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THE PLAINTIFF'S DILEMMA: ILLEGALLY OBTAINED EVIDENCE AND ADMISSIBILITY IN INTERNATIONAL ADJUDICATION

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A suit cannot be pressed, whether on the domestic or international level, without supporting evidence. The processes of gathering such evidence are carefully regulated in many developed legal systems, in part because experience has shown that too zealous a pursuit of evidence can easily transform institutions designed to resolve conflict into a rationalization and a setting for possibly even more rancorous conflict. When some part of the state apparatus is prosecuting a case, liberal democracies have often imposed more stringent regulations as part of what we may call, in a nondocumentary sense, the "constitutional" or "rule of law" tradition, that continuing compact between governors and governed about restraint in the use of official power. .

In any system of "rule of law," norms permitting as well as norms restraining the overly zealous collection of evidence for judicial purposes are under continuing stress. Defendants plead that judicial inquiry is being exploited as an excuse to conduct wide-ranging interventions into protected private spheres. Potential plaintiffs claim that they cannot prove their cases unless evidence completely within the control of the defendant is discovered. If the gravamen of the dispute is not merely a personal injury, but an allegation that the defendant, in not "playing by the rules," is harming the entire community, the plaintiff may argue with some cogency that prosecution of the case to his advantage, as well as vindication of the relevant norms to the community's, will be rendered impossible. The government apparatus bringing criminal or civil suits on behalf of the community often lodges a similar argument. With the extraordinary growth in the technology of crime, government personnel frequently maintain that they are unable to gather evidence for prosecution and for the protection of public order unless restraints on the gathering of evidence are relaxed.¹ This claim eventually stirs and then is countered by the ancient fear that the apparatus of justice may degenerate into little more than another instrument of elite control over an intimidated rank and file.²

In international adjudication, the problem is, if anything, aggravated. Formally speaking, there is no public prosecutor *jure gentium*; virtually all adjudications are initiated and conducted by states and against states. Compulsory and effectively sanctioned methods for securing necessary evidence, devices such as the interrogatory, discovery, and the subpoena duces tecum found in

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¹ See, e.g., Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 222 (1974).

² See, e.g., Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Levin & Cohen, *The Exclusionary Rules in Nonjury Criminal Cases*, 119 U. PA. L. REV. 905 (1971); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).

many domestic legal systems, do not exist. The "rule in *Parker's case*,"³ which admonishes states to yield all the information pertinent to the suit and under their control, is often an empty ploy; even if the defendant-state were willing to inventory all the pertinent evidence it had, there is really no way a plaintiff-state can compel it to surrender evidence that may be indispensable to the prosecution of its case. Hence, in international law, even more than in domestic systems, pressure may mount for the unilateral (and in some instances unlawful) gathering of evidence. But unilateral methods can themselves become a new source of conflict. This is, in short, the plaintiff's dilemma.

The plaintiff's dilemma confronts international tribunals with difficult and important choices. A municipal court can have its cake and eat it, too: when confronted with evidence secured unlawfully by a government department, it has the option of accepting the evidence while at the same time penalizing the specific agent responsible for its acquisition. But since international tribunals cannot penalize particular officers within a state, they do not have this option. International decision makers, when presented with claims supported by illegally obtained evidence, must balance the needs of a good faith plaintiff to secure evidence for its case against the rights of the defendant to the integrity of its own processes of confidentiality and secrecy. Yet the decision maker must also consider the more general need of the international community to maintain respect for the "sovereignties" of states. Because world order may be seriously threatened by evidentiary incursions, the international tribunal must be very sensitive to the provocativeness of an unlawful gathering of evidence and the consequences it may precipitate, no matter how damning the evidence retrieved may be.

I.

It is commonly acknowledged that "the practice of international tribunals in the admission of evidence has developed a pattern comparable to that of the liberal system of procedure in the civil law countries."⁴ But scholars differ as to the reasons. "Anglo-American law," writes Sandifer, a commentator quite representative of the general view, "has exerted only a minor influence

³ See W. M. REISMAN, NULLITY AND REVISION 593-94 (1971):

The most extreme statement of the international burden of disclosure is found in the *Parker Claim* before the United States-Mexican General Claims Commission in 1927. In this case, the commission held that the respondent government was under an "obligation to lay before the Commission all evidence within its possession to establish the truth whatever it may be" and proceeded to declare that:

the parties before this Commission are sovereign nations who are in honor bound to make full disclosures of the facts in each case so far as such facts are within their knowledge or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case no matter what their effects may be.

The rule in *Parker's case* has been cited with approval by other tribunals, and similar high burdens of disclosure appear in many compromises [footnotes omitted].

⁴ D. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 176 (1975).

on the matter of the admission of evidence.⁵ Sandifer suggests that this differential influence of civil and common law states derived from the relatively greater participation of civil-law-trained lawyers in the conduct of international tribunals.⁶ Lauterpacht, in contrast, attributed the lesser influence of Anglo-American evidentiary rules to their inherent inappropriateness for international tribunals:

The question of rules of evidence applied by international tribunals shows . . . that international judicial settlement may be relied upon to produce, independently of any particular system of law, rules appropriate to its own requirements and circumstances. Thus, the history of international arbitration shows that whatever may be the merits of the strict Common Law rules regulating the admissibility of evidence and of burden of proof, it is not practicable to follow them in international litigation. They are not followed there; in fact, they have been expressly repudiated. There are therefore in this matter no longer two schools of thought in international law; there is one rule of international law on the subject, which as it happens, does not coincide with that which Common Law courts apply in actions brought before them.⁷

In Anglo-American law, the party adducing challenged evidence bears the burden of establishing that the evidence satisfies all applicable rules regarding admissibility. In international practice, as in the civil law,⁸ the burden is shifted; evidence offered within time limits established by the tribunal will normally be admitted unless the individual challenging its acceptance can show specific grounds for nonadmissibility.⁹ Sandifer summarizes this underlying approach:

In the absence of the provision of a specific ground of exclusion in the arbitral agreement, there is no rule of law that can be invoked as

⁵ *Ibid.*

⁶ *Ibid.*

⁷ H. Lauterpacht, *The So-called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31, 41 (1931).

