

Extrinsic Evidence in International Law

Hans Aufricht

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Hans Aufricht, *Extrinsic Evidence in International Law*, 35 Cornell L. Rev. 327 (1950)
Available at: <http://scholarship.law.cornell.edu/clr/vol35/iss2/3>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

EXTRINSIC EVIDENCE IN INTERNATIONAL LAW

HANS AUFRICHT*

International agencies are frequently called upon to decide questions of evidence. In international as well as in domestic law a distinction has been made between "extrinsic" and "intrinsic" evidence. For instance, international agencies when interpreting international agreements often resort to "extrinsic" evidence as a means of interpretation, when the "intrinsic" evidence derived from the text of such agreements is inconclusive. But extrinsic evidence may also be of decisive significance outside the field of treaty¹ interpretation.

The purpose of this essay is to indicate some principles and practices relating to extrinsic evidence in international law. To this end the discussion will proceed under the following headings: (1) Extraneous "sources of law" or "bases of decision," (2) Admission and exclusion of evidence, (3) Appreciation of evidence, (4) Circumstantial evidence, (5) "Facts,"—notorious facts, facts that require evidence, (6) Intention of the parties, (7) Qualification of the maxim, "limitations of sovereignty cannot be presumed," (8) Means of evidence.

Extraneous "sources of law" or "bases of decisions"

Among the extraneous "sources of law" or "bases of decisions" the preparatory work (*travaux préparatoires*) is probably of the greatest general significance. In addition, presumptions, maxims of interpretation, and decisions by international and domestic tribunals may be deemed extraneous material.

The preparatory work is of special significance in the interpretation of the major multilateral conventions which during the last thirty years have been concluded under the auspices of the League of Nations and of the United Nations, and in all those instances where a multilateral convention has been the result of a special conference convoked for the purpose of working out a multilaterally acceptable Draft Convention. The Proceedings of such Conferences are perhaps the outstanding example of *travaux préparatoires*. With the aid of such Proceedings the legislative history of individual provisions may be traced back by comparing

* Assistant Counsellor, Legal Department of the International Monetary Fund, Washington, D. C.; Lecturer in International Relations and Organization, Graduate School of American University. The views expressed in this article are those of the author and not necessarily those of the International Monetary Fund.

¹ For the purposes of this paper no distinction is made between the terms "treaty" and "agreement".

the preliminary drafts leading to the formulation of the final text, by scrutiny of the successive versions of individual provisions, by reference to Committee Reports, Reports of Rapporteurs, statements in Committee or Plenary Sessions, by relevant statements of delegates to the public at large.²

The principle that for purposes of clarification of *prima facie* unclear provisions of an international agreement *travaux préparatoires* should be consulted has been embodied in a Resolution adopted on December 24, 1933 by the Seventh International Conference of American States. Article 3 of this Resolution reads as follows:

When the meaning of an international agreement is not clear from the text, the real will or purpose of the parties shall be sought from the preamble and from the diplomatic documents and protocols involved in the negotiation of the treaty.³

There are numerous awards by international tribunals which are based on references to *travaux préparatoires*. The majority of these awards reaffirms the principle that resort to *travaux préparatoires* is permissible only if the text of an agreement is unclear.

The following awards of the Permanent Court of International Justice confirm this principle:

In the *Lotus* case the Court held:

The Court must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.⁴

Nevertheless, the Court apparently examined the preparatory work. This may be inferred from the following statement:

Moreover, the records of the preparation of the Convention . . . would not furnish anything calculated to overrule the construction indicated by the actual terms of Article 15.⁵

In the treatment of *Polish Nationals in Danzig* case the Court stated:

This text not being absolutely clear, it may be useful, in order to ascertain its precise meaning, to recall here somewhat in detail

² For *Travaux préparatoires* see comment on Article 19 of the *Draft Convention on the Law of Treaties*, prepared by the Research in International Law of the Harvard Law School (hereafter referred to as *Harvard Draft Convention*) in 29 AM. J. INT'L LAW (Supp. H 1935) 675-1226, and at 956, where it is stated that *travaux préparatoires* "are to be distinguished from formal reservations and from interpretations mutually agreed upon and formally recorded as 'authentic' interpretations."

³ *Id.* at 1225.

⁴ P.C.I.J., Series A, No. 10, p. 16.

⁵ *Id.* at 17.

the various drafts which existed prior to the adoption of the text now in force.⁶

After reviewing these drafts the Court,⁷ taking into account the contentions of the interested parties, stated that the interpretation of the text contended for by the Polish Government would, in the opinion of the Court, be incompatible with the preparatory work and "contrary to the expressed intentions of the Conference of Ambassadors".⁸

In its Advisory Opinion on the *1919 Convention on Employment of Women during the Night* the Court said:

The Court has been so struck with the confident opinions expressed by several delegates with expert knowledge of the subject at Geneva during the discussions in 1930 and 1931 on the proposal to revise the Washington Convention on Night Work of Women to the effect that the Convention applied only to working women—*ouvrières*—that the Court has been led to examine the preparatory work of the Convention in order to see whether or not it confirmed the opinions expressed at Geneva.⁹

In doing so, the Court does not intend to derogate in any way from the rule which it has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself.

In the *Lighthouse* cases the Court held:

The Court cannot regard the expression "duly entered into" as a technical term, invariably possessing the same signification. Where the context does not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice, has to consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties.¹⁰

Among the decisions rendered by Arbitral Tribunals the *Salem* claim and the *Société Vinicole de Champagne v. W. de Mumm*, case are of special interest.

In the *Salem* claim (1932) the majority (2 to 1) held:

That an arbitral tribunal is authorized to interpret the arbitration agreement (compromise) whereunder it is constituted has been contested in certain cases, but the prevailing opinion in international practice acknowledges their right to do so. Such interpretation is however only admissible if the wording of the compromise allows

⁶ P.C.I.J., Series A/B, No. 44, p. 33.

⁷ *Id.* at 33-36.

⁸ *Id.* at 36-37.

⁹ P.C.I.J., Series A/B, No. 50, p. 378.

