinary rules to govern their procedure and determine the privileges and duties of the litigants before them. This right exists whether expressed in the protocol or not.¹⁵⁹

Whatever its source, there can be no doubt that the power is well established by customary practice.

But does this implied rule making power extend to confer on the World Court a discretionary competence to call evidence of its own motion, and to ascertain for itself the facts in a dispute, in the absence of an express provision to

¹⁵⁷ Hudson, op.cit.supra note 123, at 86; Simpson & Fox, op.cit.supra note 66, at 147, 152; Sandifer, op.cit.supra note 21, at 28-29. See also the dictum of the United Kingdom - Mexican Claims Commission in the Cameron Case, 5 R.I.A.A. 29.

¹⁵⁸ Sandifer, op.cit.supra note 21 at 197.

¹⁵⁹ Ralston, Law and Procedure 197(1926).

this end in its rules of procedure. There is very little relevant practice recorded in the proceedings of ad hoc tribunals and mixed commissions, certainly nothing in the way of direct authority, to support the presence within international judicial tribunals of an implied discretionary power to undertake their own investigations into the facts of a case. However, such practice as does exist, mainly in proceedings before the World Court, would seem to point to the recognition of an implied power to take an active role in the collection of evidence.

1. Documentary Evidence

As has been seen, the Court by its statute and rules has been conferred express power to request the production of documents, and any other evidence on points of fact, in re-
¹⁶⁰
 gard to which the parties are not in agreement. The documents which may be the subject of the exercise of these powers are limited to those in the possession of the parties to proceedings, whether or not relied on during the hearing. Further, through a request to a public international organization for information, the Court may also receive documentary evi-
¹⁶¹
 dence relevant to the proceedings before it. *Prima facie* this appears to be the extent of the Court's powers to obtain documentary evidence.

¹⁶⁰ See supra, 26 - 31.

¹⁶¹ See supra, 45 - 48.

However, Judge Jessup, in his dissenting judgment¹⁶² in the Southwest Africa Case, indicated that, in his opinion, the Court's competence to have regard to documents, relevant to any issue before the Court, goes beyond the competence suggested by the Statute and Rules. In discussing the evidence¹⁶³ considered by the Court in its advisory opinion of 1950, he stated:

One must be aware however, that the International Court of Justice does not limit itself to considering documents actually presented to it by counsel, or as in the case of the 1950 Advisory Opinion, by the Representatives of the Governments or the United Nations. ¹⁶⁴

This statement indicates that the Court has an implied competence to have regard to documents other than those produced by the parties, either voluntarily or in pursuance to an order for production, or by public international organizations.

2. Enquiries and Expert Evidence

During the discussions, by the members of the Permanent Court of International Justice, of the amended Rules of Court in 1936, Judge Anzilotti pointed out that whenever the Court requested an enquiry or expert opinion, under¹⁶⁵ Article 50 of its Statute, it was exercising an inherent power appertaining to it as a tribunal. He said:

¹⁶² [1966] I.C.J. Rep.6, 348.

¹⁶³ International Status of Southwest Africa Case, [1950] I.C.J. Rep. 128.

¹⁶⁴ [1966] I.C.J. Rep.6, 348.

¹⁶⁵ See Art. 50 I.C.J. Statute.

It was of no great consequence whether these powers were derived from Article 50 or from a general principle of procedure not stated in the Statute. In any case the Court has the power to order an expert inquiry. 166

This view must carry great weight as it aroused no recorded dissent from the other judges. Nor did they make any reference to the consent of parties as a necessary precondition for the exercise of this power by the Court.

There is no recorded instance of the World Court having initiated an expert enquiry by virtue of the implied competence accredited to it by Judge Anzilotti, and, in fact such a course has only once been taken by any judicial tribunal.

In the Lighthouse Arbitration, the Permanent Court of Arbitration ordered expert enquiries and appraisals in the absence of any express authority to do so in the compromis, and apparently without asking the parties whether they consented.¹⁶⁷ Under Article 7(6) of the compromis of July 15, 1931, the tribunal was to

... conform to the rules for proceedings by arbitration in Chapter III of Part IV of the Convention for the Pacific Settlement of Disputes, signed at The Hague on October 18th, 1907. 168

This excluded the provisions relating to the appointment of experts by the tribunal in Chapter VI.¹⁶⁹ There is no corres-

166 P.C.I.J., Ser.D, No.2(3d. add) 247 (1936).

167 12 R.I.A.A. 155; [1956] Int'l. Rep. 659 (No.23).

168 Text of compromis, 12 R.I.A.A. 161.

169 Text of 1907 Hague Convention for the Pacific Settlement of Disputes reproduced in The Hague Conventions and Declarations of 1899 and 1907 (Scott ed. 1915).

pending provision in Chapter III.

