Burden of proof and related issues:
a study on evidence before international tribunals

by Mojtaba Kazazi.

BURDEN OF PROOF AND RELATED ISSUES

A Study on Evidence Before International Tribunals

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by

Dr. Mojtaba Kazazi



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NOTE BY THE SERIES EDITOR

The settlement of international disputes has always been a central issue in international law and international relations. Fundamental changes in the international system after the end of the Cold War and increasing global interdependence have moved the question of international conflict resolution even more into the forefront recently. This is reflected in the importance attached to the settlement of disputes in the United Nations Decade of International Law, the programme announced by the UN General Assembly for the period 1990-1999, which includes the possibility of holding a third international peace conference (after the 1899 and 1907 Hague Peace Conferences) or other suitable conference at the end of the Decade.

The series "Studies and Materials on the Settlement of International Disputes" intends to contribute to the UN Decade of International Law from an interdisciplinary perspective — law, economics, history and politics — with the primary objective, however, to search for answers to the question of how to strengthen the rule of law in international relations. For practical purposes, this objective requires a broad perspective and must cover not only the analysis of the peaceful settlement of international disputes, but also the role of the use of force and its legitimacy. Furthermore, while the traditional focus of studies in this area has been limited to interaction between states, the series encourages the analysis also of international dispute settlement involving international organizations and non-state actors, including individuals, minorities, indigenous people, non-governmental organizations, and transnational companies. Finally, the series will also assist in exploring more in depth the linkages between dispute settlement in "public international law" and "international commercial arbitration" and their significance for enhancing the international rule of law.

The first volume of the series written by Dr. Mojtaba Kazazi on burden of proof and related issues of evidence before international courts and tribunals is a substantial contribution to the clarification of international rules and practice in the area. The long experience of the author as a judge in a civil law system, his intimate knowledge of the work of the Iran-United States Claims Tribunal in The Hague, and currently the United Nations (Security Council) Compensation Commission, have equipped him well to address the subject competently, both from a theoretical and practical perspective. The subject-matter is not only placed into a critical conceptual framework, but also reflects on the relevance of the different approaches in common law and civil law systems on the international level. As noted by Professor Verhoeven in his foreword, the subtleties of evidence in international proceedings has not been systematically studied since quite a number of decades and this book may very well become a standard work of reference in this area.

Peter Malanczuk Series Editor

FOREWORD

The importance in any legal system of the law of evidence cannot be over-emphasized. For obvious reasons, a fair and efficient regulation of the various issues related to proof is critical for a harmonious and peaceful development of social relations. Nevertheless, the law of evidence is still largely uncertain in international law and practice. Clear rules are exceptional and many evidentiary problems remain unsolved. This is partly because resort to international tribunals does not occur very often, and the opportunities to develop specific rules on evidence are therefore lacking. This, of course, does not mean that such rules are not needed or are not necessary. It does, however, indicate the authority and freedom of international tribunals in applying the rules that they find applicable, on the one hand, and the unusual difficulty involved in studying the practice of international tribunals in this regard, on the other hand. In such a context, it is not surprising that scholarly works on evidence before international tribunals are far from numerous. The well known studies of Wittenberg and Sandifer, originally published in 1936 and 1939 respectively, are still the usual references in this matter. Whatever be their intrinsic merits, the very fact that nearly sixty years have passed since their original publication is illustrative of the relative lack of comprehensive studies on evidence in international law.

This said, things are now slowly changing. International litigation is increasing, as proved by the case law of the International Court of Justice and by the creation of new international tribunals. Scholars are now paying more attention to problems of evidence that were usually neglected in international doctrine. Mojtaba Kazazi is one of them. Having practiced as a civil courts judge in Tehran before being closely associated for many years with the Iran-United States Claims Tribunal in the Hague which was established by the Algiers Declarations (1981), he is fully aware through his direct experience of the importance and complexities associated with proof and evidence in international litigation. Although Mojtaba Kazazi is able to deal with all of the facets of the law of evidence, in the present book he is mainly concerned with the issue of the burden of proof. The addition in the title: "and related issues" makes it clear, if need be, that such a problem cannot be disassociated from the other aspects of the law of evidence. In fact, he has used the burden of proof, which is the general and main question of evidence, as a point of departure in order to study different aspects of procedure and evidence before international tribunals. Mojtaba Kazazi generally looks at the problems from a practical point of view. While his long experience with the claims before the Iran-United States Claims Tribunal has influenced him, his study is not restricted to this particular Tribunal. Many other judicial and arbitral practices are carefully reviewed and analyzed. Nor is the object of the analysis purely "practical". In any system of law, important theoretical considerations regarding law and litigation lie behind the technicalities of evidence and their immediate practical purpose and Mojtaba Kazazi rightly and constantly emphasizes these considerations while keeping them

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outside of purely academic discussions. His basic approach of analyzing the problems more from a practical rather than a theoretical view is surely useful as regards the law of evidence.