¹⁰ P.C.I.J., Series A/B, No. 62, p. 13.

of several meanings of which none can be recognized as the clear will and purpose of the parties. In this case the Arbitral Tribunal has to investigate which meaning agrees with what has been the joint will of the parties when they concluded the compromise. Now, in order to ascertain in the joint will of the parties, an arbitral tribunal is likewise entitled, according to the predominating international practice, to refer to the discussions and negotiations which led to the compromise.¹¹

In *Société Vinicole de Champagne v. W. de Mumm*, the Mixed Arbitral Tribunal interpreted certain sections of Part X of the Treaty of Versailles in the light of the exchange of notes between the German delegation and the Allied and Associated Powers.¹²

The question of the value of *travaux préparatoires* in interpreting treaty provisions was extensively discussed by the International Court of Justice in its Advisory Opinion of May 28, 1948 on *Conditions of Admission of a State to Membership in the United Nations* (Article 4 of the Charter). The Minority Opinions ascribed decisive significance to the preparatory work. The Dissenting Judges Basdevant, Winiarski, Sir Arnold McNair and Read said:

Without wishing to embark upon a general examination and assessment of the value of resorting to *travaux préparatoires* in the interpretation of treaties, it must be admitted that if ever there is a case in which this practice is justified it is when those who negotiated the treaty have embodied in an interpretative resolution or some similar provision their precise intentions regarding the meaning attached by them to a particular article of the treaty. This is exactly what was done with respect to paragraph 2 of Article 4.¹³

And Mr. Zoricic, in his Dissenting Opinion, refers to the preparatory work as follows:

¹¹ *Salem Claim, Award*, ARBITRATION SERIES No. 4, Pt. (6) (Dep't State 1933) 29.

¹² 1 RECUEIL DES DÉCISIONS DES TRIBUNAUX ARBITRAUX MIXTES INSTITUÉS PAR LES TRAITÉS DE PAIX (1922) at 22, 25, 26. Additional references to *travaux préparatoires* in cases decided by the Mixed Arbitral Tribunals are to be found in the comments to the *Harvard Draft Convention*, *op. cit.* at 959. For additional arbitral decisions which contain references to the significance of preparatory work see CHARLES ROUSSEAU, PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC (1944) at 736-739. On preparatory work see also *Harvard Draft Convention*, *op. cit.* at 956-966; MCNAIR, THE LAW OF TREATIES (1938), especially at 262-270; HACKWORTH, 5 DIGEST OF INT'L LAW 259-263 (1943); HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942 652-655 (1943); HYDE, 2 INTERNATIONAL LAW 1482-1483 (2nd ed. 1945); Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties*, 48 HARV. L. REV. 549-591 (1935); ROUSSEAU, PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC (1944), especially at 748-762 (containing numerous quotations from and references to cases); SPENCER, L'INTERPRÉTATION DES TRAITÉS PAR LES TRAVAUX PRÉPARATOIRES (1935).

¹³ I.C.J. Reports 1948, p. 87.

The two reports of the Committees were approved by the respective Commissions, and it is difficult to suppose that the carefully chosen wording of these reports, considered first in the Committees, and then by the Commissions, does not express their thoughts and true intentions. On the contrary, I believe that these reports are to be taken as agreements on the interpretation of the provisions in question, and that consequently their terms must be understood and applied in their normal meaning as forming the surest means of interpreting Article 4 of the Charter.¹⁴

Mr. Krylov, in his Dissenting Opinion, also relied on the preparatory work.¹⁵

The following general principles may be derived from the opinion of writers,¹⁶ general principles of interpretation and numerous decisions by international tribunals:

An international tribunal is in principle authorized to take *travaux préparatoires* into consideration, provided a specific provision of a document or a rule established by oral agreement is unclear and its meaning open to doubt. This authority includes the competence of the Court to determine as to whether or not a specific rule is unclear. Parties to a dispute may, however, in a *compromis ad hoc* exclude expressly the Court's authority to resort to preparatory material.

Wherever dissenting or individual opinions of judges, arbiters, commissioners, are permissible¹⁷ it is conceivable that the tribunal is divided on the question as to whether a certain provision is clear.

The International Court of Justice for example, in its Advisory Opinion of May 28, 1948 was so divided. Only the majority opinion held that there was no need to resort to preparatory work.¹⁸

In addition to a situation where members of a Court differ as to whether a specific rule is "clear", a situation is conceivable where a different interpretation of the rule is based on a different interpretation of the *travaux préparatoires*. The dissent of Judge Anzilotti to the Advisory Opinion on the 1919 law on Employment of Women during the Night may serve to illustrate the latter situation. It reads in part as follows:

For these reasons, I am of the opinion that a correct interpretation

¹⁴ *Id.* at 100.

¹⁵ *Id.*, especially p. 110.

¹⁶ See note 12, *supra*.

¹⁷ See, for instance, Article 74, paragraph 2 of the *Rules of Court* of the International Court of Justice which provides: "Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his dissent. See also Article 84, paragraph 2 of the *Rules of Court* relating to Advisory Opinions which is in substance identical with Article 74, paragraph 2.

¹⁸ I.C.J. Reports 1948, p. 63.

of Article 3 of the Convention of Washington leads to the conclusion that that Convention applies exclusively to woman manual workers.

If however any doubt were possible, it would be necessary to refer to the preparatory work, which, in such case, would be adduced not to extend or limit the scope of a text clear in itself, but to verify the existence of an intention not necessarily emerging from the text but likewise not necessarily excluded by that text.

Now the preparatory work shows most convincingly that the intention of the Washington Conference was to maintain—whilst for technical reasons adopting a new convention—the main lines of the Berne Convention, save for a certain number of clearly indicated modifications none of which relate to the question before us. And since the Berne Convention, according both to its actual terms and to the universally adopted interpretation thereof, refers only to women manual workers, it follows that the intention of the Conference was to regulate the night employment of women manual workers. Thus the preparatory work would, if need be, confirm the interpretation which, in my view, naturally flows from the text of the Convention.¹⁸

Rules on Admission and Exclusion of Evidence

As to the admissibility of evidence, i.e., evidence proper as well as extrinsic evidence, many writers and international awards recognize the principle that “the greatest liberality will obtain in the admission of evidence” before international tribunals.