The report of the proceedings in the Lighthouse Arbitration contains no mention of the tribunal asking the parties whether they agreed to the employment of independent experts. Neither is any objection to this course recorded. On the contrary, the award of the tribunal indicates that it came to an independent decision on this point, one of the main reasons for which was the inadequacy of the documentary evidence presented by the parties, and which it regarded itself as being under an obligation to take.¹⁷⁰

It is difficult to envisage in what circumstances the World Court would have recourse to its implied competence to initiate expert enquiries in the light of the express power conferred upon it. However, should a state, while consenting to the submission of a dispute to the Court, lodge a reservation with respect to the application of Article 50 of the Statute, it is suggested that the Court could circumvent any problems raised by the reservation through recourse to its inherent competence.

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3. Judicial Notice

International judicial tribunals, notwithstanding the absence of any express authority in the compromis or rules of procedure,¹⁷² have followed the practice of accepting

170 12 R.I.A.A. 288; [1956] Int'l L.Rep. 348 (No.23).

171 For the definition of the term "judicial notice" as used in this section see supra, note 4.

172 In only two instruments creating international judicial tribunals has the writer found provision expressly conferring on the tribunal authority to take judicial notice of certain facts. See Art.21 of the Charter of the I.M.T. (Nuremberg), and Art.

certain facts as true without requiring the production of proof. The practice of the World Court does not constitute an exception to this. In general, it appears that the facts of which judicial notice will be taken by the Court may be divided into two categories: (1) notorious facts; and (2) "judicial" facts.

With respect to the first category, that of notorious facts, the Court has held that facts which are of common knowledge do not need to be substantiated by proof. In its judgment in the case concerning German Interests in Polish Upper Silesia, the Court refused to accept the Polish contention that proof of acquisition of Czechoslovak nationality could be established only by means of a certificate from the Czechoslovak Government recording the fact. It then declared, with reference to certain data furnished by one of the applicants in proof of his nationality:

Moreover these data, furnished by the Applicant relate, at least in part, to matters of common knowledge; Poland does not dispute their accuracy, she merely asks for documentary proof. 173

Again in the advisory opinion of the Permanent Court of International Justice concerning the Austro-German Customs Regime, Judge Anzilotti, in considering the evidence, and in particular the fact as to whether the aim of the customs regime was to effect the political union of the two countries, declared:

13(d) of the Charter of the I.M.T. (Far East), cited by Bin Cheng, op.cit.supra note 10, at 303 note 10.

173 P.C.I.J., Ser.A, No. 7, 73 (1926).

Here we are confronted with a well-known fact and one which the Court could take into consideration even if it had not been advanced by the interested parties. 174

Although it is clear that the Court will take judicial notice of notorious facts, no inclusive list of those facts can be made as the issue has arisen only rarely in proceedings before the Court. However, it is clear for the above passages that facts of history will be treated as within the common knowledge of the tribunal.

Within the second category fall facts with which the Court is presumed to be acquainted on account of their close nexus to the judicial function. The principal instances of such facts in international judicial proceedings are treaties and local laws.

Of international treaties, the Court will apparently take judicial notice. In the International Commission of the River Oder Case, the Court said in its judgment that the fact not having been contested, that Poland had not ratified the Barcelona Convention, it was "evident that the matter was purely one of law such as the Court could and should examine ¹⁷⁵ ex officio." But with respect to rules of municipal law, which may be raised during the proceedings, the position is not as clear. In the Brazilian Loans Case the Court said in

174 P.C.I.J., Ser. A/B, No. 20, 70(1931). See also Competence of the I.L.O. with respect to Agricultural Labour Case, P.C.I.J., Ser. A/B, No.2, 31 (1922).

175 P.C.I.J., Ser. A, No.23, 18-19 (1929).

its judgment that being "a tribunal of international law" it was "in this capacity ... deemed to know what the law is" but that it was not also obliged to know the municipal law¹⁷⁶ of the various countries. However, it added:

All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied, And this it must do either by means of evidence furnished it by the parties, or by means of any researches which the Court may think fit to undertake or to cause to be undertaken. 177

From this it appears that although the Court does not consider itself bound to know the local law of the states appearing before it, at the same time it does not consider such law simply a question of fact to be proved by evidence produced by the parties. This leaves the Court free, it is suggested, perhaps even obligated, to resolve, through its own researches, any uncertainty concerning such a law if the parties fail to produce adequate proof. Nevertheless, it is the more prudent course for the parties not to leave the Court the burden of the elucidation of questions of municipal law essential to the proof of the contentions on which they rely. For as stated by Judge Anzilotti in the case concerning the Consistency of Certain Danzig Decrees with the Constitution of the Free City, Article 38 of the Statute, in prescribing the sources of law to be applied by the Court,

... only mentions international treaties or

176 P.C.I.J., Ser. A, No. 21, 124 (1929).

177 Ibid.

custom and the elements subsidiary to these two sources to be applied if both of them are lacking. 178

He then asserted:

It follows that the Court is reputed to know international law; but it is not reputed to know the domestic law of the different countries. 179