⁸ See Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) ("It is said that while common law systems are mainly concerned with the issue of admissibility, civil law systems admit all evidence that is logically relevant." *Id.* at 513).

⁹ Sandifer writes:

The International Court of Justice has construed the absence of restrictive rules in its Statute to mean that a party may generally produce any evidence as a matter of right, so long as it is produced within the time limits fixed by the Court. Evidence submitted after those time limits may only be admitted with the consent of the other party and subject to the sanction of the Court. In practice, while the Court has placed few restrictions upon the rights of the parties to produce whatever evidence they see fit, it has upon occasion exercised its discretionary authority to refuse to accept evidence offered.

D. SANDIFER, *supra* note 4, at 184-85 (footnotes omitted).

Rosenne writes:

The practical inability to deduce from the preceding survey of the practice of the Court—whether its administrative decisions or its judicial work—clear guidance on the material admissibility of evidence (beyond the general test of relevance) is to no small extent due to the nature of international litigation and the manner in which it is conducted. The truth is that material admissibility is rarely disputed, least of all on formal grounds, and the parties concentrate on attacking the weight of evidence brought by the other side.

2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 584 (1965).

binding a tribunal to exclude particular evidence. In practice . . . tribunals have been unwilling to exclude evidence in reliance upon general rules or principles, drawn from the practice of other tribunals or from municipal law. Admission is a matter of right, and the burden is upon the party challenging any piece of evidence to show that the particular procedural law of the tribunal will be violated by a refusal to exclude it.¹⁰

Commentators agree that, in the words of one observer, "[e]vidence is seldom excluded by the [International] Court [of Justice]."¹¹ The Swiss Memorial in the *Interhandel* case¹² averred that the liberal standard of admissibility established by the Court meant that "[l]es parties sont . . . dans une large mesure libres de présenter les preuves qu'elles estiment nécessaires et opportunes."¹³ That is the traditional practice in international arbitration.¹⁴ Umpire Gutiérrez-Otero, in his opinion in the *Franqui* case¹⁵ before the Spanish-Venezuelan Mixed Claims Commission of 1903, quoted Mérignhac¹⁶ to the effect that "le tribunal arbitral demeurera libre d'employer, pour s'éclairer, tous les genres de preuves qu'il croira nécessaires; et il ne sera lié, à cet égard, par aucune des restrictions qu'on rencontre dans les lois positives, spécialement quant à l'administration de la preuve testimoniale."¹⁷

One explanation of the practice of liberal admission before international tribunals is that the nature of the cases presented and of the tribunals themselves demands an especially broad tolerance. After all, tribunals in international law have traditionally been viewed as creatures of the consent of the litigants with only those powers the litigants have accorded them. Perhaps judges have been hesitant to exclude evidence in view of the very difficulty often attending its acquisition. Others have theorized that the rules of admissibility are an integral part of the trial-by-jury system in Anglo-American procedure.¹⁸ According to this rationale, it is appropriate for "the [interna-

¹⁰ D. SANDIFER, *supra* note 4, at 189-90.

¹¹ Alford, *Fact Finding by the World Court*, 4 VILL. L. REV. 37, 81 (1958). Cf. M. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE §520, at 571 (1943) ("The occasions have been rare in which the [Permanent] Court [of International Justice] has excluded evidence proffered, and no general rules for exclusion have been formulated").

¹² *Interhandel Case (Switz. v. U.S.)*, 1959 ICJ REP. 6 (Judgment of March 21).

¹³ *Mémoire du Gouvernement de la Confédération Suisse*, 1959 ICJ Pleadings (*Interhandel*) 79, 128 (Memorial dated March 3, 1958).

¹⁴ J. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS §§379-83 (1926); J. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION 192-93 (1959).

International tribunals usually allow the parties the greatest freedom in presenting evidence. In international law there are no general rules requiring the exclusion of categories of evidence. While it is open to the parties to agree upon rules of exclusion, the tendency has always been to give tribunals the widest discretion in the admission and assessment of evidence.

Id. at 192.

¹⁵ *Franqui Case (Spain v. Venez.)*, 10 R. Int'l Arb. Awards 751 (1903).

¹⁶ A. MÉRIGNHAC, TRAITÉ THÉORIQUE ET PRATIQUE DE L'ARBITRAGE INTERNATIONAL §272, at 269-70 (1895).

¹⁷ 10 R. Int'l Arb. Awards at 751.

¹⁸ The assumption that restrictive rules of admissibility are an exclusively Anglo-American phenomenon, evolving in the law of evidence of common law countries only because of the

tional] tribunal to admit evidence that might normally be rejected in municipal litigation" because "the members of the tribunal, being jurists trained in the sifting of evidence, are [unlike jurors] competent to appreciate the evidence according to its intrinsic and relative value."¹⁹

But it would be wrong to say that there are no restrictions on admissibility of evidence. Although barriers to the admission of evidence have been relatively insignificant, they have not been entirely lacking. Commentators have pointed to considerations of internal procedural fairness and the orderly administration of judicial machinery ("good judicial order") as the most important policy limitation on the liberal evidentiary standard. Thus, evidence purposely withheld for late submission, with the intent of gaining an unfair advantage, has on occasion been rejected by international jurists. Different conceptions of what constitutes bad faith, however, have protected some such tardy submissions from rejection. In the *Island of Palmas* arbitration,²⁰ for example, Judge Huber found that the Netherlands had committed no impropriety in withholding documents mentioned in its memorandum until they were called for by the arbitrator in his discretion.²¹