This principle has been clearly formulated and repeatedly reaffirmed in the awards of the Mexican Claims Commissions. In the case of *Lillie S. Kling (United States v. Mexico)* the General Claims Commission, established under the Claims Convention signed September 8, 1923, said:

Little adjective law has been developed in international practice. International tribunals are guided to some extent by rules formulated in connection with each arbitration. With respect to matters of evidence *they must give effect to common sense principles underlying rules of evidence in domestic law.*²⁰

In the U.S.A. (William A. Parker) v. United Mexican States the same Commission rules:

For the future guidance of the respective agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of the United States or Mexico as applied to the conduct of trials in their municipal courts, they

¹⁸ P.C.I.J., Series A/B, No. 50, pp. 388-389.

²⁰ OPINIONS OF COMMISSIONERS, Docket 3114 (1931) 36, 45. On the Mexican Claims Commission see FELLER, *THE MEXICAN CLAIMS COMMISSIONS* (1935); on evidence, see especially at 250-283.

have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses or issue processes for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as 'universal principles of law' or 'the general theory of law', and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with a view of discovering the whole truth with respect to each claim submitted.²¹

In the *Shufeldt Claim (United States v. Guatemala)* the arbitrator declared:

On the question of evidence over which there was some argument, I may point out that in considering the cases quoted on both sides it is clear that international courts are by no means as strict as municipal courts and cannot be bound by municipal rules in the receipt and admission of evidence. The evidential value of any evidence produced is for the international tribunal to decide under all the circumstances of the case.²²

In the same vein is the frequently quoted separate opinion of Judge van Eysinga in the *Oscar Chinn* case. Judge Eysinga stated there that the Permanent Court of International Justice is "not tied to any system of taking evidence . . . its task is to cooperate in the objective ascertainment of the truth"²³

The principle that "the greatest liberality in the admission of evidence obtains in international law" has been justified on various grounds. Several writers, comparing the strict common law rules on evidence with the more liberal principles which govern the international law of evidence, explain the difference between the common law and the international law of evidence primarily by reference to the common law jury system which has no counterpart in international law.²⁴

²¹ OPINIONS OF THE COMMISSIONERS 35, 38, 39 (1927).

²² ARBITRATION SERIES, No. 3 (Dep't State 1932) 852.

²³ P.C.I.J., Series A/B, No. 63, p. 146.

²⁴ SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 119 (1939). Sandifer says: "It is significant that the term admissibility finds but very little use in describing the reception of evidence in civil law. It has seemed more appropriate, therefore, to use the term admission as descriptive of the procedure or of the reception of evidence by international tribunals. What is examined under this heading, and in other parts of this study where questions of the acceptance and exclusion of evidence are considered, is primarily the broad question concerning what types of evidence will be considered by arbitral tribunals." (120).

It is controversial whether the rules governing admission of evidence are "genuine" rules of customary international law, or whether they are in the last analysis derived from general principles of law recognized by civilized nations in the sense of Article 38, paragraph 3 of the Statute of the International Court of Justice. Lauterpacht states on this point: "It is in their capacity as courts of justice that international tribunals have taken over and adopted for their purposes private law rules of evidence and procedure. Intervention, exceptions (demurrers), the rules of evidence, the burden of proof—all these questions touch upon the subject under discussion."²⁵ In apparent conflict with this statement is the ruling of the United States-Mexican General Claims Commission in the *William A. Parker* case:

The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law" or "the general theory of law", and the like.²⁶

It may be argued, however, that this ruling is directed only against a tendency to consider municipal *restrictive* rules of evidence as "general principles of law," but not against rules of evidence as such.

A corollary to the broad discretionary powers of international tribunals to *admit* evidence is their discretionary right to *exclude* evidence.

The Permanent Court of International Justice has at various occasions excluded certain types of evidence. In the *Chorzow* case the Court declined to consider the reference to the German-Polish Arbitration Treaty initialled at Locarno on October 16, 1925. It declared: "This reference . . . cannot serve to modify the source from which, according to the Application, the Court derives jurisdiction".²⁷

The *Danube Commission* case furnishes a noteworthy example of exclusion of *travaux préparatoires* on another ground than that the text in itself is sufficiently clear. The Court refused to consider the legislative history of the relevant articles of the Treaty of Versailles on the grounds that the work preparatory to the adoption of these Articles is classified as "confidential" and that it has not "been placed before the Court by, or with the consent of, the competent authority".²⁸ The Court did not consider as relevant the *Protocole interprétatif* to Article 6 of the Statute of the Danube which Romania also invoked on the ground that

²⁵ LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 210-211 (1927).

²⁶ See note 21, *supra*.

²⁷ P.C.I.J., Series A/B, No. 9, p. 19.

²⁸ *Id.* at 32.

"the States interested in the present dispute do not agree as to the true meaning and the value of the Protocol, and it appears from the record before the Court that the members of the [European Danube] Commission who had signed the Protocol also disagreed as to its proper meaning".²⁹

As previously indicated an international tribunal usually enjoys broad discretionary powers as to the admission or exclusion of evidence. However, if the Rules of Procedure of the tribunal provide for certain time limits within which evidence has to be submitted, any evidence furnished by either party after the expiration of such time limits may validly be excluded. A Rule to this effect is contained, for instance, in Article 48 of the Rules of Court of the International Court of Justice.³⁰

In short, there is probably no general rule of international law requiring a court to exclude evidence as such.³¹ As concerns extrinsic evidence, however, the general principle is recognized that extrinsic evidence is admissible only if the intrinsic evidence is inconclusive.

Appreciation of evidence

A distinction has frequently been made between the admission and the appreciation of evidence. There is considerable agreement that freedom in the admission of evidence means that any evidence at all will be admitted, i.e., it will go into the record and be considered by the tribunal; freedom in evaluation of evidence means that the tribunal will be enabled to give to the evidence admitted such weight as it desires.³²

In practice international tribunals have frequently in the same ruling asserted both freedoms. In this section supporting statements are quoted primarily with a view to proving that the principle of freedom in the evaluation of evidence has been widely accepted.