The value of judicial notice, as a means by which the Court may apprise itself of the true facts of a dispute, is limited if the term judicial notice is used to refer to the propositions in a party's case as to which he is not required to produce evidence, being taken for true by the tribunal without the need for proof. On this definition of judicial notice, it is essential that the fact of which judicial notice is taken has been raised by the party. However, in view of the statement of Judge Anzilotti, that there are certain facts which the Court can take into consideration¹⁸⁰ even if they "had not been advanced by the interested parties", the principle of judicial notice in international judicial proceedings is not so restricted. This dictum extends the operation of the principle beyond the sphere of facts actually raised by the parties themselves, to all facts which, if contained in the allegations of the parties, would have been the subject of judicial notice. But, the dictum cannot be read as extending the actual categories of facts of which judicial notice will be taken.

178 P.C.I.J. Ser. A/B, No. 65, 60 (1935).

179 Ibid., 61.

180 See supra, 55 - 56.

4. Visits to the Place

The power of a tribunal to visit the scene connected with the dispute would not seem to be dependent upon express authorization in the compromis or rules of procedure.

The decision of the Permanent Court of International Justice, in the case concerning the Diversion of Water from the Meuse, to visit the scene and see the various canals, locks and other installations, was not based upon any express provision in the Court's Statute or Rules of Procedure. It was, admittedly, made at the request of Belgium, one of the parties, with the consent of the other party, the Netherlands, but the Court regarded the suggestion as an invitation to procure its own information, rather than as an offer on the part of Belgium to present evidence. Hudson has pointed out that the Court was free to decide whether or not it should take advantage of the invitation, and it is clear from the response of the President to the Belgium suggestion, as well as from the terms of the Court order deciding upon an inspection, that the Court was acting of its own motion and not acquiescing in a suggestion by one of the parties.

181 P.C.I.J., Ser. A/B, No. 70 (1937).

182 Hudson "Visits by International Tribunals to Places Concerned in the Proceedings" 31 A.J.I.L. 696, 697 (1937). And see Hudson, The Permanent Court of International Justice, 566-67 (1943).

183 P.C.I.J., Ser. C, No. 81, 553 (1937).

184 Cf. Free Zones of Upper Savoy and the District of Gex Case, P.C.I.J., Ser. A/B, No. 46, 162-63 (1932) in which the Court declined to make an investigation of the spot, which it was authorized to do under the special agreement between France and Switzerland.

What use, if any, the Court made of the information thus gained is not indicated in its judgment. The minutes of the Court's visit to the places concerned, consisting of the itinerary with a bare summary statement of persons heard, were attached to the record of the Court's public sitting of May 18, 1937.¹⁸⁵

While the extent of the usefulness of this technique for fact finding may be questioned, it is important to bear in mind the comment by Judge Hudson:

[A]n international tribunal cannot ignore the possible usefulness of such procedure, not only for ensuring that results will be arrived at on the basis of the fullest possible information, but also for creating that support in public opinion which is the one sure sanction of its judgements.¹⁸⁶

5. Third Party Evidence

The World Court is expressly authorised by its Statute and Rules to request material and information, relevant to a dispute before it, from certain third parties,¹⁸⁷ namely public international organizations. But the question remains, can the Court invite a third state, which is not a party to the proceedings, to bring evidence before the Court? As yet, the Court has not had occasion to approach a third state for evidence, but should such a course become necessary, it is suggested, that the Court would be competent to adopt it.

Support for this contention is to be found in the

¹⁸⁵ P.C.I.J., Ser. C, No.81, 222-23 (1937).

¹⁸⁶ Hudson, supra note 26, at 697.

¹⁸⁷ See supra, 45 - 48.

Corfu Channel Case. One of the arguments of the United Kingdom was that there had been collusion between Albania and Yugoslavia in the laying of the minefield which caused the damage to the United Kingdom warships. This argument appeared in the written reply,¹⁸⁹ and assumed prominence in the hearing.¹⁹⁰ Later, the Albanian Government filed certain documents, obtained from the Yugoslav Government, as evidence to rebut this allegation. Subsequently the latter formally intimated to the Court its willingness to submit certain other documents to the Court,¹⁹² and these documents were ultimately accepted by the Court. Commenting on this in its judgment, the Court said:

On its side, the Yugoslav Government, although not a party to the proceedings authorized the Albanian Government to produce certain Yugoslav documents, for the purpose of refuting the United Kingdom's contention.... As the Court was anxious for full light to be thrown on the facts alleged, it did not refuse to receive these documents. But Yugoslav's absence from the proceedings meant that these documents could only be admitted as evidence subject to reserves, and the Court finds it unnecessary to express an opinion on their probative value. 193

Thus, if the interests of a third state may be involved in the proceedings before the Court, and the facts in

188(Merits) /1949/ I.C.J. Rep. 4.

189 2 Corfu Channel Case - I.C.J. Pleadings, 258 (1950).

