SPEECH BY H.E. JUDGE PETER TOMKA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

31 OCTOBER 2014

Mr. Chairman,

Distinguished Delegates of the Sixth Committee,

I am pleased to address your Committee today. I congratulate His Excellency Ambassador Tuvako N. Manongi on his election as Chairman of the Sixth Committee for the Sixty-Ninth Session of the General Assembly. Today, rather than going over the ground I already covered in the General Assembly, I would like to address you with a more narrow focus on what I consider to be a timely topic. In particular, I propose offering some brief views on select aspects of the evidentiary practice of the Court.

The role and place of evidence in international legal proceedings are of fundamental importance for international justice and the rule of law. In many ways, the production and management of evidence constitute the most crucial building blocks in ensuring a just and well-reasoned judicial outcome in a dispute between sovereign States. Over the last decade, there has been renewed interest in the Court's approach to evidentiary issues, as it is increasingly confronted with fact-intensive and science-heavy cases. Indeed, the principal judicial organ of the UN remains paramount in applying and developing international legal principles; its many contributions on evidentiary matters warrant further consideration.

The evidentiary framework

The Court's pronouncements are not only a way to peacefully resolve disputes between States, but they also strive to establish an accurate historical record of events and facts which are relevant to a dispute before the Court. In that light, the role of evidence becomes central. After all, it should be recalled — and stressed — that the principal judicial organ of the UN is not only a court of first instance but also of last instance. According to Article 60 of the Statute of the Court, "[t]he judgment is final and without appeal". Invariably, in each case brought to it the Court is called upon to sift through vast evidentiary records, establish the factual complex related to the proceedings and, ultimately, reach well-supported and just conclusions both on the facts and the law, thereby settling peacefully the disputes of which it is seised.

The rule of thumb for evidentiary matters before the Court is flexibility. The Statute of the Court is correspondingly cursory in the wording of Article 48, simply providing that the Court shall "make all arrangements connected with the taking of evidence". In principle, there are no highly formalized rules of procedure governing the submission and administration of evidence before the Court, nor are there any restrictions about the types of evidentiary materials that may be produced by parties appearing before it. In deciding the cases submitted to it, the overarching objective of the Court is to obtain all relevant evidence pertaining to both facts and law that may assist it in ruling on issues of substance, as opposed to providing a judicial outcome grounded primarily in technical and/or procedural rationales. The Permanent Court of International Justice (PCIJ), had identified this as its dominant judicial philosophy as early as 1932 in the *Free Zones of Upper Savoy and the District of Gex* case, when it proclaimed that "the decision of an international dispute of the present order should not mainly depend on a point of procedure"[1].

[1]Case of the *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46,* p. 155.

The Court disposes of a wide margin of latitude not only in requesting evidentiary elements, but also in assessing the evidence in each dispute submitted to it, while considering both the relevant rules of international law and the specific facts and circumstances of each case. Interestingly, the Rules of Court — particularly Articles 57 and 58 thereof — lay down a fairly robust evidentiary framework with respect to the submission and admission of oral evidence. In contrast, the practical effect of these provisions is somewhat tempered by Article 60 of the Rules of Court, which prescribes succinctness and finiteness of oral statements, and by Article 61, which enables the Court to manage the administration of evidence and to question the parties. By virtue of Article 49 of the Court's Statute, "[t]he Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal." Moreover, Article 50 of the Statute confers vast fact-finding powers upon the Court, which allows it to entrust "any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion". It should also be mentioned that the statutory and procedural framework governing proceedings before the Court enables parties to call witnesses — including expert-witnesses — which may in turn be cross-examined.

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

The Court rendered is Judgment on 31 March 2014 in the case concerning *Whaling in the Antarctic*. As the Judgment demonstrates, this case constitutes further and incontrovertible proof that the Court can deal with vast amounts of highly technical scientific evidence in a cogent and methodical fashion, invariably delivering judgments of rigour characterized by their analytical clarity. Furthermore, the Court is currently in the process of constructing its Judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*. It is to be anticipated that the voluminous testimonial evidence adduced in the context of the Parties' written and oral submissions, which included some *in camera* witness sessions during the hearings, will again play an important role in establishing the factual record before the Court.