Where arbitral agreements have limited the nature of the evidence to be considered, some tribunals have refused admission of other evidence, on the rationale that were exceptions made, opposing parties might ignore the decision of the tribunal on grounds of *excès de pouvoir*.²² Article V of the arbitral agreement concerning the *Masica Incident*,²³ for example, specified that "neither government shall be entitled to put in any further evidence as to the events which occurred on the 16th June, 1910, beyond that which was given before, or taken into consideration by, the above-mentioned court of enquiry at La Ceiba."²⁴ On other occasions, tribunals have shown some reluctance to admit evidence not submitted within time limits fixed by them. At least twice,

institution of the jury, is widely shared among scholars. McCormick has written: "It is safe to say that without the jury there would be no law of evidence remotely resembling the rules of admissibility which make up its contents in English-speaking countries today." *Evidence*, in 5 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 639 (1931). Wigmore is to the same effect:

But chiefly it owes its origin, maintenance, and system to the separation of function between judge and jury. If this separation of judge and jury had not existed as it has, with all its history, nothing marked would probably have developed. Under the Continental systems, in which the jury is but a modern borrowing, little of the sort appears.

I J. WIGMORE, *EVIDENCE* §28, at 409 (1940). Sandifer writes: "The radical difference in Anglo-American and in civil law rules relating to admissibility of evidence is generally attributed to the presence of the jury in the judicial system of the former and its absence in the latter." D. SANDIFER, *supra* note 4, at 177.

¹⁹ D. SANDIFER, *supra* note 4, at 182.

²⁰ *Island of Palmas Case (Neth. v. U.S.)*, 2 R. Int'l Arb. Awards 831 (Perm. Ct. Arb. 1928).

²¹ *Id.* at 840-42. See D. SANDIFER, *supra* note 4, at 60-69.

²² On nullity in general, see A. BALASKO, *CAUSES DE NULLITÉ DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC* (1938); W. M. REISMAN, *supra* note 3; J. WITENBERG, *L'ORGANISATION JUDICIAIRE, LA PROCÉDURE ET LA SENTENCE INTERNATIONALES* (1937).

²³ Arrangement between the United Kingdom and Honduras Referring to Arbitration Matters relating to the *Masica Incident*, 10 AJIL, Supp. 98 (1916).

²⁴ *Id.* at 100.

for example, the Central American Court of Justice proved sympathetic to challenges to the admissibility of documents not submitted with the complaint, although in neither case did the Court find that it was necessary specifically to exclude the tardily proffered evidence.²⁵ Similarly, in the *Saint-Naoum* case,²⁶ the Permanent Court of International Justice refused to hear testimony offered by the Serb-Croat-Slovene representative after the close of proceedings, despite the earlier unavailability of the witness concerned.²⁷

On at least one occasion, the Permanent Court of International Justice rejected documentary evidence because it was not filed in proper form. In the *Free Zones* case,²⁸ Switzerland offered documents that, although bearing indirectly on the case, were not annexed to any written proceedings and were therefore not formally presented either to the judges or to the opposing party, France. When the Swiss agent referred to the documents during oral argument, France objected and the Court, invoking Article 52 of its Statute,²⁹ refused to admit the evidence.³⁰ Under similar circumstances, in the *Mavrommatis Jerusalem Concessions* case,³¹ the Court hesitated to receive into evidence specific documents that had not been annexed, and admitted the evidence only "by a special decision . . . under Article 33 of the Rules."³²

Other policies have also animated decisions by international tribunals to exclude apparently relevant evidence. Several decisions of the Permanent Court of International Justice manifest a concern for maintaining the viability of efforts at extrajudicial settlement by insisting on the preservation of the

²⁵ *Honduras and Nicaragua v. Guatemala and El Salvador, THE CLAIM INSTITUTED BEFORE THE COURT OF JUSTICE OF CENTRAL AMERICA BY THE GOVERNMENT OF HONDURAS AGAINST THE GOVERNMENT OF GUATEMALA* 90-143 (1908); *Felipe Molina Larios v. Honduras*, 3 ANALES DE LA CORTE DE JUSTICIA CENTROAMERICANA 58, 60-61 (1913). See D. SANDIFER, *supra* note 4, at 185-86.

²⁶ *Question of the Monastery of Saint-Naoum (Albanian Frontier)*, 1924 PCIJ, ser. B, No. 9.

²⁷ 1924 PCIJ, ser. C, No. 5-II, at 381-82; 1926-27 PCIJ, ser. E, No. 3, at 214.

²⁸ *Case of Free Zones of Upper Savoy and the District of Gex*, 1932 PCIJ, ser. A/B, No. 46.

²⁹ Article 52 of the Statute of the Permanent Court of International Justice read: "After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents." Article 52 of the Statute of the International Court of Justice is identical to that of the Permanent Court.

³⁰ 1929 PCIJ, ser. A, No. 22, at 14, 21.

³¹ *The Mavrommatis Jerusalem Concessions*, 1925 PCIJ, ser. A, No. 5.

³² 1929-30 PCIJ, ser. E, No. 6, at 290.

Article 33 of the 1926 Rules of the Permanent Court of International Justice read:

The Court shall fix time limits in each case by assigning a definite date for the completion of the various acts of procedure, having regard as far as possible to any agreement between the parties.

The Court may extend time limits which it has fixed. It may likewise decide in certain circumstances that any proceeding taken after the expiration of a time limit shall be considered as valid.

If the Court is not sitting, the powers conferred upon it by this article shall be exercised by the President, subject to any subsequent decision of the Court.