190 5 Corfu Channel Case - I.C.J. Pleadings, 200 (1949-50).

191 Ibid., 244, 233. These documents were not admitted as evidence but, on agreement between the parties, were used in the examination of one witness.

192 Ibid., 234.

193 (Merits) /1949/ I.C.J. Rep. 4, 17.

issue require clarification, the Court may request the third state for material and information which may throw "full light ... on the facts alleged."

CHAPTER 5

FACT FINDING IN PROCEEDINGS

BEFORE THE WORLD COURT

Having completed the review of the various fact finding techniques available to the World Court it is now necessary to have regard to their applications in the various categories of proceedings which may be instituted before the Court.

The Statute and Rules of the World Court jointly provide for two categories of proceedings:

- (1) Proceedings in contentious matters;¹⁹⁴ and
- (2) Advisory proceedings.¹⁹⁵

1. Proceedings in contentious matters

States only may be parties to proceedings of a contentious nature before the Court.¹⁹⁶ Such proceedings, by Article 36(2) of the Court's Statute, may relate to: the interpretation of a treaty; any question of international law; the existence of facts, which if established, would constitute a breach of an international obligation; or, the nature and extent of the reparation to be made for the breach

¹⁹⁴ Art's. 34-64 I.C.J. Statute. See also Art's. 34-64 P.C.I.J. Statute.

¹⁹⁵ Art's. 65-68 I.C.J. Statute. See also Art's. 65-68 P.C.I.J. Statute.

¹⁹⁶ Art. 34(1) I.C.J. Statute. See also Art. 34 P.C.I.J. Statute.

of an international obligation.¹⁹⁷ All four bases for instituting proceedings, entail a consideration of the facts¹⁹⁸ giving rise to the dispute.

The Statute of the World Court provides two methods by which disputes of a contentious nature may be settled. The first is before the Court itself.¹⁹⁹ There can be no question that, insofar as the facts in issue are in doubt, the Court can avail itself of all the fact finding techniques it possesses in such proceedings.

The second method is by summary proceedings before a Chamber of the Court.²⁰⁰ Here again, it is suggested, if the facts giving rise to the proceedings are in dispute, the Court can undertake its own researches into them. Under Article 72 (4) of the Rules of Court the Chamber, of five judges in summary proceedings, retains the right to call upon the parties to supply verbal explanations, even if the parties have agreed to dispense with oral proceedings which this article entitles them to do.²⁰¹ Further, all witnesses and experts

¹⁹⁷ See also Art.36 P.C.I.J. Statute.

¹⁹⁸ It is clear however, that the parties may agree as to the facts of a dispute, and request the Court to determine "any question of international law" arising from these facts. As to the effect of such an agreement see infra, 66 - 70.

¹⁹⁹ Art's. 32-60 I.C.J. Rules. See also Art's. 32-60 P.C.I.J. Rules.

²⁰⁰ Art's. 70-73 I.C.J. Rules. See also Art's.70-73 P.C.I.J. Rules. It should here be briefly mentioned that Art's.26-27, P.C.I.J. Statute, provided for the appointment of a special Chambers of the Court for labour cases and cases relating to transit and communications. Further Art.28, P.C.I.J. Statute, provided that chambers of the Court could sit elsewhere than at The Hague if the parties consented. These provisions were never applied.

²⁰¹ See also Art. 72(4) P.C.I.J. Rules.

who are mentioned in the proceedings must be available to
 202
 appear if, and when, their presence is required.

It is clear from the discussion of Article 72 during the preparation of the 1936 amendments that the Court intended to preserve the right to avail itself of the powers to ascertain the facts of a dispute even under summary procedure. A proposal that the chamber be only entitled to institute oral proceedings in the absence of a contrary intention, between the parties was defeated.
 203
 As Vice-President Guerrero pointed out:

... the Court [adjudicating as a Chamber of Summary procedure] ... must, like any other tribunal, be able to command all means for obtaining the information which would enable it to deliver a sound judgment. The summary character of the proceedings was primarily to be obtained by a curtailment of the time-limits. 204

Consequently, it appears that the Court retains the right in summary proceedings to resort to any or all the techniques available to it to discover the facts. The summary procedure has only been utilized in one case, the Interpretation of the Treaty of Neuilly,
 205
 in which there was no occasion for the application of any of the Court's fact finding powers.

202 Art.72(5) I.C.J. Rules. See also Art.72(5) P.C.I.J. Rules.

203 P.C.I.J., Ser.D, No.2, 3d add., 365-66 (1936).

204 Ibid., 366. See also Hudson, op.cit. supra note 182, at 377.

205 P.C.I.J., Ser.A, No's. 3 & 4 (1924 and 1925).

So far the discussion has proceeded on the basis that the facts in issue have been contested by the parties to the proceedings. Thus, it may be asked, what is the position if a point of fact is undisputed, either because one of the parties considers it to be irrelevant, or because the parties (expressly or tacitly) agree upon it? Normally the Court will have no reason to examine these facts. The Permanent Court of International Justice has hence refused to request the production of evidence.