While States are afforded a wide margin of freedom in submitting evidence, the Statute nonetheless requires that all evidentiary elements the parties intend on using to support their claims be presented in the course of the written proceedings, and according to the modalities prescribed by the Rules of Court. This essentially means that those documents must be annexed to the written pleadings. Thus, the overarching guideline is that of full disclosure of the evidence at the written stage of the proceedings. Sometimes, a party may attempt to produce a new evidentiary element after the conclusion of the written proceedings, during the oral phase, or refer during its oral statement to the contents of a document that has not been produced during the written proceedings. The Court is increasingly confronted with this type of litigation strategy. In that regard, the Rules the Court are rather straightforward, at least in principle: "After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party." Yet, the Rules enable the Court to authorize the production of such document after hearing the parties. When a party refers to a previously unproduced document, such evidentiary item may be admitted if it "is part of a publication readily available".

This last *cas de figure* arose in one of the Court's most recent judgments on sovereignty and maritime delimitation opposing Nicaragua and Colombia, dealing both with sovereignty over certain maritime features located in the Western Caribbean Sea and the delimitation of an international maritime boundary in that area. In its Judgment of November 2012, the Court pointed out that the Parties had provided judges' folders during the oral proceedings, as is customary in litigation before the World Court. Referring to its Statute, the Court further noted that Nicaragua had included two documents in one of its judges' folders which had not been annexed to the written pleadings and were not "part of a publication readily available"[2]. Consequently, the Court decided not to allow those documents to be produced or referred to during the hearings. Subsequently, the Court recently adopted a new practice direction for States appearing before it in relation to this type of evidence, with a view to governing the introduction of new, or previously unproduced, audio-visual or photographic material at the oral proceedings stage[3].

Admissibility issues

As regards admissibility of evidence, generally, the Statute and Rules do not lay down any major restrictions. In principle, the permissive nature of the evidentiary framework governing proceedings before the Court allows parties to submit pretty much any form or type of evidence they see fit, with the caveat that the Court will enjoy unfettered freedom in weighing it against the circumstances of each case and by reference to relevant international legal rules. Among limited exceptions of inadmissible evidence before the Court, unlawfully obtained proof may obviously be excluded from the purview of what is acceptable, as was emphasized by the Court in its *Corfu Channel* Judgment. The Court does not operate on the basis of any preliminary evidentiary filter to weed out inadmissible evidence at the outset; rather, the Court possesses a wide margin of appreciation in ascribing different weight to different evidentiary elements originating from varied sources. This component of the Court's judicial function is set into motion once the evidence has been entered into the written record.

Evidence typically excluded in domestic judicial proceedings, such as hearsay evidence ("preuve par ouï-dire"), is not inadmissible before the World Court although the Court ascribes little or no weight to such evidentiary elements. As regards hearsay evidence, for instance, the Court indicated in its oft-cited Judgment in the *Military and Paramilitary Activities in and against Nicaragua* case that, "[n]or is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight"[4]. In the *Corfu Channel* decision, the Court flat-out set aside hearsay evidence on the basis that it amounted to "allegations falling short of conclusive evidence"[5].

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

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[2] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 632, para. 13.

[3] See the Court's Press Release titled "The Court adopts Practice Direction IX*quater* for use by States", dated 11 April 2013, available at: http://www.icj-cij.org/presscom/files/6/17296.pdf.

[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68.

[5] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 17.

> "among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)[6]".

It is not unusual for the Court to attribute prima facie weight to factual statements made by the principal organs of the UN, although the actual weight afforded to such items may vary. Such evidence may well be afforded "prima facie superior credibility" since it may originate in the statement(s) of what the Court has termed a "disinterested witness" in the *Military and Paramilitary Activities in and against Nicaragua* case, that is to say "one who is not a party to the proceedings and stands to gain or lose nothing from its outcome"[7]. What is more, those types of reports or factual statements emanating from UN organs are often produced by UN commissions of inquiry, peacekeeping missions or other subsidiary organs, and are inspired by direct knowledge and involvement with the situation on the field or stem from an international consensus of States regarding the occurrence of certain events. Those evidentiary items are sometimes instrumental in bolstering the Court's findings of fact.

