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The Use of Experts by International Tribunals, by Gillian White (1965)

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recent Cuban Revolution. What is needed, clearly, are comparative historical and sociological studies of lawyers in different societies.

In particular, we need studies of the legal profession that are cast in more sophisticated research designs, including, for purposes of scientific control, lawyers in politics, lawyers out of politics, and politicians who are not lawyers. Otherwise the data that are collected do not permit the falsification of hypotheses, regardless of whether these hypotheses are derived from psychoanalytic or any other set of axiomatic presuppositions.

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THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS. By Gillian White. Syracuse: Syracuse University Press. 1965. Pp. xv, 259. $8.95.

A perusal of the cover literature encasing the volume discloses that "Gillian White" in fact is Gillian *Mary* White. Our author proves to be not a venerable Justinian, but a common law Portia, a Barrister-at-Law of Gray's Inn, a Ph.D from the University of London and a Cambridge University Research Fellow.

The book is designed to fill a textual void discovered by the author when, for a corporate client, she undertook to research the law regarding the use of experts by international tribunals. It is the fourth volume to be published in the Procedural Aspects of International Law Series. Its scope is thus defined: "This study is restricted to the use of independent experts by international judicial tribunals" (p. 3). Although, on occasion, these "experts" may give oral testimony in court and possibly be subjected to oral examination by agents of the parties, their submissions are much more likely to be made in formal written reports to which the parties may add their written comments. Those with a common law background should distinguish such "experts" from "expert witnesses" in common law courts whether called by a party or by the court itself.

International tribunals possess implied rule-making authority and, unless expressly prevented by the terms of the organic statute of a permanent body, or a provision of the *compromis* submitting a cause

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to an *ad hoc* tribunal, may appoint their own experts. After stating this thesis, the author pictures the climate of such proceedings in these words:

> A[n] ... important consequence of the absence of the adversary principle from many international proceedings is the fact that the hearings will be conducted in a manner resembling more closely the inquisitorial system, operative in many civil law jurisdictions. The tribunal will have a considerable degree of control over the adduction of evidence by the parties, who may be permitted to call their own expert witnesses only with permission of the tribunal, which may itself be able to call upon independent experts of its own choice. This power is frequently subject to the important safeguard for the parties of an express right to comment upon any resulting opinion, either in writing or by the experts at an oral hearing (p. 10).

The true task of the expert is to supply the material upon which the tribunal's own evaluation of the facts can be based. There is no definitive means to determine whether the judges have made their own evaluations or have merely followed those made by the expert.

With the stage thus set, the author examines the use made of experts in civil litigation in the domestic courts of France, Germany, Italy, England and the United States. Also considered are their procedures of reference to referees, assessors and special masters. It is stressed that these functionaries must always be subordinate to and never displace the court in the discharge of the adjudicative function.

Chapters III and IV are devoted, respectively, to the express and implied competence of international tribunals *propria motu* to call upon independent experts and to order inquiries and investigations. Express provisions pertaining to this competence are reviewed. These include judicial bodies convened under the Hague Convention for the Pacific Settlement of International Disputes of 1907; the Permanent Court of International Justice and, its successor, the International Court of Justice; the Permanent Court of Arbitration; the Court of Justice of the European Communities; the Franco-Italian, United State-Italian and Anglo-Italian Commissions; the United State-Japanese Property Commission; the Nuclear Security Tribunal of the Organization for Economic Cooperation and Development; the European Commission of Human Rights; and the Court of Human Rights. The author indicates that these tribunals have not extensively used this power. Per-

haps as more technical questions become the subject of international litigation need for such experts will increase.

Recognition of the accepted power of international tribunals in this respect is reflected by the unopposed inclusion in 1958 by the International Law Commission of Article 18 in its draft articles on arbitral procedure. Article 18, in part, reads:

> The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it (p. 72).