... going outside the terms of the dispute and raising a question of law not referred to it by the parties. 206

The International Court of Justice has also declared a purely factual difference - concerning some base-points in the Anglo-Norwegian Fisheries Case - "devoid of object", after the production of new evidence, on the grounds that the Norwegian assertions with regard to these base-points had not been further disputed by the United Kingdom. 207

The next step, however, is to presume that the Court finds the evidence, as agreed on by the parties, pointing in a direction contrary to what is common ground between them. Is the Court bound by the facts as presented by the parties, or may it undertake its own researches into the facts even if such a course constitutes a denial of undisputed points of fact?

206 P.C.I.J., Ser. E, No. 3, 212 (19).

207 [1951] I.C.J. Rep. 116, 140.

In municipal law it is generally recognized that in some kinds of cases, namely criminal cases and those civil cases such as divorce cases, where society has a special interest in the truth, an admission made by one of the parties, or an agreement as to the facts by the parties, are by no means always sufficient proof. Given that international judicial proceedings, to some extent, must proceed by analogy²⁰⁸ to municipal proceedings, and that international disputes are to be compared with the more ordinary types of domestic civil cases, it is still suggested that the Court will not accept admissions of, or agreements as to, fact to be binding.

If the facts agreed upon by the parties are far from the events which really took place, the agreement between the parties might be overruled by analogy of the provisions of the Statute which says that states are not entitled to²⁰⁹ request advisory opinions.

But even if the admitted facts do not differ from what the judge regards as the substantial truth to such an extent that the above argument could be invoked, it is to be recommended that the Court follows its own idea of justice. To ascertain the substantial truth must be the aim of international procedure. It is not in keeping with the dignity of

²⁰⁸ Art. 38 of the I.C.J. and P.C.I.J. Statutes, respectively provide that the Court shall apply "general principles of law recognized by civilized nations."

²⁰⁹ See Art. 65 I.C.J. Statute which provides that the right to request advisory opinions is reserved to authorized "bodies".

the World Court that the parties should be able to compel it to find as established such facts as the Court itself considers to be incorrect. The Court must settle a real case -
 210
 not a fictitious case.

In the practice of the World Court only one statement has been made on this problem. Judge Azevedo in the Corfu Channel Case said:

It is true ... that an agreement between the parties on the facts is valid even though an international court, having more freedom in regard to evidence than a municipal judge, might make reservations. 211

But how substantial might these reservations be?

Bin Cheng has made the observation that questions of law, as opposed to questions of fact, need not be raised by the parties, but that the Court should examine them proprio
 212
motu. Does this then mean that the Court cannot examine factual questions proprio motu? It is suggested that the answer is no. Bin Cheng himself subsequently makes the statement that:

It may be said that the aim of an international tribunal is to arrive at a moral conviction of the truth and reality of all relevant facts of a case on which its decision is to be based. 213

210 An exception to this is where the Court deals with hypothetical cases when giving abstract interpretations of treaties. See Hambro, "The Jurisdiction of the International Court of Justice," [1950] 1 Recueil des Cours 125, 166.

211 (Merits), [1949] I.C.J. Rep. 4, 84.

212 Bin Cheng, op.cit. supra note 10, at 299.

213 Bin Cheng, op.cit. supra note 10, at 302.

How can the Court arrive at such a conviction if it is limited to a consideration of the facts presented to it by the parties if the Court is of the opinion the facts are incorrect?

The Statute or Rules of the Court could of course provide that the decision shall be based on the facts as the parties see them. But, in the absence of such provision the Court should have the right to overrule even an agreement on the facts, and "ferret out" new facts even on points with regard to which the parties are not in dispute. The ascertainment of the real truth should be the main rule.

One question remains: does Article 54 of the Rules²¹⁴ of Court prevent this solution? That article provides that the Court

may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement.

Prima facie this provision may be interpreted as excluding the Court's right to call evidence when the parties are in agreement on a point of fact. If this is correct the Court will have to abstain from overruling an agreement as to, or an admission of, fact.

Such reasoning, it is suggested, cannot be supported. In the Draft Scheme of the first Rules of Court, Article 68 provided that the full Court or the Chambers of the Court

... may on their own initiative ... order the production of any evidence which it may consider necessary. 215

214 See also Art. 54 P.C.I.J. Rules.

215 P.C.I.J., Ser. D, No. 2, 370 (1922).

But, this provision was subsequently amended to the wording now used in Article 54. This alteration cannot, in itself, uphold the view that the draftsmen intended to give the article a more limited scope, for the provision was discussed at length and nowhere is there to be found the reason for the alteration.²¹⁶ From this, it is possible to surmise that the draftsmen of the Rules were thinking only of the ordinary situation, namely the situation where the relevant points on which the parties agree are beyond doubt.