Rules of Court, adopted on July 31, 1926, PCIJ, ser. D, No. 1, at 33, 46-47.

confidentiality of earlier efforts at settlement.³³ In the *Chorzów* case,³⁴ the Court refused to consider declarations, admissions, or proposals made by the parties in the course of prior, abortive direct negotiations.³⁵ During proceedings in the *Danube Commission* case,³⁶ the Court declined admission of the history of certain articles of the Versailles Treaty, since these were "confidential" and had not "been placed before the Court by, or with the consent of, the competent authority."³⁷ By special order in the *Oder Commission* case,³⁸ the Court ruled inadmissible, as *travaux préparatoires*, the minutes of the Commission on Ports, Waterways and Railways of the Paris Peace Conference.³⁹ And when, in the *Meuse* case,⁴⁰ the Netherlands objected to Belgium's offer into evidence of a treaty draft that the two parties had considered during abortive negotiations, the Court declined to make the document a part of the record.⁴¹

Beyond these scattered examples, international tribunals have displayed little interest in excluding evidence. Documentary, testimonial, and real evidence has frequently been accepted for consideration even when irregularly presented. Despite the intermittent storms over this matter in domestic law, strong opposition to the near lack of international evidentiary barriers has never really developed. The general consensus of practitioners and commentators alike is that stricter rules of admissibility are wholly inappropriate for international arbitration or adjudication.⁴² In his opinion in the *Máximo Mora*

³³ This consideration is an important one on the domestic level as well. Rule 408 of the Federal Rules of Evidence provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

According to the Advisory Committee's Note to Rule 408, "exclusion may be based on two grounds. (1) The evidence is irrelevant. . . . (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes."

See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §274 (2d ed. E. Cleary 1972).

³⁴ Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction), 1927 PCIJ, ser. A, No. 9.

³⁵ *Id.* at 19.

³⁶ Jurisdiction of the European Comm'n of the Danube between Galatz and Braila, 1927 PCIJ, ser. B, No. 14.

³⁷ *Id.* at 32.

³⁸ Case Relating to the Territorial Jurisdiction of the Int'l Comm'n of the River Oder, 1929 PCIJ, ser. A, No. 23.

³⁹ *Id.* at 42.

⁴⁰ The Diversion of Water from the River Meuse, 1937 PCIJ, ser. A/B, No. 70.

⁴¹ 1937 PCIJ, ser. C, No. 81, at 220, 224.

⁴² See, e.g., Alford, *supra* note 11, at 81:

An exclusion of evidence by the [International] Court [of Justice] based upon the way in which it was secured would be unrealistic in view of the known barriers established by States

case⁴³ before the United States-Spanish Mixed Claims Commission of 1871, the Spanish arbitrator expressed a common attitude:

It may be that under the strict English-American rules of evidence which prevail in trials where a court decides questions of law and a jury decides questions of fact, and the judge prescribes what witnesses can testify, and what description of evidence can be permitted to go to the jury, these newspaper clippings might not be admitted. But this commission is not bound by such English-American rules of evidence in jury trials. The arbitrators hear and decide questions of law and fact alike. The arbitrators are competent to decide for themselves as to the amount of credibility to be given to any evidence, and are not in danger of being misled, as juries may be. This objection to the reception of newspapers to prove facts of general and public notoriety seems, so far as I can see, to grow out of a very technical, artificial, and varying rule in English and American tribunals, which excludes all evidence which can be labeled as hearsay.⁴⁴

More recently, Rosenne has asserted, with regard to documentary evidence submitted to the International Court, that "the restrictions upon admissibility of evidence sometimes encountered in municipal procedure (and connected with the system of jury trial) have no place in international adjudication, where the relevance of facts and the value of evidence tending to establish facts are left to the entire appreciation of the Court."⁴⁵

The scholarly discussion is plainly not satisfactory. The resistance of international commentators and decision makers to more formidable evidentiary barriers stems from a constricted conception of the purpose of rules limiting the admissibility of evidence. As our review has shown, most arbitral and doctrinal discussions have characterized the problem of admissibility solely in terms of the differential skills of legal specialists and laymen in a courtroom. Strict rules of admissibility are typically viewed as having no rationale whatsoever in the absence of the jury trial. Since the institution of the jury is not part of international judicial practice, doctrinalists found no reason for strong restrictions upon the acceptance of evidence in that context. Whatever limitations were accepted were attributed to an overriding concern with internal procedural fairness and the orderly administration of judicial machinery. The concern for "good judicial order" obviously must figure prominently among the policies stimulating the exclusion of evidence. But it is neither the only nor the most important evidentiary policy.

International tribunals and judicial scholars err seriously when, relying purely on historical argument and rigidly textual interpretation, they ignore

to the flow of information. The Court is not faced with the problem of intermittent police abuses of individuals which national constitutional guarantees are designed to minimize. The Court must get its evidence when and by whatever means it can obtain it.

⁴³ Case concerning Antonio Máximo Mora (Spain v. United States), 16 RECORD, OPINIONS AND DECISIONS, UNITED STATES-SPANISH MIXED CLAIMS COMMISSION, Decision No. 48 (1871).

⁴⁴ Count Lewenhaupt, Umpire, Case of Antonio Máximo Mora, quoted in D. SANDIFER, *supra* note 4, at 182-83.

⁴⁵ 2 S. ROSENNE, *supra* note 9, at 557.

other significant policy implications involved in rules limiting admissibility. One such implication is the constitutional or rule of law dimension in which courts are supposed to function, *inter alia*, as a buffer between the other institutions of government and the other participants in the social process. While the structural features of the domestic decision process itself and, in particular, the presence or absence of the jury will unquestionably have some effect on rules of evidence, many of the restrictive principles of admissibility now derive from complex relationships between different branches of government. Restrictive admissibility is often an attempt to limit the power of the prosecutor and to protect the community from overly zealous invasions of privacy in the interests of gaining evidence for judicial purposes.⁴⁶ *Mutatis mutandis*, the same problems may apply on the international level. Indeed, international tribunals have not been entirely oblivious to this dimension. On two occasions, at least, the admissibility of relevant evidence has been questioned because it was secured in a manner that the court deemed harmful to public order and that it did not wish to encourage.⁴⁷

II.