The book now turns to an approach of looking at what it is the expert has been asked to do. In summary of Chapter V, which collects boundary cases, the author says:

> The object of collecting and examining these boundary cases has been simply to demonstrate the usefulness of surveys carried out by independent experts in such cases. . . . It is hoped that this examination . . . will be . . . of assistance to those concerned with . . . the presentation of boundary cases to tribunals (p. 103).

This account of eight successful adjudications of boundary disputes ranges from the award of the King of the Netherlands in 1831 in the *Northeastern Boundary* controversy between Britain and the United States to the 1953 decision of the three member Franco-Italian Conciliation Commission which resolved a dispute between France and Italy arising out of the 1947 peace treaty. These cases variously employed surveys, maps, aerial photograph mosaics, and hydrographic, topographic and demographic studies prepared by engineering, forestry, hydrographic and other experts selected by the tribunal.

These peaceful settlements of boundary disputes are nostalgic reminders that the society of nations was once a stately body not infrequently motivated by good will and often given to gentlemanly conduct. In the most recent turmoil between India and Pakistan over their Kashmir border areas no one has proposed arbitration before Premier Chou En-Lai as sole arbitrator, nor submission to a commission of three with an Indian and Pakistani member, presided over by President De Gaulle or Premier Kosygin. In a more serious vein, it just

does not seem "realistic" to suggest that if the disputants would stop shooting at each other long enough to prepare a *compromis*, the matter is justiciable and could be peaceably decided by either the International Court of Justice or the Permanent Court of Arbitration. Without the impartial expert factual approach and third party adjudication the matter will never be resolved. Without compulsory jurisdiction the possibility of its submission to judicial decision is most remote.

The next grouping made by the author collects cases where experts were used to determine facts which, if established, would give rise to international responsibility. The *Oscar Chinn*[1] and *Société Commerciale de Belgique*[2] cases in which the Permanent Court of International Justice declined to use experts are discussed. Also considered is the *Corfu Channel (Merits)*[3] case where naval experts were employed to determine, among other facts, whether a submerged mine field could have been laid by unknown parties if Albania had maintained the sea watch it claimed it did. Two *ad hoc* tribunal proceedings are examined involving governmental liability for allegedly negligent sequestration of enemy property in time of war,[4] in which experts were used to determine the factual circumstances of the sequestration. The primary *caveat* here stressed is that the instructions given to the expert by the court must be precise, and should be submitted in advance to the agents of the parties for comment, to insure that the expert does not inadvertently exceed the terms of his reference.

Instances of the use of experts to aid the Permanent Court in fixing the amount of indemnity to be paid are the *Chorzow Factory Case*[5] and the *Corfu Channel Case*. In the first the experts, industrial engineers, were to value a factory unlawfully appropriated, but the case was settled before they could report. In *Corfu,* Netherlands naval officers examined estimates of destroyer damage which had been submitted by the United Kingdom. The practice of other international tribunals in problems of valuation is reviewed and it is concluded that except in situations where, due to lack of essential evidence or lapse of time, a reference to experts would serve no useful purpose, such references are made.

Chapter VIII addresses itself to situations where states have con-

[1] P.C.I.J., ser. A/B, No. 63 (1934).
[2] P.C.I.J., ser. A/B, No. 78 (1939).
[3] [1949] I.C.J. Rep. 4.
[4] [1955] Int'l L. Rep. 312 (No. 22); [1955] Int'l L. Rep. 317 (No. 22) *sub nom. Re Rizzo and Others* (No. 3).
[5] P.C.I.J., ser. A, No. 17 (1928).

ferred upon arbitration tribunals the power to lay down regulations for the future. In some instances the tribunals have called upon independent experts to assist in this task. The *Bering Sea Fur Seal Arbitration,* the *Free Zones Case* between France and Switzerland, the *Ottoman Debt Arbitration* and the *Trail Smelter Arbitration* between the United States and Canada are reviewed as cases in point. The author believes that these precedents point the way to combining judicial settlements on the basis of law with legislative recommendations for the future regulation of the subject matter of the dispute.