Finally, even if Article 54 should be interpreted to the contrary it cannot absolutely prevent the Court from overruling an admission, or agreement. The Court has a discretionary power to disregard its Rules for a particular occasion.²¹⁷

2. Advisory Proceedings

Under the relevant provisions of the United Nations Charter²¹⁸ and the Statute of the World Court²¹⁹ advisory opinions can only be requested by, or given to, the General Assembly, the Security Council, and such other organs of the United Nations and Specialized Agencies as may be authorised thereto by the General Assembly. Advisory opinions cannot be requested

²¹⁶ Ibid., 409.

²¹⁷ Concerning the interpretation of the Rules of Court in general, see Rosenne, op.cit.supra note 43, 221.

²¹⁸ Art. 96.

²¹⁹ Art's. 65-68. See also Art's. 65-68 P.C.I.J. Statute.

by, or given to, states or groups of states. Further, an advisory opinion merely constitutes a formal opinion by the Court upon a question law submitted to it by a competent body;²²⁰ it is not a decision on a concrete case at law as it lacks both rival litigants, and a specific actual fact situation out of which their dispute arose.

It follows from the character of advisory opinions and of the entities to which the opinions are rendered that, in theory at any rate, and in form, advisory opinions are not contentious; in any case states are not parties to them as they are to a dispute in the nature of a litigation. Nevertheless, states may, in practice, be very much affected by the outcome of advisory proceedings, which may indeed have had their origin in a difference of opinion between two or more states,²²¹ and recognition of this fact is given by the Statute and Rules of Court in various ways.²²²

As a consequence of the nature of these proceedings, and the exhaustive documentation which normally accompanies and follows a request for an advisory opinion,²²³ the Court will rarely need to exercise its powers to initiate enquiries and investigations into the facts of any issue on which an advisory opinion is requested. Nor can there by any question

²²⁰ See supra, note 7.

²²¹ E.g. Interpretation of Peace Treaties with Bulgaria Hungary & Roumania, [1950] I.C.J. Rep.65.

²²² See infra, 74 - 75.

²²³ Art, 65 (2) I.C.J. Statute. See also Art.65 P.C.I.J. Statute, and Rosenne, op.cit.supra note 43, at 478-80.

of the use of such powers by the Court to discover the facts in a situation such as obtained in the Status of Eastern Carelia Case.²²⁴ There the Court declined to give an advisory opinion because it found that the opinion, requested of it, was directed at obtaining an answer to the very point at issue between Finland and Russia, and the latter had not accepted the jurisdiction of either the Court, or the Council of the League of Nations. This meant, as the Court said in its advisory opinion on the Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania,

... that answering the dispute would be substantially equivalent to deciding the dispute between the parties, and at the same time it raised a question of fact which could not be elucidated without hearing both parties' intentions. 225

In the Status of Eastern Carelia Case the Court said on this point:

The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some inquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are. 226

Where there is no insurmountable obstacle, in the form of a lack of consent to the Court's jurisdiction by a state involved in the advisory proceedings, then the Court is free to resort to the available methods of obtaining the

224 P.C.I.J., Ser. B, No. 5 (1923).

225 /1950/ I.C.J. Rep.65, 72.

226 P.C.I.J., Ser.B, No. 5, 28 (1923).

requisite material and information. In other words the principle as stated in the Status of Eastern Carelia Case remains the desirable mode of procedure in advisory opinion cases but it is not more than a guide or a working rule. This has been recognized by Fitzmaurice where, in discussing the limitations imposed by the Court, itself, on its advisory jurisdiction, he stated that it would not deliver such an opinion

... if the Court could not do substantial justice in the matter ... because essential facts were lacking which could not be made available to the Court by the means at its disposal 227

Thus, in the Greco-Bulgarian "Communities" Case the Court in its order of June 30, 1930, stated it was necessary to supplement the information furnished in the written documents and oral proceedings. It drew up a series of questions to be answered by the President of the Greco-Bulgarian Mixed Commission. In its advisory opinion on the Competence of the European Commission of the Danube, the Court, while relying on the findings of fact of the special committee appointed by the League of Nations Advisory and Technical Committee nevertheless made it clear that, had there been any contrary evidence, it could, and perhaps would, have ordered its own inquiry:

227 Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organizations and Tribunals", 19 B.Y.B.I.L. 53 (1952).

228 P.C.I.J., Ser.C, No. 18-1, 1077 (1930).

229 P.C.I.J., Ser.B, No. 14 (1927).

The Court is fully aware that the Roumanian Government has refused to accept the facts established by the Committee as conclusive evidence in the matter, but the Court is of the opinion that for the purposes of the present procedure it must accept the findings of the Committee on issues of fact unless in the records submitted to the Court there is evidence to refute them. 230

In its opinion on the Competence of the International Labour Organisation to Regulate Incidentally the Personal Work of the Employer the Court expressed its willingness to hear experts in the baking industry selected by the International Federation of Trade Unions, but ultimately the Federation de-
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cided not to call them. However, had the Court decided to call these experts of its own motion, there is clear authority, it is suggested, for its competence to do so; and, for it to institute an independent inquiry, or investigation, in accordance with the provisions of its Statute and Rules.