Factual statements made by the principal UN organs, particularly evidentiary items submitted by the Secretary-General, were afforded considerable weight in the advisory proceedings on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Similar treatment was granted to comparable pieces of evidence in the Bosnian *Genocide* case with the Court drawing extensively form a Report submitted to the General Assembly by the Secretary-General entitled "The Fall of Srebrenica". Having noted the privileged vantage point of the Secretary-General in preparing a comprehensive report some time after the relevant events had transpired, the Court declared that "[t]he care taken in preparing the report, its comprehensive sources and the independence of those responsible for its preparation all lend considerable authority to it . . . the Court has gained substantial assistance from this report"[8].

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

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

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 69.

[8] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro, Judgment, I.C.J. Reports 2007 (I)*, p. 137, para. 230.

between Peru and Chile and in the *Territorial and Maritime Dispute* between Nicaragua and Colombia[9].

Maps play an important role in the evidentiary strategies put forward by parties appearing before the Court, especially in boundary disputes and maritime delimitation cases. That said, such evidentiary items are typically insufficient, in and of themselves, to establish a party's claim as to sovereignty over a certain land territory or maritime feature(s). In the *Territorial and Maritime Dispute* between Nicaragua and Colombia, the Court recalled that according to its "constant jurisprudence, maps generally have a limited scope as evidence of sovereign title"[10]. In its analysis, the Court quoted from its 1986 decision in the *Frontier Dispute* between Burkina Faso and Mali, stressing that "of themselves, and by virtue solely of their existence, [maps] cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights"[11].

Substantive pronouncements

Turning to more substantive matters, the rule of thumb with respect to the burden of proof before the Court resembles that found in most domestic judicial proceedings on civil matters: a party alleging a fact typically bears the burden of proving it, while the usual standard of proof tends to align with "proof by a preponderance of the evidence". While this evidentiary principle was reaffirmed in the *Diallo* case, the Court nonetheless qualified its application by declaring that "it would be wrong to regard this rule, based on the maxim *onus probandi incumbit actori*, as an absolute one, to be applied in all circumstances"[12]. The Court went on to clarify that the onus will vary based on the type of facts required to ensure the resolution of the case; in other words, the subject-matter and the nature of each dispute will inform and ultimately dictate the determination of the burden of proof in any given case.

In the *Diallo* case, the Republic of Guinea was arguing that Mr. Diallo — its national — had suffered several fundamental human rights violations while in the Democratic Republic of the Congo. However, strict adherence to the above-mentioned rule would have engendered significant evidentiary hurdles to Guinea's case in establishing these violations, which were equated with "negative facts" given that they had occurred in the Respondent's State, and the Democratic Republic of Congo was therefore better situated to adduce evidence about its compliance with the relevant obligations. In the past, the Court had been confronted with similar situations where one of the parties appearing before it had exclusive access to important evidentiary elements but refused to produce them in light of security concerns or other reasons. In the *Corfu Channel* case, the Court resolved this dilemma by having recourse to flexible inferences of fact against the State which had refused to produce the evidence in question[13].

When parties invoke domestic law before the Court, such item is typically equated with a fact to be proven by the party alleging its existence, notwithstanding the Court's ability to satisfy itself, of its own initiative, of the existence of such fact. This evidentiary practice is firmly rooted in the jurisprudence of the PCIJ, which articulated several key aspects of procedural law which still

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[9]See Jens Evensen, "Evidence before International Courts", 1955, 25 *Acta Scandinavica Juris Gentium* 14, 53-54; Andrés Aguilar Mawdsley, "Evidence before the International Court of Justice" in Ronald St. John Macdonald (ed.), *Essays in Honour of Wang Tieya*, Dordrecht, Boston and London, Martinus Nijhoff, 1994, 533, 547.

[10]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 661, para. 100.

[11]*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 582, para. 54.

[12]*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 660-661, para. 54.