This freedom of evaluation has been clearly formulated in two cases decided by the Mexican Claims Commission:

As far as the kind of evidence is concerned, our Commission is not bound by any rule of the Convention . . . and it has the greatest freedom of appreciation in this regard; . . . it considers the testimony, declarations and expert opinions in the record as amply sufficient to establish the nature and the importance of the losses of which claimants complain.³³

²⁹ *Id.* at 33.

³⁰ On Time of Submission of Evidence, see, SANDIFER, *op. cit.*, Ch. II, especially at 68-69.

³¹ *Id.* at 129.

³² FELLER, *op. cit.*, p. 259. On "freedom of appreciation", see also SANDIFER, *op. cit.*, p. 12. "The general principle that the probative force of the evidence presented is for the tribunal to determine has received frequent statement."

³³ Case of the *Compania Azucarera del Paraiso Novello* (reorganized French-Mexican

In accordance with the provisions of Art. 25 of the Rules, the Commission will receive and consider all declarations, documents and other written evidence presented by the agents; consequently, the evaluation of these documents, declarations and other evidence is subject to the judgment of the Commission in every case, without subjection to special rules of procedure.³⁴

In the Arbitral Award in the *Island of Palmas* case Max Huber, the sole arbitrator, held:

It is for the Arbitrator to decide both whether allegations do or—as being within the knowledge of the tribunal—do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated.³⁵

The Permanent Court of International Justice ruled in the case concerning *German Interests in Upper Silesia* that “the Court is entirely free to estimate the value of statements made by the parties.”³⁶

Although there can be no doubt that the principle of the freedom in the appreciation of evidence is generally recognized in international law, it would be erroneous to assume that this principle is only recognized in international law. Actually many modern codes of civil procedure have embodied it as basic. The Austrian and German Codes of Civil Procedure, for instance, have incorporated the principle of the *freie Beweiswürdigung* and in the practice of French Courts the principle of *libre conviction* is recognized.³⁷

Commission, Decision No. 70 (unpublished)), quoted in FELLER, *op. cit.*, pp. 258-259 (note 19).

³⁴ *Rep. Alemana (Juan Andresen) v. Estados Unidos Mexicanos* (German-Mexican Commission, Decision No. 17 (unpublished)), quoted *ibid.*

³⁵ 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS (UN) 841.

³⁶ P.C.I.J., Series A, No. 7, p. 73.

³⁷ For the principle of the freedom of appreciation of evidence see Section 272 of the Austrian Code of Civil Procedure in *Die Jurisdiktionsnorm und die Zivilprozessordnung* 261 (4th ed., Vienna 1948), by Franz Fetter; see also Section 267 of the same Code and the cross references to related provisions cited there. Karl Wolff, *Grundriss des österreichischen Zivilprozessrechts* 282 (Vienna 1936) defines *Beweiswürdigung* as follows: “Appreciation of evidence is the finding as to whether or not proof has been furnished.” [English translation supplied]. The original German version of this definition reads: “Die Beurteilung, ob der Beweis erbracht ist oder nicht, heisst Beweiswürdigung.” See also Section 286 of the German Civil Code in *Zivilprozessordnung* 520f. (18th Adolf Baumbach ed., Munich and Berlin, 1947).

Circumstantial Evidence

"Circumstantial evidence" is not synonymous or coextensive with extrinsic evidence; it constitutes rather a special aspect of extrinsic evidence. It includes, thus, the general "historical situation" at the time of the conclusion of an international convention, the circumstances of the parties at the time the convention was entered into, and subsequent conduct of the parties. By contrast, the so-called legislative history of an individual provision of an international convention is usually confined to the various drafting stages of a particular provision, rather than to the circumstances surrounding the conclusion, execution, and termination of a treaty. Accordingly, the legislative history of one, or several provisions of an international convention is to be considered a special case of the significance of *travaux préparatoires*. However, at times no clear-cut distinction is made between these two types of extrinsic evidence.³⁸

International courts, in exploring all circumstances that may contribute to the sound interpretation of a disputed rule, may consider and actually have considered "historic facts." It is noteworthy that even legal principles prevailing at the time of the conclusion of an international convention may be considered as circumstantial evidence. Accordingly, the Permanent Court of International Justice in considering the territorial jurisdiction of the International Commission of the River Oder declared that, in case the purely grammatical analysis of a text should not lead to definite results, "there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers."³⁹ An international tribunal may, in addition to the implications of a legal principle at a given time, take into account subsequent modifications of that principle. In the *Oder Commission* case, for instance, the Permanent Court of International Justice deemed it necessary to "go back to the principles governing international fluvial law in general," to consider the conception of international river law as laid down by the Act of Congress of Vienna of

³⁸ JOKL, *DE L'INTERPRÉTATION DES TRAITÉS NORMATIFS* 146 (1936), who rightly emphasizes the need for a distinction between "history of the text" and other historic circumstances, quotes the *Memel* case (Series A/B, No. 47) as an illustration of a confusion on the part of the Permanent Court of International Justice of "les faits historiques, avec les travaux préparatoires." Actually, such a confusion can only be read into the French version of the Court's decision. While the French text reads: "Quant aux considérations d'ordre historique . . ." the English version reads: "As regards *the arguments based on the history of the text . . .*" Hence, the English text leaves no doubt that the Court referred to the preparatory work rather than to historical facts. (Series A/B, No. 47, p. 249).

³⁹ P.C.I.J., Series A, No. 23, p. 26.