As there are no "parties", in the strict sense of the term, in advisory proceedings it is very doubtful as to whether the Court could request the states, which may be affected by the proceedings, to call witnesses and experts, or to produce documents or evidence and explanations. However, by Article 68 of its Statute the Court is specifically empowered to follow the provisions of the Statute which apply to contentious proceedings to the extent to which it recog-
232
nizes them to be applicable. Pursuant to that Article, the Rules of Court merely provide that any state or states who

230 Ibid., 46.

231 P.C.I.J., Ser.B, No.13 (1926).

232 See also Art.38 P.C.I.J. Statute.

may be affected by the advisory opinion may appoint ad hoc
 judges to sit during those proceedings.²³³ No reference is
 made to the fact finding provisions in the Statute or Rules.
 Nevertheless, states who may be affected by the proceedings
 may, at the Court's invitation, or on their own motion, sub-
 mit statements, and comment on statements submitted, to the
 Court.²³⁴ Such statements and comments may be written or oral.²³⁵
 Consequently states may produce witnesses to substantiate their
 claims or allegations.

With respect to the Court's power to obtain evidence
 and information from public international organisations, it is
 suggested that Article 34(2) of the Statute and Article 57(5)
 of the Rules of Court only apply to the contentious juris-
 diction of the Court.²³⁶ This view is substantiated by the fact
 that Article 66 (2) prescribes a special procedure to enable
 international organisations to present statements to the Court

233 Art. 31 I.C.J. Statute and Art. 83 I.C.J. Rules. And
 see Art. 31 P.C.I.J. Statute and Art. 83 P.C.I.J. Rules.

234 Art. 66 (2) I.C.J. Statute. See also Art. 66(2)
 P.C.I.J. Statute.

235 See supra, note 134.

236 In the case of Reservations to the Convention on
 the Prevention and Punishment of the Crime of Genocide, [1950]
 I.C.J. Rep. 406, an advisory matter, the Court thought it
 advisable to receive information from the I.L.O., and in-
 structed the Registrar to notify that Organization, in appli-
 cation of Art. 66 (2) of the statute: supra, at 407.

in advisory matters.²³⁷ By this article the Court can notify any international organisation, which is likely to be able to furnish information, of the advisory proceedings, and such organisations may submit written or oral statements relating to the question before the Court.

But it should be noted that if Article 34 of the Court's Statute is applicable only to contentious proceedings then the relevant provisions of the Relationship Agreements establishing the status of the Specialized Agencies²³⁸ also only apply to contentious cases. Nevertheless it is probably true to say that the spirit of the Relationship Agreements ought to be applicable in advisory matters.

237 See also Art. 66(1) P.C.I.J. Statute.

238 See supra, 46.

CHAPTER 6

CONCLUSIONS

The World Court, no less than its municipal counterparts, has a primary duty to resolve the issues, of fact as well as of law, submitted to it for adjudication. This duty is owed simultaneously to the parties and to the international community at large - the latter having a clear interest in the proper functioning of its main judicial organ. But, the proper determination of the legal issues is often dependent on a correct appreciation of all the factual evidence. This, in some instances, may be difficult, if not impossible, to achieve if the Court is limited to a consideration of the evidence voluntarily adduced by the parties. Thus, in order to discharge its duty satisfactorily in all cases, the Court must possess such powers as will enable it to obtain the absolute truth, or the closest approximation to the absolute truth which is possible in any given instance.

The competence, both express and implied, of the World Court to undertake its own researches into the facts of any issue submitted to it, therefore, is a concomitant of the principle that its function is to resolve the dispute before it on the basis of all the relevant factual data, and that it has a duty to satisfy itself that it is in possession of this material and information.

Winterberg has summarized the correlative rights and duties of states parties to proceedings and the Court in the

following way:

Litigant states have not only the right, but also the duty, to prove their case. They have a real obligation to collaborate in providing the international judge with the precise facts. He, for his part, has the onerous duty of himself carrying out researches so as to obtain the true state of the facts in dispute. 239

Hudson agrees that the Court may, and should if the circumstances warrant it, undertake researches of various kinds into the facts of any dispute of its own initiative, notwithstanding the absence of express authorization.²⁴⁰ Although Carlston does not deal specifically with this point, in his extensive survey of arbitral awards that have been the object of protests by one, or both, the parties on the ground of exces de pouvoir he does not refer to a single case where the objection was made that the tribunal had undertaken investigations and enquiries into the facts, of its own motion, without express authority to do so.²⁴¹

In the field of fact finding, among others, international proceedings differ greatly from proceedings in a trial court based on the adversary system. In many ways they resemble proceedings conducted upon the inquisitorial basis²⁴² operative in many civil law jurisdictions. Within the juris-

239 Winterberg, "La Theorie des Preuves devant des Jurisdictions Internationales", 56 Recueil des Cours 5, 97 (1936 - II). See also Rosenne, op.cit.supra note 43, at 409.

