

Book Review

Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (London: British Institute of International and Comparative Law, 2009), pp. i-xxvii + 420, ISBN 978-1-905221-25-7.

A striking feature of litigation before the International Court of Justice (‘ICJ’) is the flexibility that is applied to issues of procedure and evidence. This led Shabtai Rosenne to claim that there is, in fact, ‘little to be found in the way of rules of evidence’;¹ Durward Sandifer noted in his treatise that ‘[n]o rule of evidence... finds more frequent statement in the cases than the one that “international tribunals are not bound to adhere to strict judicial rules of evidence.”’² Over the years, this has led to criticism of the ICJ’s approach to fact-finding as lacking transparency.³ But in more recent times, the ICJ has handled a number of cases where it has been confronted with factual, scientific, and technical evidence of extreme complexity, and it seems to have sensed the need to grapple more directly with the many challenging evidentiary issues put before it. This is particularly evident, for instance, in the ICJ’s judgments in *Armed Activities on the Territory of the Congo*,⁴ and the *Genocide Convention* case,⁵ as well as in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁶ In light of the ICJ’s apparent new willingness to address evidentiary issues, the publication by Anna Riddell and Brendan Plant of

¹ Shabtai Rosenne, *The Law and Practice of the International Court, 1922–2005* (2006) Vol. III, 1039.

² Durward Sandifer, *Evidence before International Tribunals* (rev. ed., 1975) 9.

³ See, e.g., the discussion in Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (2009) 4–5.

⁴ *Armed Activities on the Territory of the Congo (DRC v Uganda)* (ICJ Judgment of 19 December 2005), available at <www.icj-cij.org>.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ Judgment of 26 February 2007), available at <www.icj-cij.org>.

⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004), available at <www.icj-cij.org>.

this study, *Evidence before the International Court of Justice*, is very timely indeed.

The book, which is the product of a major research project carried out under the auspices of the British Institute of International and Comparative Law, is very impressive in its coverage of the issues. Chapter 2 contextualises the study: this is important, for the functions and features of the ICJ, the nature of the parties (including, of course, their status as sovereign States), and their manner of participation in proceedings, informs the way in which the ICJ addresses issues of evidence.⁷ Chapter 3 examines the rules regarding the production of evidence contained in the ICJ's Statute and Rules of Court, and also sets out the rights and responsibilities of parties as regards the production of evidence.⁸ Here, the authors note two problems that have served to impede the ICJ's fact-finding processes: first, many States submit superfluous evidence simply in order to get it on the record, even if it turns out that they ultimately do not need to refer to it; and second, the ICJ has, itself, failed to exercise its 'ample powers to obtain on its own initiative evidence to supplement the case file produced by the parties'.⁹ The latter problem results in the ICJ often finding itself 'in a position where it must make factual determinations on the basis of imperfect files of evidence'.¹⁰ Riddell and Plant make two proposals for the ICJ to manage better the difficulties it faces relating to the production of evidence: it should do more to limit the volume of evidentiary items (although the authors note that, absent any means to enforce such limits, it is questionable how effective such efforts would be); and the ICJ could hold preliminary proceedings in which it could consult with the parties on questions of fact and proof, and in which it could direct the parties on the factual issues where evidence is needed (and, conversely, where evidence is not needed).¹¹

Chapter 4 considers the rule on the allocation of the burden of proof, as well as the applicable standard of proof; the latter has been the more difficult issue, as has been critically discussed in the separate and dissenting

⁷ Riddell and Plant, above n. 3, 11–45.

⁸ *Ibid.*, 47–77.

⁹ *Ibid.*, 69.

¹⁰ *Ibid.*, 68.

¹¹ *Ibid.*, 76–77.

opinions of various members of the ICJ.¹² Chapter 5 then evaluates the ICJ's approach to the admissibility and use of evidence.¹³ The authors identify three situations where the ICJ faces difficulties in this task, which are considered in chapter 6: (i) where a party fails to appear in the proceedings; (ii) where a party fails to produce important evidence; and (iii) where a party claims a privilege of non-production in respect of sensitive or confidential information.¹⁴ The following chapters contain detailed studies on particular forms of evidence: chapter 7 deals with documentary evidence;¹⁵ chapter 8 considers witness testimony;¹⁶ and chapter 9 examines the ICJ's approach to expert evidence.¹⁷ Finally, chapter 10 considers whether the rules of evidence are applied any differently by the ICJ in advisory proceedings.¹⁸

There are many substantive issues which Riddell and Plant subject to thoughtful and careful attention, but three warrant particular mention. First, the authors' discussion of the difficulties encountered by the ICJ when States fail to produce evidence is highly topical, particularly given the refusal of Serbia and Montenegro to disclose documents requested by Bosnia and Herzegovina in the *Genocide Convention* case.¹⁹ In that case, the documents in question were the unredacted versions of certain war-time minutes of the Serbian Supreme Defence Council; Serbia and Montenegro refused to disclose the documents, explaining that they had been classified as a 'military secret' and as a matter of national security interest.²⁰ In the event, the ICJ did not request that Serbia and Montenegro produce the documents, noting that Bosnia and Herzegovina had had access to 'extensive documentation and other evidence', including the available records from proceedings before the International Criminal Tribunal for the former Yugoslavia ('ICTY').²¹ This is, of course, not the first time that

¹² *Ibid.*, 79–150.

¹³ *Ibid.*, 151–201.

¹⁴ *Ibid.*, 203–229.

¹⁵ *Ibid.*, 231–305.

¹⁶ *Ibid.*, 307–327.

¹⁷ *Ibid.*, 329–358.

¹⁸ *Ibid.*, 359–408.

¹⁹ *Ibid.*, 118–120; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ Judgment of 26 February 2007), paras. 204–206.