June 9, 1815, and to consider what position was adopted by the Treaty of Versailles in regard to these principles.⁴⁰

In the *Eastern Greenland* case the Permanent Court of International Justice surveyed briefly the history of Greenland from 900 A.D. to the Peace Treaty of Kiel, dated January 14th, 1814. The Court considered as evidence of the legal status of Greenland prior to 1380, the year when the Kingdoms of Norway and Denmark were united, reports by a saga writer. It stated: "The historian, or saga writer, Sturda Thordarson tells (about 1261) how the men of Greenland undertook to pay tribute, and how for every man murdered, a fine should be payable to the King [of Norway]"⁴¹

The circumstances prevailing at the time of the conclusion of a convention may be the result of events that have occurred decades or even centuries ago. It should be noted that the circumstances prevailing at the time of the conclusion of a convention take on a particular significance, if the maintenance of the *status quo ante*, i.e., the circumstances prior to the conclusion of the convention constitute an integral consideration. In its Advisory Opinion concerning the European Danube Commission the Court held:

. . . it is quite reasonable to suppose that the controversy was settled on the basis of the *status quo ante bellum* the restoration of the *status quo ante bellum* was one of the leading principles of the provisions of the Treaty of Versailles concerning the Danube as well as of those of the Definitive Statute.

The Court therefore has arrived at the conclusion that the words "under the same conditions as before and without any modification of its existing limits" in Article 6 of the Definitive Statute, refer to the conditions which existed in fact before the war in the contested sector, and that their effect is to maintain and confirm these conditions,⁴²

In its Advisory Opinion concerning *Polish War Vessels in the Port of Danzig* the Permanent Court of International Justice declared that it was, in principle, willing to take notice, as "a matter of history," of the promise to Poland by the Allied and Associated Powers of a "free and secure access to the sea," advanced in connection with the Peace Settlement after World War I. However, since the Court considered the contents of Section XI of Part III of the Treaty of Versailles "a complete

⁴⁰ *Id.* at 27. See on this case also Hyde, *The Interpretation of Treaties by the Permanent Court of International Justice*, 24 AM. J. INT'L LAW at 8-10 (1930).

⁴¹ P.C.I.J., Series A/B, No. 53, p. 27.

⁴² P.C.I.J., Series B, No. 14, pp. 27-28.

fulfillment of the promise,"⁴³ the Court did not see any reason for giving special weight to the reference to this "matter of history."

Express reference to the circumstances leading to a certain legal situation is to be found in the Advisory Opinion concerning the *Treatment of Polish Nationals*. Here the Court declared:

The prohibition against discrimination can best be understood *in the light of the circumstances which led to the creation of Danzing as a Free City*.⁴⁴

Similarly, the judgment on the *Free Zones of Upper Savoy and the District of Gex* reads in part as follows:

All the instruments above mentioned *and the circumstances in which they were drawn up* establish, in the Court's opinion, that the intention of the Powers was, . . . to create in favour of Switzerland a right on which that country could rely to the withdrawal of the French Customs barrier behind the political frontier of the District of Gex, that is to say, of the Gex Free zone.⁴⁵

The North Atlantic Coast Fisheries Arbitration (1910) furnishes another example for the consideration of historical circumstances by an international tribunal. The tribunal refuted the contention of the United States that the term "in common with British subjects" should be interpreted not as implying a common subjection to regulation, but as "intending to negative a possible pretension on the part of the inhabitants of the United States to liberties of fisheries exclusive of the rights of British subjects to fish."⁴⁶ The Tribunal was unable to agree with this contention on the ground that "such an interpretation is inconsistent with the historical basis of the American fishing liberty."⁴⁷

The foregoing references to and quotations from opinions of international tribunals are designed to show that international tribunals have repeatedly given special weight to historical facts and circumstances when they interpreted the documentary material in the light of historical facts and circumstances.

The cases referred to heretofore take into account: (1) circumstances preceding the conclusion of an international convention, (2) circumstances leading to the conclusion of a convention, (3) circumstances prevailing at the time of the conclusion of a convention, (4) legal principles

⁴³ P.C.I.J., Series A/B, No. 43, p. 144.

⁴⁴ P.C.I.J., Series A/B, No. 24, p. 27. Italics added.

⁴⁵ P.C.I.J., Series A/B, No. 46, p. 144. Italics added.

⁴⁶ I PROCEEDINGS IN THE NORTH ATLANTIC COAST FISHERIES ARBITRATION, Sen. Doc. No. 870, 61st Cong., 3rd Sess. (1918) 78.

⁴⁷ *Ibid.*

recognized at the time of the conclusion of a convention and subsequent modifications of these principles, (5) a combination of two or all of the foregoing factors. In addition, circumstances subsequent to the conclusion of such a convention may be taken into account. In particular the conduct of the parties subsequent to the conclusion of a treaty may be an extremely significant element.⁴⁸ Since a treaty or convention may be abrogated through conclusive acts of one of the parties thereto, it follows *a fortiori* that the conduct of the parties to a validly concluded treaty may not only affect the treaty in its entirety, but also the meaning of individual provisions.

However that may be, the problems that are traditionally discussed in connection with the *clausula rebus sic stantibus* are outside the scope of this paper.

"Facts"—Notorious Facts, Facts That Require Evidence

There is ample evidence that legally relevant "facts" are matters of concern to international tribunals. Special procedures, designed to ascertain such facts and to ensure proper evaluation of such facts, have been developed under international law and recognized by international tribunals.

The 1899 and 1907 Hagne Conventions for the Pacific Settlement of International Disputes, for instance, provided expressly for International Commissions of Inquiry to facilitate the settlement of disputes "arising from a difference of opinion on points of fact." (See Article 9 of the 1907 Convention.) Under Article 10 of the 1907 Convention the Inquiry Commission "defines the facts to be examined . . ." By virtue of Article 22 of the same Convention the Commission is entitled to ask from either party for such explanations and information as it considers necessary.⁴⁹

These International Commissions on Inquiry are the prototype of several fact-finding organs established subsequently by the League of Nations and the United Nations. In general, such Commissions enjoy a high degree of discretion in the collection and evaluation of evidence as to "facts."

The Statute and the Rules of the International Court of Justice also

⁴⁸ For cases and discussion relating to subsequent conduct of parties see *Harvard Draft Convention, op. cit.*, at 966-970.