[13]*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

govern the work of the present-day Court. Of particular importance was its pronouncement in *Certain German Interests in Polish Upper Silesia*, when the Court underscored that "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures"[14]. Echoing these remarks three years later in the *Brazilian Loans* case, the Permanent Court further pointed out that it was constrained to apply domestic law when the circumstances so warranted, but that it was not obliged to possess knowledge of the various municipal laws of States; rather, it would have to secure this knowledge when the circumstances of a case compelled it to apply municipal law. More importantly for our purposes, the PCIJ stressed that "this it must do, either by means of evidence furnished [to] it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken"[15].

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

> "that in the fulfilment of its task of itself ascertaining what the international law is, it has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement[16]".

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

Similarly, the Court may take judicial notice of well-established facts, *faits notoires* or "matters of public knowledge", thereby obviating the need for parties appearing before it to prove such types of facts. Such scenario presented itself in the *Tehran* "Hostages" case, where the Court was called upon to pronounce on the international responsibility of Iran after an American embassy in Iran was taken over, ransacked and its personnel detained. The Court declared that "[t]he essential facts of the present case are, for the most part, matters of public knowledge which have received extensive coverage in the world press and in radio and television broadcasts from Iran and other countries"[17]. It went on to hold that "[t]he information available . . . [was] wholly consistent and concordant as to the main facts and circumstances of the case"[18]. This exact passage was referenced again by the Court six years later in its Judgment in the *Military and Paramilitary Activities in and against Nicaragua* case. However, in that instance the Court remained alive to the fact that this type of evidence should be approached with "particular caution", pointing to the risk that "[w]idespread reports of a fact may prove on closer examination to derive from a single source"[19]. This observation echoed remarks formulated earlier by the Court in that same Judgment to the effect that such evidence should be treated with "great caution"; in short, the Court

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[14] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

[15] The case concerning *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124.

[16] The case concerning *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31.

[17] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 9, para. 12.

[18] *Ibid.*, p. 10, para. 13.

[19] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 63.

construed such evidentiary items "not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact"[20]. It should be stressed that the Court's conclusion on this front remained unaffected by the fact that such evidence might "seem to meet high standards of objectivity"[21].

In the *Armed Activities* case, the Court provided further substantive guidance on the evidentiary parameters within which it carries out its judicial mandate. In particular, it underscored that it "will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source"[22]. Moreover, the Court indicated that it "prefer[s] contemporaneous evidence from persons with direct knowledge" of the facts or realities on the ground[23]. It similarly emphasized that it would "give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them", thereby echoing the remarks it offered almost twenty years earlier in *Military and Paramilitary Activities in and against Nicaragua*[24]. Along similar lines, in the *Armed Activities* case the Court went on to say that it would ascribe weight to evidence "that ha[d] not, even before this litigation, been challenged by impartial persons for the correctness of what it contain[ed]"[25]. Finally, special attention should also be afforded, the Court continued, to "evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature"[26].

Mr. Chairman,

Distinguished Delegates of the Sixth Committee,

While the Court's evidentiary practice is rather flexible when compared to that espoused by most domestic courts and tribunals, the World Court nonetheless applies a great degree of caution when handling certain evidentiary items, rigorously scrutinizing all evidence put before it and balancing relevant evidentiary standards against the facts, circumstances and subject-matter of each case. The Court's practice is equally forward-looking as regards the introduction of new modes of producing evidence, thereby embracing new technology and innovative ways of establishing factual records. A rich fact-finding judicial tradition emerges from its practice: while an applicant State appearing before the Court will typically be called upon to substantiate its claims with available evidence, the other party is by no means exempted from assisting the Court in fulfilling its judicial function. Rather, the idea of evidentiary collaboration between the parties and the Court — supplemented by a productive dialogue between the bench and the agents and counsel of the parties — ensures that the principal judicial organ of the UN can carry out its noble duties in the most effective and impartial way. That is to say: the search for objective truth, the peaceful settlement of disputes and the promotion of the international rule of law.

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[20] *Ibid.*, p. 40, para. 62.

[21] *Ibid.*

[22] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[23] *Ibid.*

[24] *Ibid.*; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United* States *of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64.

[25] *Armed Activities on the Territory of the* Congo *(Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61.

[26] *Ibid.*