The question of the admissibility of evidence obtained by unlawful intervention was raised, in rather sharp fashion, in the merits phase of the *Corfu Channel* case⁴⁸ in 1949. British ships transiting the Straits of Corfu in a claimed right of innocent passage struck mines whose presence had not been made known by the Albanian Government. Thereafter, British minesweepers swept the Channel without securing Albanian permission. Later, in the International Court, the United Kingdom sought to use the mines that had been collected in the sweeping operation as evidence of Albanian responsibility.

The Court paid close attention to the question of the lawfulness of the November 1946 sweeping operation. "Operation Retail," as it was called by both the parties and the Court, had been preceded by a request from the United Kingdom to the Albanian Government for permission to sweep Corfu Channel. The Albanian Government had replied on October 31, 1946 that it did not consent to any sweeping within Albanian territorial waters, *i.e.*, in the Straits of Corfu. In the meanwhile, the United Kingdom had requested the permission of the International Central Mines Clearance Board for a sweeping of the Channel; the board indicated its judgment of its own lack of competence by approving the British request subject to Albanian consent.

⁴⁶ Such was the basic rationale for the United States Supreme Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which held that the Fourteenth Amendment fully incorporated the Fourth Amendment's guarantee against unreasonable searches and seizures, on the ground that "the only effectively available way" that one could compel respect for the "constitutional guaranty" of the Fourth Amendment was to exclude from both state and federal criminal prosecutions all evidence obtained in violation of the Constitution. 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). Stressing the importance of "the imperative of judicial integrity," the Supreme Court noted that "[n]othing can destroy a government more quickly than its failure to observe its own laws." 367 U.S. at 659.

⁴⁷ See notes 49-69 and accompanying text, *infra*.

⁴⁸ *Corfu Channel Case (UK v. Alb.)*, 1949 ICJ REP. 4 (Judgment of April 9).

When Britain then informed Albania of its intention to conduct the sweep, Albania replied that a sweep within its territorial waters, where it claimed "foreign warships [had] no reason to sail,"⁴⁹ would be considered a deliberate violation of Albanian territory and sovereignty.

Despite the protest, Operation Retail was carried out on November 12 and 13. The British invited an officer of the French Navy to attend as observer. There seems to be no evidence that the sweep was conducted with any purpose other than its manifest objective, nor any dispute about the absence of formal authority for it. As the Court observed:

The United Kingdom Government does not dispute that "Operation Retail" was carried out against the clearly expressed wish of the Albanian Government. It recognizes that the operation had not the consent of the international mine clearance organizations, that it could not be justified as the exercise of a right of innocent passage, and lastly that, in principle, international law does not allow a State to assemble a large number of warships in the territorial waters of another State and to carry out mine-sweeping in those waters. The United Kingdom Government states that the operation was one of extreme urgency, and that it considered itself entitled to carry it out without anybody's consent.⁵⁰

The United Kingdom justified its action on two grounds. One related to an agreement among the United Kingdom, France, the Soviet Union, and the United States, allocating competence for mine clearance. The Court dismissed it summarily. The second justification related to the gathering of evidence. As the Court phrased it, the main defense of the United Kingdom was that "the *corpora delicti* must be secured as quickly as possible, for fear they should be taken away, without leaving traces, by the authors of the minelaying or by the Albanian authorities."⁵¹ The justification for this defense rested on "a new and special application of the theory of intervention, by means of which the State intervening would secure possession of evidence in the territory of another State, in order to submit it to an international tribunal and thus facilitate its task."⁵² The United Kingdom also justified Operation Retail as a method of self-protection and self-help.⁵³

⁴⁹ *Id.* at 33.

⁵⁰ *Id.* at 33-34.

⁵¹ *Id.* at 34.

⁵² *Ibid.*

⁵³ In oral argument, Sir Eric Beckett, representing the United Kingdom, characterized his nation's intervention theory as follows:

[W]e say that the United Kingdom had the right to sweep for the purposes of investigating the cause of the explosions under *Saumarez* and *Volage* in October, because (i) the United Kingdom did suspect, and had good reason to suspect, that a most serious international offence had been committed against ships of the Royal navy; (ii) the United Kingdom wished to bring a claim before the Security Council, if evidence was found to justify its suspicions; (iii) the United Kingdom feared, and had good reason to fear, that if very speedy action was not taken that evidence would be made to disappear by the party guilty of this offence.

Reply by Sir Eric Beckett, ICJ Pleadings (4 Corfu Channel) 542, 572 (Reply dated Jan. 18-19, 1949).

The legality of such intervention as its minesweeping operation represented, asserted the United Kingdom, was well recognized in international law:

(a) There is recognized in international law the right of a state, when a state of affairs involving a serious and flagrant breach of the law has been brought about by another State

The International Court rejected both of these claims. It felt that the assertion of a right of intervention for these purposes would be abused by relatively stronger states and ruled that the principle of self-help would not apply even after "the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes."⁵⁴ Nonetheless, the Court viewed those circumstances as extenuating to the point of virtually obliterating Britain's adjudged counter-delict. It declared "that the action of the British Navy constituted a violation of Albanian sovereignty,"⁵⁵ but the Court refused to apply any serious sanction against the United Kingdom. It decided unanimously that its declaration of the unlawfulness of the United Kingdom's act "is in itself appropriate satisfaction."⁵⁶ More important, it admitted evidence concerning the mines that had been unlawfully swept by the United Kingdom.