The focus is next shifted to the scope of the power of experts. The experts' role cannot be considered in isolation but is always relative to the overriding competence and function of the tribunal itself. Cited with approval is the statement of Balasko:

> [O]nly a decision emanating from the arbitral tribunal as such can be considered as a valid award.... The award must be the result of the personal participating of each member of the tribunal, to the exclusion of other persons (p. 167).

Fundamental procedural standards dictate this requirement in the absence of express authority to the contrary, either in the organic statute of a tribunal, or by agreement of the parties in the *compromis* in the course of proceedings before an *ad hoc* body. Where expressly agreed, experts may be appointed to carry out in detail decisions already rendered by tribunals or to determine whether specific factual situations come within legal determinations previously made by the tribunal.

Occasionally a dispute is referred to a tribunal composed of non-legal technical experts for final adjudication. This technique is provided for in some oil concession agreements between states and individuals. It is also contemplated in the European Fisheries Convention of 1964 and in the unratified Fishing and Conservation Convention of 1958.

Experts appointed by international tribunals, like consuls, should be accorded restricted privileges and immunities related to their function rather than to the experts as persons. This point is not covered by the statute of either the Permanent Court or the International Court of Justice. A 1946 agreement between the Netherlands and the President of the Court provides that in the Netherlands "witnesses and experts shall be accorded the immunities and facilities necessary

for the fulfilment of their mission." General Assembly resolution 90(I) recommends that witnesses, experts and persons performing missions by order of the International Court be accorded by member states the privileges and immunities of experts on missions for the United Nations. These are quite broad. This United Nations resolution has been fully implemented by municipal law only in Switzerland. It at least furnishes a specific guide for making travel and other arrangements for experts, both with the states who are parties to the proceedings and with third states when duties of experts call them to such states. Arrangements were successfully negotiated by the Registrar of the Court with Italy and Yugoslavia, as well as Britain and Albania, on behalf of the *Corfu Channel Case* experts. Agreement of party states may normally be anticipated, but as matters now stand, third states, except the Netherlands and Switzerland, are free to grant or withhold such privileges and immunities.

Finally, Chapter XI relates to fees and expenses of experts. Normally the common expenses of arbitration before *ad hoc* bodies are shared equally among the parties and fees of experts appointed by the tribunal, their travelling and other expenses, and the costs of inquiries ordered by the tribunal are treated as common expenses. Most permanent tribunals including the International Court of Justice pay the fees and expenses of expert inquiries ordered by them from funds derived from the contributions to the tribunal budget. In its Budget Estimates for 1949 the International Court said:

> The Court deems it necessary to have a budgetary provision for the compensation of judges *ad hoc*. However, since assessors or experts are not usually called by the Court, the Court considers it possible to omit provision in the budget for such expenditures. It is suggested that an authorization for use of the Working Capital fund in case of necessity be granted (p. 205).

In the Court of Justice of the European Communities and in the Arbitral Commission on Property, Rights, and Interests in Germany, jurisdiction is exercised over disputes between individuals as well as between states. Accordingly, much of their procedure has been modeled on municipal court systems and these bodies may apportion the costs of court experts among the parties with power to make the losing party pay all.

The book contains three detailed and interesting appendixes. The first covers the use of experts by the Court of Justice of the European

Communities, and the second the practices of the British Foreign Compensation Commission and the Foreign Claims Settlement Commission of the United States in this regard. Appendix III contains a helpful draft of clauses to be incorporated in either a bilateral arbitration agreement or the constitution of a permanent tribunal. Here the author effectively accomplishes her declared purpose to "... embody the essential points which need to be covered if the experts are to fulfill their function effectively and impartially" (p. 242).

The organization of the book results in repetitive discussions of the same cases. In a treatment in depth of a limited subject this is perhaps inevitable.

The volume is a worthy addition to the burgeoning literature of international law.

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