⁴⁹ The following cases relate to an International Commission of Inquiry instituted in accordance with the relevant provisions of the 1899 and 1907 Conventions. *The Dogger Bank Case*, see SCOTT, HAGUE COURT REPORTS 403 (1916); *Tavignano case, ibid.*, p. 413, 616; and the *Tubantia case, ibid.* (2d ser. 1932) 133.

contain several references to "facts." Article 42(1) of the Rules, provides that "A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions." The so-called optional clause (Article 36, paragraph 2 of the Statute) recognizes in subparagraph (c) "the jurisdiction of the Court in all legal disputes concerning . . . the existence of any fact which, if established, would constitute a breach of an international obligation." Moreover, Article 61, paragraph 1 of the Statute provides that an application for revision of judgment may be made if "it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."

It follows from the principle of the freedom in appreciation of evidence⁵⁰ that the International Court of Justice has complete freedom to decide whether certain facts are relevant and whether the evidence at the disposal of the Court concerning such facts is satisfactory. In this connection it should be noted that Articles 53 to 55 of the Rules of Court contain special provisions as to witnesses and experts.

As to "notorious facts" it seems to be a general principle of law, inherent in the meaning of the term "notorious facts," that no evidence is required to prove a notorious fact.⁵¹

Thus in the case *Fabiani v. Venezuela* the arbitrator, the President of the Swiss Confederation, held that even in ordinary tribunals⁵² notice could be taken of facts so notorious that proof would be unnecessary and that there are even stronger reasons to apply this principle in matters of international arbitration provided the application of the principle has not been excluded by the parties.⁵³

Certain "historical facts" may be considered notorious, but not all "historical facts" are necessarily of this sort. On the contrary, extensive research may be required to ascertain a "historical fact." Conversely, a fact may be notorious, but not of a general significance and therefore not historical. In short, if a "historical fact" is a "notorious fact" no evidence is required, but if a "historical fact" is not a "notorious fact"

⁵⁰ See, discussion on "Appreciation of Evidence," *supra*.

⁵¹ SANDIFER states, *op. cit.*, that this principle is to be found only in Anglo-American and German procedural law (269).

⁵² See in this context the Anglo-American principle of "Judicial Notice" which "means that Courts consider, without evidence, those matters of public concern which are known to all well-informed persons." *State v. Finch*, 128 Kan. 665, 280 Pac. 910, 66 A. L. R. 1369 (1929).

⁵³ For the text of the award see MOORE, 5 HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS (1898) to which the United States has been a Party, at page 4905.

it should, as previously indicated, be considered a special case of circumstantial evidence.⁵⁴

It may be controversial whether certain legal measures are "facts" and which legal measures may be considered "notorious facts." In the case concerning *German Interests in Polish Upper Silesia* the Permanent Court of International Justice declared that from the viewpoint of the Court "municipal laws are merely facts" when it said:

From 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.⁵⁵

This is in line with the principle of Anglo-American procedural law that foreign law is a fact to be proved.⁵⁶

In connection with the Advisory Opinion relating to certain *Danzig Legislative Decrees* Judge Anzilotti rendered an individual opinion which is designed to justify and to explain the authority of the Permanent Court of International Justice to accord different treatment to domestic as compared with international law rules, when he held:

Article 38 of the Statute, which states the sources of law to be applied by the Court, only mentions international treaties or custom and the elements subsidiary to these two sources, to be applied if both of them are lacking. 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.⁵⁷

In other words, municipal law cannot be considered a "notorious fact," but has to be proved before the Court. On the other hand, the Court "is reputed to know international law." Similarly, in the *Las Palmas Island* arbitration, the arbitrator, Huber, considered the Treaty of Utrecht as "of public notoriety and accessible to the Parties."⁵⁸

Intention of the Parties

The "intention of the parties" may be considered extraneous evidence, whenever such evidence is secured outside the text of a con-

⁵⁴ RALSTON, *LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 105, note 66 (Supp. to Rev. ed. 1936) and *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 219 (Rev. ed. 1926) refers to the *De Lamos case* (reported in *VENEZUELAN ARBITRATIONS OF 1903*, p. 310, 321) as an example for "historical facts" which at the same time are considered by an international tribunal at "notorious facts."

⁵⁵ P.C.I.J., Series A, No. 7, p. 19.

⁵⁶ See SANDIFER, *op. cit.*, p. 274, note 18.

⁵⁷ P.C.I.J., Series A/B, No. 65, p. 61.

⁵⁸ See note 35, *supra*, Huber's opinion at p. 842.

vention. On the other hand, to the extent that it has expressly been stated in the text of the convention at issue, it cannot be deemed extraneous evidence.

The intention of the parties insofar as it can be inferred from the *travaux préparatoires* and surrounding circumstances has been discussed in the first and fourth parts of this paper. Intention may, however, be proved by other means such as conclusive acts, or the objects of the convention. It may be added that consideration of the intention of the parties is a basic principle underlying the domestic law on the interpretation of contracts in many countries. This principle has been embodied, for instance, in Article 1156 of the French Civil Code, Paragraph 914 of the Austrian Civil Code, Sections 133 and 157 of the German Civil Code, and Section 18 of the Swiss Code on Obligations (*Schweizerisches Obligationenrecht*).

It is a widely recognized principle that an international tribunal should seek to ascertain from all the available evidence the intention of the parties to a convention.⁵⁹

Of the numerous decisions on this question by international tribunals the following cases seem to be of special interest:

In the *van Bokkelen* case the arbitrator held:

. . . the judicial tribunals of a country, when called upon to decide controversies between individuals which grow out of or are dependent upon treaty stipulations, will not hesitate to construe the language of those treaties according to the rules of law which apply to all instruments. They will construe the provisions so as to give effect to rather than to defeat the intention of the contracting parties; and they will reconcile apparent conflicts of particular parts by reference to the context in which they occur and to the whole instrument.⁶⁰

The arbitrator in the *Manica* case referred to "the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who have arranged it and the most favorable to the aim of the contract. . . ."⁶¹

⁵⁹ See for instance, McNAIR, *THE LAW OF TREATIES* 185 (1938). "The primary rule is that the tribunal should seek to ascertain from all the available evidence the intention of the parties in using the word or phrase being interpreted." It should be noted that McNAIR does not make any distinction as to whether such evidence is extrinsic or intrinsic evidence. By contrast, Ehrlich, *L'Interprétation des Traités*, 24 *RECUEIL DES COURS* 117-139, considers the "intention of the parties" exclusively as a matter of extrinsic evidence by discussing it under the heading "Recherche de la Volonté en Dehors du texte."