The phenomenon of a judgment that affirms a norm, while allowing the illegal fruits of its violation to be enjoyed by the violator, is not unusual. Courts doing this seem to wish to vindicate the norm, while establishing, by special jurisprudence, that some violations will be tolerated. In terms of strictest

or has been permitted to come about, to intervene by direct action. The purpose of such intervention may be to prevent the continuance of the situation which is in breach of the law, or, where the intervening State has suffered an injury of a nature capable of being redressed, to further the administration of international justice by preventing the removal of the evidence.

(b) In this case it was plain from the nature of the incident of 22nd October that a serious breach of international law had been committed by some State whether Albania or another. Not only had a dangerous obstruction been placed right across an international highway of navigation, thus constituting a threat to the shipping of all nations, but this obstruction took the form of a minefield the laying of which was a manifest breach of the Hague Convention VIII of 1907. Either of these grounds was in itself sufficient to justify intervention by the United Kingdom, the State which had suffered from it.

Reply of the United Kingdom, *id.* (2 Corfu Channel) 241, 282, para. 82 (Reply dated July 30, 1948).

The United Kingdom acknowledged that any right of intervention must be "exercised in a reasonable manner so as to cause the minimum interference with the sovereignty of the State concerned." *Id.* at 284, para. 82(f). It argued that this requirement had been fulfilled in Operation Retail because "the Government of the United Kingdom in fact took the utmost precautions to ensure that all aggressive and provocative acts were avoided and that Albanian sovereign rights were not infringed." *Id.* at 286, para. 84.

In response to the claims of the United Kingdom, Albania asserted that a right of intervention, if it existed any longer in international law, was a collective right of international organizations and not individual states. Reply of Albania, *id.* at 313, 372, para. 151 (Reply dated Sept. 20, 1948). According to Albania, the fact that British ships were victims of mine explosions did not excuse the sweeping operation. And even if Great Britain had possessed a right of intervention, the Albanians declared, the abusive manner in which the minesweeping operation was exercised would itself constitute an infringement upon the sovereignty of Albania. *Id.* at 372, para. 150. The Albanian representative warned that support by the International Court for the act of the United Kingdom would create a serious threat to world order: "Le Gouvernement albanais . . . ajoute qu'il serait fort dangereux pour la Cour de sanctionner par son autorité des pratiques qui ne correspondent pas à l'état actuel des relations internationales et sont la négation même de la justice internationale." *Id.* at 371, para. 147.

⁵⁴ 1949 ICJ REP. at 35.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

construction, mines illegally swept in another's territorial waters are admissible to prove sole responsibility for their explosion and injury to others. For precedential purposes one may say that unlawfully gathered evidence may at least on the facts of the *Corfu Channel* case be deemed admissible.⁵⁷ More broadly construed, the only practical interpretation of this aspect of the *Corfu Channel* judgment would seem to be that certain unlawful collections of evidence will be declared violations of international law, yet no sanction will be imposed on the gatherer, nor will the illegally gained evidence be deemed inadmissible.

It is noteworthy that the result achieved did not require these fine distinctions. The Court might have admitted the mines but substantially penalized the United Kingdom. Alternatively, it might have denied admissibility but imposed an onerous *praesumptio juris*, effectively requiring Albania to demonstrate either that it could not have known of the mines or that it had used all due diligence in seeking to clear the Corfu Channel. Either technique would have affirmed the normative principle prohibiting the unlawful gathering of evidence, while still confirming Albanian liability. We will speculate below on the reasons why the Court rejected these alternatives and the longer range political consequences of the way it formulated its decision.

III.

The issue of admissibility presents itself as a subtle factor in a different context in the *Iranian Hostages* case⁵⁸ of 1980. The Iranian Government, despite the compelling jurisdictional case submitted by the United States, chose not to appear in court, and availing itself instead of an interesting practice long countenanced by the Permanent Court and the International Court,⁵⁹ presented its arguments by letter delivered through diplomatic channels. A basic Iranian point, not always stated with optimum coherence, was that the invasion of the Embassy, the sequestration of the documentary material there, and the incarceration of the U.S. diplomats had to be put in context. As the Iranian letter explained:

[I]t cannot be studied separately . . . [for it] involves, *inter alia*, more than 25 years of continual interference by the United States in the in-

⁵⁷ *But see* Shah, *Discovery by Intervention: The Right of a State to Seize Evidence Located Within the Territory of the Respondent State*, 53 AJIL 595, 612 (1959):

Certain eminent writers are of the view that, despite what they term the somewhat general language used by the [*Corfu Channel*] Court, the observations of the Court could be confined merely to rejecting the right of self-help for the purpose of discovery of evidence, and self-help might still be regarded as legal in some circumstances. It is submitted that the learned authors, in their anxiety to retain the right of self-help for states till such time as the systems of pacific settlement of international disputes and of collective security established by the Charter can be rendered effective, read into the declaration of the Court an interpretation that it cannot bear. . . . [D]iscovery of evidence by intervention is not a method that is admissible in international law [footnote omitted].

⁵⁸ Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 1 (Judgment of May 24).