Mojtaba Kazazi is opportunely reminding everyone of the increasing need in international law to regulate and systemize the law of evidence, while avoiding the complexities that accompany issues related to evidence in municipal law. I have no doubt that this work will be recognized by international lawyers as a significant contribution to the law of evidence in international law.

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Joe Verhoeven Member of the Institute of International Law

PREFACE AND ACKNOWLEDGEMENTS

It is a welcome coincidence that the publication of this work coincides with the fiftieth anniversary of the United Nations, the decade of international law and the time that, as a result of the end of the cold war era and other developments in the last two decades, international law has found more ground to cover. The United Nations has never before been so busily engaged in the world's affairs and in peacekeeping operations. The number of cases on the docket of the International Court of Justice is constantly increasing. There are also new attempts to activate and make more use of the machinery of the Permanent Court of Arbitration and new international and regional tribunals and claims commissions are being established. Existing regional and global trade agreements are being strengthened and new trade agreements are being founded by States. The Law of the Sea Convention has finally come into force and the tribunal envisaged in the Convention is expected to start its work soon. This is all occurring in spite of the fact that the international community is experiencing a difficult time with numerous conflicts around the globe. Hopefully, once the current unfortunate turbulence settles, there will be even more resort to the means for peaceful settlement of disputes through the United Nations and other international organizations, and through international courts and tribunals. It is the author's hope that this work will contribute to that purpose.

This book is the revised and updated version of research that I undertook during the last four years of my ten-year work (1982-1991) on claims before the Iran-United States Claims Tribunal in The Hague. The research in its original format was submitted to the Faculty of Law, Université Catholique de Louvain (Belgium), as my doctoral thesis.

I would like to acknowledge with gratitude the encouragement and assistance that I have received from many friends and colleagues over the years of preparation and revision of this work in The Hague and in Geneva. I am indeed indebted to friends who kindly read parts of the manuscript and made comments and suggestions for improvement. In particular, I would like to thank Professor Joe Verhoeven of Université Catholique de Louvain, for his valuable support and ideas. I would also like to thank Professor Peter Malanczuk of the University of Amsterdam, the editor of this series, for his efforts and valuable suggestions for improvements on the manuscript. I remain, of course, solely responsible for any shortcomings and mistakes that might still be found in the work. Finally, it should be emphasized that the views expressed in this work are mine and have been made in my personal capacity, and that they do not necessarily reflect the views of the organizations with which I have in the past been associated, or of the United Nations Compensation Commission, where I am currently working.

Mojtaba Kazazi Geneva, December 1994

ABBREVIATIONS

AFDI Annuaire français de droit international
AJIL American Journal of International Law
BYIL British Year Book of International Law

CJS Corpus Juris Secundum

Clunet Journal de droit international

GAOR General Assembly Official Records

IBA International Bar Association

ICC International Chambre of Commerce

ICCA International Council of Commercial Arbitration

ICJ International Court of Justice

ICLQ International and Comparative Law Quarterly

ICSID International Centre for Settlement of Investment Disputes

ILC International Law Commission
ILM International Legal Materials

ILO International Labour Organisation

ILR International Law Reports

Iran-U.S. CTR Iran-United States Claims Tribunal Reports

JIA Journal of International Arbitration
LJIL Leiden Journal of International Law
PCA Permanent Court of Arbitration

PCIJ Permanent Court of International Justice

Recueil de cours Académie de droit international (The Hague), Recueil de cours

Res. Resolution

Rev.Belge Revue belge de droit international

RGDIP Revue générale de droit international public RIAA Reports of International Arbitral Awards

Supp. Supplement
UN United Nations

UNCC United Nations Compensation Commission

UNCITRAL United Nations Commission on International Trade Law

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