⁶⁰ For full report, see, MOORE, 2 *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATION* 1837 f. (especially at 1852).

⁶¹ *Id.* (vol. 5) at 5011.

In the case of the *Ottomon Public Debt* the arbitrator stated in reference to a question at issue:

De l'avis de l'Arbitre, la question doit être résolue, non d'après une règle de droit pur, mais bien plutôt en conformité de l'intention commune des Hautes Parties contractantes, telle que l'Arbitre est appelé à l'interpréter.⁶²

Similarly, the Permanent Court of International Justice ruled in the *Chorzow* case as follows:

For the interpretation of Article 23 [of the Geneva Convention between Germany and Poland signed at Geneva May 15, 1922] account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting parties is to be attributed to this provision.⁶³

To be sure, the principle that extraneous evidence may be sought by an international tribunal to ascertain the intention of the parties may be subject to the following qualifications: (1) an international tribunal is authorized to resort to extraneous evidence as to the intention of the parties only if the meaning of the text does not closely reveal the intention of the parties;⁶⁴ (2) several writers on international law contend that the interpretation of a treaty by reference to the express or implied intention of the parties is hardly applicable to treaties in which the intention of one of the contracting parties was of little consequence, i.e., to treaties imposed by force;⁶⁵ (3) other writers contend that in case of certain multilateral treaties, especially those that

⁶² *Affaire de la Dette Publique Ottomane* (1925) in 2 REPORTS OF INTERNATIONAL ARBITRAL AWARDS (U.N.) 556.

⁶³ P.C.I.J., Series A, No. 9, p. 24. For a discussion of the rulings of the Permanent Court of International Justice on "intention of the parties," see, HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942* at 643-645 (1943).

⁶⁴ See on this point YI-TING CHANG, *THE INTERPRETATION OF TREATIES BY JUDICIAL TRIBUNALS* 61, 183 (1933).

⁶⁵ See LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 272 (1933). In this connection see also the *Treaty of St.-Germain (Yugoslav Liquidations)* case decided by the Austrian Supreme Court, April 11, 1934. On the question whether the treaty of St.-Germain had been interpreted in accordance with the intention of the Parties the Court ruled: "It cannot be said that there has been a departure from the 'avowed intention' of the Treaty. Since that document, although for the most part representing the dictates of the Allied and Associated Powers, is nevertheless to be regarded as being in essence an agreement, we must look not only to the will of the victor States but also to the discoverable intention of Austria . . ." (Translation in *ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES (1933-1934)*) (Lauterpacht ed.) Case No. 118, p. 297-298.

are open to accession, there may be different "intentions" on the part of those parties that have been primarily responsible for the drafting of the treaties and other parties;⁶⁶ (4) the "intention" of the original parties to multilateral treaties may be different from the intention of those parties that subsequently adhered to such a treaty.

*Qualification of the Maxim That "Limitations of Sovereignty
Cannot Be Presumed"*

One author (Ralston) enumerates "legal presumptions" under the general heading of "Evidence"⁶⁷ while another (Schindler) maintains that presumptions are unknown to international arbitral procedure, except the Anglo-American principle of estoppel;⁶⁸ a third author (Sandifer) holds that "International tribunals may recognize certain legal presumptions as affecting the primary burden of proof, but the presumptions are so variously stated, and there is such a lack of uniformity in the circumstances of their application that no general rules in the matter can be stated."⁶⁹

However that may be, there is one presumption which deserves special consideration, since it is derived from or based on a widely recognized implication of the concept of sovereignty. The Permanent Court of International Justice has formulated this presumption as follows: "... in case of doubt a limitation of sovereignty must be construed restrictively."⁷⁰ In other words, unless the contrary is proven a limitation of sovereignty is not presumed. This presumption, however, is rebuttable: as evidenced by several decisions rendered by international tribunals. Again, whenever a text clearly contains a limitation of sovereignty resort to extraneous evidence is not permissible and the principle that a limitation of sovereignty cannot be presumed is not applicable.⁷¹

⁶⁶ See Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L LAW 94f. (1929).

⁶⁷ RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 223-225 (1926).

⁶⁸ SCHINDLER, *DIE SCHIEDSGERICHSBARKEIT SEIT 1914* 155 (1938). "Vorab is festzustellen, dass Präsumptionen der internationalen Schiedsgerichtsbarkeit unbekannt sind. Eine Ausnahme macht das dem englischen Recht entnommene Prinzip des estoppel . . ."

⁶⁹ SANDIFER, *op. cit.*, p. 98.

⁷⁰ P. C. I. J., Series A/B, No. 46, p. 561. See also statement by the arbitrator (Mr. Uden) in the *Greek-Bulgarian dispute concerning some forests in Central Rhodope* (1931) [translation in 28 AM. J. INT'L LAW 760, 770 (1934)]. "It is a principle universally recognized that a stipulation limiting the sovereignty of a state must be interpreted strictly. In case of doubt limitation of sovereignty is not presumed."

⁷¹ See ROUSSEAU, *PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC* 692 (1944), "... l'interprétation restrictive n'est qu'un moyen *subsidaire* exclusivement utilisable pour l'éclaircissement de dispositions obscures ou équivoques; mais on ne saurait par ce procédé contredire un texte clair."