⁵⁹ *See, e.g.*, Status of Eastern Carelia (Advisory Opinion), 1923 PCIJ, ser. B, No. 5; Nuclear Tests Cases (Austl. v. Fr.), 1973 ICJ REP. 99 (Order of June 22), 1974 ICJ REP. 253 (Judgment of Dec. 20); Fisheries Jurisdiction Case (UK v. Ice.), 1974 ICJ REP. 3 (Judgment of July 25).

ternal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.⁶⁰

The Iranian claim might be reformulated as follows: The United States is alleged to have intervened in Iranian affairs for a quarter of a century and to have unlawfully influenced Iranian politics during that period. Evidence that would permit the Iranian Government to prove its allegation—excluding that which is in the United States and, of course, is classified and securely kept and is for all intents and purposes nonexistent for influencing international judicial proceedings—is available in the United States Embassy in Tehran and in other consular facilities throughout Iran.⁶¹ If the principle of inviolability of diplomatic premises is taken as an absolute, the United States would be permitted to remove this information or to destroy it in place. Then the Iranian Government would never be able to prove its case, for it is most improbable, if not inconceivable, that the United States would voluntarily release such information or otherwise make it available to an international judicial process. The only way that the Iranian Government could establish its claim would be by a type of international discovery through self-help: precipitous entry into the U.S. facilities, sequestration of the documents there, their examination and filtering, and then their submission in an international process.

In these terms, the constructive Iranian argument can be seen as akin to the British argument in the *Corfu Channel* case and as one more manifestation of what we have characterized as the plaintiff's dilemma. If evidence cannot be gathered immediately, though unlawfully, the entire suit will be frustrated.

In contrast to its treatment in the *Corfu Channel* case, the Court did not explicitly consider the evidentiary dimension of the constructive Iranian claim.⁶² In part, this may be because the Iranian Government did not make

⁶⁰ 1980 ICJ REP. at 8.

⁶¹ No convincing evidence of illegal United States intervention in Iranian affairs seems to have been discovered in the American Embassy in Tehran. Barry Rubin explains the disparity between the expectations of the student militants who seized the Embassy and the reality of their findings in the following terms:

None of [the leaders of the students who occupied the Embassy] had much experience with international politics or with the workings of embassies. This, coupled with their ideology, made their analyses of the United States Embassy's operations inaccurate in the extreme. For them, a State Department report on the Kurdish insurrection or on the anti-Khomeini Islamic terrorist group Forqan was proof that the United States was in contact with these movements, if not directing them. Any meeting between an Iranian official and embassy employees was proof of the former's treason and the latter's espionage. What was the most remarkable was their failure, after months in the embassy files, to produce any hard evidence of their accusations; some of the material circulated as evidence within Iran consisted of the most transparent forgeries.

B. RUBIN, PAVED WITH GOOD INTENTIONS 326 (1980).

⁶² The *Times* of London found an inability independently to scrutinize the evidence to be one of the failings of the five-man United Nations Commission sent to Tehran in February of 1980. In an editorial entitled *A Meaningless Tribunal*, the *Times* criticized the Commission in part as follows:

The United Nations has a fundamental responsibility to uphold and preserve international law. It also has the task of resolving international disputes by whatever peaceful means are

the claim clearly; in part, it may have been the Court's exercise of its own discretion in determining the pertinent and determinative issues to which it should address its attention. Certainly, the continuing detention of the diplomats was then perceived as a grave and combustible threat to world public order that urgently required defusing. Whatever the particular reasons, the Court responded in general terms that the gravity of a seizure of an embassy and its personnel could not be considered "secondary" or "marginal," considering the importance of the legal principles involved.⁶³

In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.⁶⁴

The remedies supplied by diplomatic law to which the Court referred were (1) the declaration by the receiving state of a member of a mission as *persona non grata* under Article 9 of the 1961 Convention⁶⁵ and under Article 23 of

appropriate. The continued captivity of the hostages in Iran has now compelled the United Nations to jettison one of those principles in pursuance of the other. In giving its imprimatur to the five-man Commission investigating the alleged crimes of the former Shah of Iran, the United Nations is playing a dangerous game. It is saying, in effect, that it is prepared to accept, and submit to, one of the most serious and blatant acts of international illegality of the century in the hope of gaining the release of the American hostages, and, as a secondary objective, promoting the normalization of relations between Iran and the United States, especially desirable in the context of the Soviet invasion of Afghanistan.

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The investigation will meet not even the most basic principles of natural justice. There will be no independent scrutiny of the evidence, no cross-examination of witnesses, no attempt to ensure that any denial or explanation or defence on the part of the former Shah is heard and taken into account. It will be an entirely one-sided affair, staged-managed by the Iranians to achieve a particular result.

The Times (London), Feb. 21, 1980, at 15.

⁶³ 1980 ICJ REP. at 38-43.

⁶⁴ *Id.* at 38. See CASE CONCERNING UNITED STATES DIPLOMATIC AND CONSULAR STAFF IN TEHRAN (UNITED STATES V. IRAN), MEMORIAL OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA, pt. V, at 73 (1980):

Various Iranian spokesmen have stated or implied that some of the members of the United States Embassy in Tehran may have been engaged in functions (specifically, information-gathering or intelligence work) that are not contemplated by Article 3 of the Vienna Convention on Diplomatic Relations and that such actions, and the use of Embassy premises for such purposes, justify Iran's failure to accord inviolability to United States diplomatic agents and premises under Articles 22 and 29-35 of the Vienna Convention on Diplomatic Relations. But even if—contrary to fact—the Government of Iran had proved to the Court that in one or more respects the United States or the members of its Embassy had violated one or more obligations under the Vienna Convention, there would be no ground for finding that such violations excuse Iran from the legal obligations . . . described in this Memorial.

⁶⁵ 1980 ICJ REP. at 38-40; Vienna Convention on Diplomatic Relations of 1961, 500 UNTS 95, 23 UST 3227, TIAS No. 7502.

the 1963 Convention,⁶⁶ with the coordinate obligation of the declaring state to provide for the safe exit of the departing diplomat and, (2) *in extremis*, "the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission."⁶⁷ Even in this latter case, under Article 45 of the 1961 Convention,⁶⁸ the diplomatic premises of the erstwhile sending state would still remain inviolable.