240 Hudson, International Tribunals, Past and Future 93 (1944).

241 Carlston, op.cit.supra note 66, at 81-124 (1946).

242 White, op.cit.supra note 61, at 10, 17-20; Sandifer, op.cit.supra note 21, at 2.

dictions wherein is to be found an adversary system, the truth which is sought and obtained in municipal tribunals is distinctly "relative" - if a rule of evidence is invoked by one party to prevent the submission of certain evidence by the other, the function of the judge is only to determine whether the rule is properly invoked regardless of the effect on the disclosure of the actual facts involved. Nor can the judge undertake to any, but a very limited, extent his own investigations and inquiries into the facts.²⁴³ On the other hand, the judge in an inquisitorial system retains considerable control over the adduction of evidence by the parties, and the means by which he shall satisfy himself of the true facts of any issue submitted to him. Thus, it may be said, that under this latter system the judge has a much wider scope to ascertain the "absolute" truth.

It is suggested that it can be assumed from the quite extensive and varied practice of the World Court in the ordering of investigations and inquiries of various kinds into the facts of disputes which have aroused no recorded dissent by the states concerned,²⁴⁴ that this practice may never arise as a contested issue. Provided the fundamental procedural safeguards are adhered to, principally the communica-

²⁴³ See Schiff, supra note 3.

²⁴⁴ The writer has found no case where a state has objected to the use of fact finding techniques by the Court. However, in the Ousset Claim/1955 Int'l L. Rep. 312 (No. 22) it was complained that the expert had exceeded his instructions - but this is another matter.

tion of all evidence obtained by the Court through its own researches to the parties, and the conferment of a reasonable opportunity to them to comment upon it, the decision of the Court to play an active role in the collection of factual evidence is not one to which the parties are likely to object.

In conclusion one question remains. Do the fact finding powers of the World Court require extension or amendment? It should here be noted that the content of the procedural rules considered in this study have not only remained unchanged, but have not been seriously reviewed since 1936.²⁴⁵

It is suggested that the express powers of the Court by which it can, independently of the parties, discover the truth of a dispute i.e. through the use of experts, enquiries, and information obtained from public international organizations, are adequate as currently embodied in its Statute and Rules. Although it is true that the Court, before it can order an enquiry, must necessarily obtain the consent of the state within whose territory the enquiry is to be held, this should not create any difficulties for, as has been seen, submission by a state to the Court's principal jurisdiction necessarily entails a submission to its incidental jurisdiction.

Possibly, it may be deemed convenient, or advisable, for the sake of clarity and certainty, to include in the Statute or Rules of the Court specific provisions relating to its powers to visit the scene of the dispute, and to procure

²⁴⁵ See P.C.I.J., Ser. D, No.2 add.3 (1936).

evidence from, and use evidence presented by, states not parties to the proceedings before the Court. This would also circumvent any problems arising from the potential argument that the Court is limited to the fact finding techniques expressly provided for it in the instruments of its creation. However, such an argument has not yet been invoked by a state and, even without the inclusion of express provisions incorporating these fact finding techniques, its chances of success are minimal in view of the past practice of the Court.

The powers of the Court which most obviously require amendment are those relating to documentary and testimonial evidence. The World Court should have the power to require the production of documents, subpoena witnesses, and punish for perjury. The conferment of such powers on the Court would be an invaluable contribution to the strengthening of the international adjudicative process.²⁴⁶ These powers could be granted to the Court by one of several methods. The first would be to amend the Statute of the Court. The second would be by an optional protocol conferring such powers on the Court. The third would be by a general international convention conferring such powers on all international judicial tribunals. The fourth would be by providing for such powers in national legislation.²⁴⁷ And the fifth would be by

²⁴⁶ For an example of an international judicial tribunal with these powers see supra, note 29.

²⁴⁷ For an account of such legislation see the articles cited supra, note 30.

the inclusion of provisions conferring such powers in special agreements, and the compulsory jurisdiction clauses of international agreements.

But while submission to the jurisdiction of the Court remains voluntary any amendment, with the possible exception of that to the provisions relating to documentary and testimonial evidence, to the fact finding powers of the World Court will not have far reaching effect. For, under existing conditions, if a state agrees to submit a dispute to the Court, it is not unreasonable to expect that it will fulfil its obligation to co-operate with the Court in the production of all the evidence. In fact, such has been the practice of states in the majority of cases brought before the World Court.

With or without amendment of the Statutes or Rules, however, progress in the field of fact finding can be made only by reconciling the caution necessary to avoid any impairment of the confidence in the existing procedures of the Court with the ingenuity required to evolve a complete range of fact finding techniques adequate to expanding needs for the peaceful settlement of disputes.

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