In support of this thesis the following decisions of international tribunals may be quoted:

In the *Arbitral award in divergence of opinion between German Government and Commissioner of Controlled Revenue*, the arbitrator (Mr. Sandenburg) held:

. . . in the case in point the contention that the Commissioner's interpretation of the Article would be an infringement of the sovereignty of the state is in reality a *petitio principii*; the fact that the article constitutes a limitation on the exercise of the right of sovereignty makes it an obligation to interpret it strictly; but this obligation could never mean that the article is denied the meaning which its wording formally requires; the exact meaning has therefore to be determined by all justifiable means.⁷²

In the *Oder Commission* case the Permanent Court of International Justice declared:

Nor can the court, on the other hand, accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of states. This argument, though sound in itself, must be employed only with the greatest caution.⁷³

In its Advisory Opinion on *Minority Schools in Albania* the same Court held:

The Court, having thus established that paragraph 1 of Article 5 of the Declaration, both according to its letter and its spirit, confers on Albanian nationals of racial, religious or linguistic minorities the right that is stipulated in the second sentence of that paragraph, finds it unnecessary to examine the subsidiary argument adduced by the Albanian Government to the effect that the text in question should in case of doubt be interpreted in the sense that is most favourable to the sovereignty of the State.⁷⁴

Means of Evidence

"Means of evidence" (*Moyens de la preuve, Beweismittel*) are all types of evidence which may be considered by a tribunal, irrespective of whether the tribunal considers a particular piece of evidence relevant or not. The designation of a piece of evidence as "means of evidence" is a purely formal one, that is to say, the nature of the evidence and its probative force are determined by the content of the evidence.

"Means of evidence" are frequently classified as: documentary and

⁷² Text in 21 AM. J. INT'L LAW 326, 343 (1927).

⁷³ P. C. I. J., Series A, No. 23, p. 24.

⁷⁴ P. C. I. J., Series A/B, No. 64, p. 22.

testimonial,⁷⁵ or written and oral.⁷⁶ Documentary evidence, for instance, includes *travaux préparatoires*, texts of international agreements, texts of national laws, maps. By contrast, oral or testimonial evidence is usually secured by interrogation of witnesses or experts.

Under Article 53, paragraph 1 of the Rules of the International Court of Justice witnesses and experts shall be examined by the agents, counsel or advocates of the parties under control (*autorité*) of the President of the Court. Questions may be put to them by the President of the Court and the judges. Before giving evidence in Court witnesses and experts are required to make a solemn declaration that they will speak the truth, the whole truth and nothing but the truth.⁷⁷

It is controversial whether "hearsay evidence" is admissible, or whether witnesses or experts are required to have personally known and observed the facts to which they testify.⁷⁸

"Affidavits," although not known in the so-called civil law countries, are deemed generally admissible before international tribunals;⁷⁹ they are considered an intermediary type, since they constitute a combination of oral and written evidence.

It should be emphasized that under Article 57, paragraph 4 of the Rules of the International Court of Justice a public international organization may on its own initiative furnish the Court with information relevant to a case before the Court in the form of a Memorial to be filed in the Registry. In this case the Court retains the right to require *additional information, orally or in writing*, in the form of answers to any questions which it may see fit to formulate, and to authorize the parties to comment in writing on the information then furnished.

Conclusion

The foregoing brief survey of the principles and practice concerning

⁷⁵ For this classification, see, SANDIFER, *op. cit.*, p. 137f. on "Documentary evidence," and p. 206 on "Testimonial evidence".

⁷⁶ For the distinction between written evidence (*la preuve écrite*) and oral evidence (*la preuve testimoniale*) see WITENBERG, *L'ORGANISATION JUDICIAIRE: LA PROCÉDURE ET LA SENTENCE INTERNATIONALES* 243-256 (1937).

⁷⁷ This rule is identical with Article 53 of the Rules of the Permanent Court of International Justice.

⁷⁸ In favor of "hearsay evidence" see the *Antonio Maximo Moro* case quoted in SANDIFER, *op. cit.*, p. 123. Sandifer holds: "Generally speaking, there are no rules in international judicial procedure against the admission of hearsay evidence, that is, evidence not based on personal observation." *Ibid.*, 257. By contrast, WITENBERG, *op. cit.*, p. 252, considers hearsay evidence as inadmissible before international tribunals.

⁷⁹ In reference to affidavits WITENBERG says, *op. cit.*, p. 255: "On peut, actuellement, considérer cette admissibilité comme étant de coutume en droit international arbitral." See also SANDIFER, *op. cit.*, p. 179f.

extrinsic evidence in international law may be summarized by indicating (i) principles relating to intrinsic and extrinsic evidence; (ii) principles relating to extrinsic evidence only;⁸⁰ (iii) principles germane to international law; (iv) principles common to domestic and international law.

(i) The following principles relate to intrinsic and extrinsic evidence:

1. International tribunals enjoy, in principle, the greatest freedom as to the admission of evidence, and are not bound by restrictive rules of evidence applicable in certain national legal systems.
2. International tribunals enjoy the greatest freedom in the appreciation of evidence.

(ii) The following principle relates to extrinsic evidence only:

In the interpretation of treaties or any other rule of international law an international tribunal may resort to extrinsic evidence if the rule at issue is not clear. The Court is authorized to decide whether or not a rule is clear. In resorting to extrinsic evidence, the Court may resort to "sources of evidence" other than the disputed text or rule such as *travaux préparatoires*; "circumstantial evidence" such as conclusive acts, circumstances of the parties at the time a treaty was entered into; subsequent conduct of the parties; relevant facts; the intention of the parties; certain presumptions which render proof unnecessary.

(iii) The following principle is germane to international law:

International tribunals enjoy, in principle, the greatest freedom as to the admission of evidence, and are not bound by restrictive rules of evidence applicable in certain national legal systems.

(iv) The following principles are common to domestic and international law:

1. Freedom in the appreciation of evidence.
2. The intention of the parties to an international agreement must be ascertained, if the wording of the agreement is unclear.

On the whole, resort to extrinsic evidence is permissible in international law. However, extrinsic evidence will contribute to a clarification of the available intrinsic evidence only if it is clear in itself and if it adds new evidence which could not have been inferred from the intrinsic evidence.

⁸⁰ In this paper the term "extrinsic" evidence is used as synonym for "extraneous" evidence; and the term "intrinsic" evidence is used as synonym for "internal" evidence. On the treatment of extrinsic evidence in the practice of the Supreme Court of the United States see Ten Broek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, a series of excellent articles on the subject, in 26 and 27 CALIF. L. REV. (1937-1939).