In terms of the *Corfu Channel* outcome, all of these remedies fail to assure access to the evidence that the plaintiff has reason to suspect will be grounds for and will promise success in the judicial process. To be sure, the Court's holding cannot be considered dispositive of the plaintiff's dilemma. Only if Iran had released the hostages but retained the information seized when the militants penetrated the diplomatic premises, would the Court have been obliged to determine whether state responsibility was engaged, specifically for retaining the evidence, whether damages might be owing to the United States, and, most important, whether the evidence gained by this unlawful entry could be admitted in a possible suit before the International Court of Justice. Nevertheless, the Court's dispositive lends credence to the inference that the illegally gained evidence would have had to be returned unused, the plaintiff's dilemma notwithstanding. The Court decided unanimously that Iran "must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran."⁶⁹ In these terms, the implication would appear to be that that evidence would not be admissible.

IV.

National decisions seem to have yielded, in certain cases, to the admissibility of evidence gained illegally from diplomatic premises. In the well-known Canadian case of *Rose v. The King*,⁷⁰ the Canadian court permitted the admission of documents obviously taken from Soviet diplomatic premises in Ottawa against the wishes of the Soviet Government. That case, however, was complicated by the fact that the Canadian Government, though using the documents as evidence, had not itself taken them. Moreover, it was the defendant, a Canadian national, who raised the issue of admissibility; the Soviet Union made no effort to claim the documents or to protest their use in the trial. Given the extraordinary circumstances in which the documents reached the court, *Rose* and a number of similar incidents would not appear to be the sorts of incremental erosions of the physical immunity of diplomatic premises that signaled the alarm of the International Court of Justice in the *Iranian Hostages* case. As regards electronic monitoring, however, state practice now appears to tolerate—perforce—much, if not widespread, listening to communications

⁶⁶ 1980 ICJ REP. at 38–40; Vienna Convention on Consular Relations of 1963, 596 UNTS 261, 21 UST 77, TIAS No. 6820.

⁶⁷ 1980 ICJ REP. at 40.

⁶⁸ Vienna Convention on Diplomatic Relations, *supra* note 65.

⁶⁹ 1980 ICJ REP. at 44.

⁷⁰ [1947] 3 D.L.R. 618.

to, from, and within premises, inconsistent with the letter of the 1961 Vienna Convention.⁷¹

V.

The plaintiff's dilemma brings two inclusive interests into conflict. On the one hand, there is a desire to encourage the use of international adjudication for alleged violations of international law and, incident to this, a desire to permit a state to pursue its interests in the courtroom by gathering evidence that will lay the groundwork for a case. A contrary concern is that a state may be overzealous in gathering evidence. Retroactive validation of illegal seizures of evidence could encourage many more interventions into the territory and social processes of other states, many initially justified as good faith efforts to gather evidence. The result could then be more conflict and frustration of the fundamental purposes of international adjudication. Plainly, judges and scholars must begin to clarify policies regarding admissibility of evidence in international adjudications and arbitrations.

In the *Corfu Channel* case, the International Court seems to have yielded to the former interest. That decision may, in retrospect, have been less than optimum. The Court need not have relied on the mines gained in Operation Retail to permit the United Kingdom to pursue its case for injury and demand for damages. As we observed, other devices, such as an absolute presumption of the responsibility of a state for unpublicized mines in its territorial waters or in straits through which international traffic transits, could have achieved the same objective. If the absolute presumption seems too rigid and strains other policies that are appropriate, the Court might have also established an onerous rebuttable *praesumptio juris*. A shifting of the burden of proof would then have required Albania to come forward with evidence indicating that it was not responsible for the location of the mines; inability to shift this burden of proof would have rendered Albania responsible for the injury. In this fashion, the Court could have reached the same conclusion without having

⁷¹ The practice of electronic and even more intrusive surveillance, *inter alia*, of diplomatic premises was defended by John Ehrlichman as authorized by 18 U.S.C. §2511. *Presidential Campaign Activities of 1972, Senate Resolution 60: Hearings before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 2543 (1973-74). In part because of this, 18 U.S.C. §2511(3) was subsequently repealed. For a review of the alleged practice of government surveillance, see V. MARCHETTI & J. MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* 204-05 (1974). The Foreign Intelligence Surveillance Act, 50 U.S.C. §1801 (1978), would appear to contravene the letter of the Vienna Convention on Diplomatic Relations, but may well represent a distressingly wide spectrum of national practice. The United States, as a "rule of law" system in which legislative-bureaucratic controls have been extended increasingly to the foreign affairs sector, may be singular among electronically eavesdropping nations only in that it must establish explicit and publicly acknowledged legislative authority to do things many other states are able to do secretly or discreetly. Hence the United States is singled out for blame for engaging in what may well be operationally accepted conduct. See W. M. REISMAN, *FOLDED LIES*, ch. 1 (1979). Be that as it may, the United States and other states that engage in such conduct must conclude, and presumably have concluded, that the need for and value of intelligence gained by electronic surveillance outweighs the incremental erosion of the norm upholding the inviolability of diplomatic premises and their communications.

had to approve, in effect, a United Kingdom intervention into Albanian territory.

In the *Iranian Hostages* case, one would have expected the Court not to follow the *Corfu* precedent. The importance the Court ascribed to the international diplomatic function, and to the immunity without which it cannot be effectively performed, required a blanket prohibition of the admissibility of any evidence gained unlawfully by a violation of diplomatic premises. This would certainly seem to be the better position. Indeed, if the diplomatic function is as important as the Court and many other authoritative statements have held, then any encouragement of a violation of its immunity would appear certain to jeopardize what international order exists. At least for embassies, if not for many other areas, any illegally gained evidence should be deemed inadmissible. The plaintiff's dilemma should be resolved against the plaintiff.