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ Judgment of 26 February 2007), para. 205.

²¹ *Ibid.*, para. 206.

a party to proceedings before the ICJ had refused to produce a document; in the *Corfu Channel* case, the ICJ requested that the United Kingdom produce documents ‘XCU’, which contained certain Admiralty orders, but the United Kingdom refused on the grounds of ‘naval secrecy’.²² In reviewing these cases, the authors carefully describe the difficult tension between the need of the ICJ and the parties to have access to relevant evidence, and also the pragmatic imperative that States be permitted to withhold documents in certain circumstances, lest they be deterred from referring future disputes to the ICJ. The authors conclude that the only ground for non-production of documents is that ‘in respect of State secrets’.²³ On this point, it would have been interesting to have the authors’ views on whether it is arguable that the grounds for non-production that obtain in many domestic legal systems (such as legal professional privilege) might also apply before the ICJ.

Another noteworthy section deals with the practice of some States appearing before the ICJ to include one or more factual or expert witnesses in their legal team, who appear as counsel and essentially deliver their testimony as part of that party’s submissions. This, of course, has the effect that the evidence submitted by such witnesses is not subject to cross-examination by the other side. For instance, Riddell and Plant note that in *Elettronica Sicula SpA (ELSI)*,²⁴ one member of the United States’ delegation, who had been making legal submissions, was ultimately treated by the ICJ as a witness, as his submissions had strayed into the territory of giving factual evidence.²⁵ But this is not the only case where this has happened; States frequently engage in this practice, which can result in confusion of roles. In *Gabcikovo-Nagymaros Project*,²⁶ for example, both Hungary and Slovakia included several scientific and technical advisers in their delegations. In the course of Slovakia’s oral submissions, counsel for Slovakia introduced Professor Igor Mucha, Professor of Hydrogeology at the Comenius University in Bratislava, as ‘Slovakia’s well-known expert on ground water’.²⁷ This provoked an immediate response from Hungary; counsel for

²² *Corfu Channel* [1949] ICJ Rep 4, 32.

²³ Riddell and Plant, above n. 3, 208.

²⁴ [1989] ICJ Rep 15.

²⁵ Riddell and Plant, above n. 3, 341–343; *Elettronica Sicula SpA (ELSI)* [1989] ICJ Rep 15, 19.

²⁶ [1997] ICJ Rep 7.

²⁷ *Compte Rendu* 97/8 (25 March 1997), 38 (Professor McCaffrey), available at <www.icj-cij.org>.

Hungary stated that Dr Mucha should be regarded as being ‘integrated in the Slovak team of pleaders. He is not being introduced as an expert. . . . [H]e is speaking, as everyone has been speaking, as an advocate on behalf of the State and not an expert.’²⁸ And most recently, in *Pulp Mills on the River Uruguay*, the ICJ admonished both parties for having included in their legal teams ‘experts who appeared as counsel’.²⁹ The ICJ stated that it ‘would have found it more useful had they been presented by the Parties as expert witnesses’, and observed that ‘those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court’.³⁰ Although this judgment was obviously handed down too late to be considered in this work, the ICJ now appears to be giving clear guidance to future litigants; perhaps we shall soon see a new Practice Direction on this issue.

A third issue worth mentioning is the authors’ consideration of a complex question that has arisen largely as a result of the ‘proliferation’ of international courts and tribunals; this is the question of the probative value to be attached by the ICJ to findings of fact made by other international adjudicatory bodies. This issue arose in the *Genocide Convention* case, where it was argued by Bosnia and Herzegovina that various findings of fact made by the ICTY should be accepted by the ICJ; for its part, Serbia and Montenegro challenged the reliability of the ICTY’s findings.³¹ In the event, the ICJ concluded that ‘it should in principle accept as highly persuasive relevant findings of fact made by the [ICTY] at trial, unless of course they have been upset on appeal.’³² Given the number of international courts and tribunals with overlapping jurisdictions, it is likely to happen with increasing frequency that two (or more) different bodies will find themselves making findings of fact on the same, or closely related, matters. The authors foresee this, and set out clearly how the ICJ approached

²⁸ *Ibid.*, 39 (Professor Crawford).

²⁹ *Pulp Mills on the River Uruguay* (ICJ Judgment of 20 April 2010), para. 167, available at <www.icj-cij.org>.

³⁰ *Ibid.*

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ Judgment of 26 February 2007), paras. 211–224.

³² *Ibid.*, 223.

the ICTY's findings of fact in the *Genocide Convention* case, and also suggest how the ICJ may consider findings made by other international courts.³³

The authors have done an excellent job in examining the many complex evidentiary issues that can arise in proceedings before the ICJ. The book is well written, clearly structured, and the material is presented in a user-friendly and approachable fashion; in particular, the extracting in full (in boxed text) of relevant provisions of the ICJ Statute, the ICJ Rules of Court, Practice Directions, and relevant judgments and separate opinions, is most useful. If there is something missing from this book, it is a closer examination of the sources of the ICJ's rules relating to evidence; here, a consideration of the relevance of customary international law, general principles of law, and the ICJ's inherent powers over issues of procedure and evidence would have been worthwhile. In addition, most readers find an index useful in reference books, and this would have been helpful. But these omissions do not detract in any substantial way from the extremely valuable contribution that this book makes to the literature on dispute settlement before the ICJ. It will undoubtedly be referred to by counsel and judges alike.

CHESTER BROWN

Associate Professor, Faculty of Law, University of Sydney

Barrister (NSW)

Door Tenant, Essex Court Chambers, London, and Maxwell Chambers,

Singapore

³³ Riddell and Plant, above n. 3, 190–192, 243–247.