Consistency in the ICJ’s Approach to the Standard of Proof: An Appraisal of the Court’s Flexibility

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Abstract

Taking steps from Judge Higgins' invitation to the ICJ "mak[ing] clear what standards of proof it requires to establish what sorts of facts", the contribution addresses the Court's case law with a view to verifying the degree of consistency in its practice. The study comes in three parts. First, the absence of rules on the standard of proof in litigation before the ICJ is addressed, and the Court's inherent power to choose the standard of proof is upheld. Second, the ICJ case law is addressed from which a highly flexible approach to the standard of proof is inferred. In particular, a two-tier approach in the matter is highlighted with regard to cases in which all the disputing parties appear, whereas the Court appears to follow a single-tier analysis in cases of non-appearance. Lastly, some concluding remarks are provided, highlighting the accordance of such a flexible approach with general principles of procedural law.

Keywords

International Court of Justice – evidence – standard of proof – general principles of procedural law – dispute settlement

1 Introductory Remarks

In her famous Separate opinion in the *Oil Platforms* case, Judge Higgins warranted "[t]he principal judicial organ of the United Nations [to] make clear

what standards of proof it requires to establish what sorts of facts".[1] Hers was just one of the many statements by Members of the Court expressing doubts about the way in which the ICJ handles the standard of proof,[2] *i.e.* "[t]he degree of proof required for any fact in issue in litigation, which is established by assessing the evidence relevant to it".[3]

The literature has devoted attention to the Court's approach to the standard of proof. The analysis of ICJ case law on the matter in point addresses two issues. Namely, the identification of the standards the Court applies to assess whether the burden of proof has been discharged, and the criteria for the choice of a certain standard in a given case.

As to the first issue, three standards of proof have been identified on the basis of the ICJ's case law. The *prima facie* standard of proof, whereby "evidence put forward by [a party] and not rebutted by [the other party] must necessarily be considered as conclusive",[4] compels the opposing party to rebut the evidence of the proponent in order to prevent the adjudicative body from considering a given fact to be established.[5] Second, the "preponderance

1 *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Judgment, I.C.J. Reports 2003*, Separate opinion of Judge Higgins, p. 225, para. 33 (hereinafter: '*Oil Platforms*, Separate opinion of Judge Higgins').

2 *E.g. Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits, Judgment, I.C.J. Reports 1986*, Dissenting opinion of Judge Schwebel, p. 259, paras. 135–153; *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), *Judgment, I.C.J. Reports 2010*, Joint dissenting opinion of Judges Al-Khasawneh and Simma, p. 108, paras. 2–17.

3 Jonathan Law, Elizabeth A. Martin, *A Dictionary of Law* (7th edition, 2014), online edition. Meeting the standard of proof is necessary to discharge the persuasive burden of proof, *i.e.* "the obligation of a party to meet the requirement that a fact in issue be proved" (Colin Tapper, *Cross & Tapper on Evidence* (11th edition, 2007), 131).

4 *William A. Parker* (*U.S.A.*) *v. United Mexican States* (*USA v. Mexico*) (1926), 4 *Reports of International Arbitral Awards* 35, 39. Similarly, in *Kling*, the Commission stated that "*prima facie* evidence is that which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed" (*Lillie S. Kling* (*U.S.A.*) *v. United Mexican States* (*USA v. Mexico*) (1930), 4 *Reports of International Arbitral Awards* 575, 585).

5 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 323–326; Chittharanjan F. Amerasinghe, *Evidence in International Litigation* (2005), 251; Mojtaba Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals* (1996), 332–339. The material effect of the *prima facie* standard of proof is thus to shift the burden of evidence, or evidential burden, which is "the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or nonexistence of a fact in issue" (Law, Martin, *supra* note 3). See also Tapper, *supra* note 3, at 132–134.

of evidence" standard requires that evidence produced by one of the parties has greater probative value than the evidence produced by the other.[6] Third, "proof beyond reasonable doubt" is the highest standard under which the proponent has to provide evidence which establishes a fact to near-certainty.[7] Given the fact that "[t]he standards of proof are less formal in an international legal proceeding than in a domestic one",[8] formulations such as "sufficiency of evidence", "proof in a convincing manner" and "fully conclusive evidence" may be seen as lexical variations of the above three standards, rather than autonomous ones.[9]

As to the second issue, the literature has identified various criteria on the basis of which the Court decides which standard to apply. Namely, the phase of the proceedings in which the assessment of evidence takes place,[10] the matter before the Court,[11] the declaratory or determinative function the Court exercises,[12] or the substantive rule to be applied.[13]

Variations in the Court's practice with regard to both of the above issues have been used to bolster the contention that the ICJ handles the standard of proof

6 Amerasinghe, *supra* note 5, at 241–242; Markus Benzing, "Evidentiary Issues", in A. Zimmermann, C.J. Tams, K. Ollers-Frahm and C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd edition, 2019), 1371, 1403; Chester Brown, *A Common Law of International Adjudication* (2007), 100; Kazazi, *supra* note 5, at 347–350.

7 Amerasinghe, *supra* note 5, at 236; Benzing, *supra* note 6, at 1403–1405; Brown, *supra* note 6, at 99. It is to be noted that Kazazi argued that this standard is "the favorite standard of proof with international tribunals since it relieves them of the task of searching for other standards" (Kazazi, *supra* note 5, at 347).

8 Inter-American Court of Human Rights, *Case of Velásquez-Rodríguez v. Honduras*, Judgment of July 29, 1988, para. 128.

9 Amerasinghe, *supra* note 5, at 239–241; Brown, *supra* note 6, at 99–101. See also Professor Chester Brown during the third lecture of his 2021 special winter course on "Evidence in International Adjudication" at the Hague Academy of International Law, quoting passages from *Corfu Channel* (*Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, 17 (hereinafter: '*Corfu Channel* (*Merits*)')) and the *Bosnian Genocide* case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), *Judgment, I.C.J. Reports 2007*, p. 43, para. 210 (hereinafter: '*Bosnian Genocide*')).

10 Robert Kolb, "General principles of procedural law", in A. Zimmermann, C.J. Tams, K. Ollers-Frahm and C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary* (1st edition, 2007), 793, 829–830.

11 Amerasinghe, *supra* note 5, at 266 ff. Supporting this position, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, I.C.J. Reports 1995*, Dissenting opinion of Judge Shahabuddeen, p. 51, 63.

12 Katherine Del Mar, "The International Court of Justice and Standard of Proof", in K. Bannelier, T. Christakis and S. Heathcote, *The ICJ and the Evolution of International Law. The Enduring Impact of the* Corfu Channel *Case* (2012), 98, 101–106.

13 *Ibid*., pp. 115–116.

in an inconsistent manner.[14] Building upon the case law and literature, this contribution systematises the ICJ's case law and identifies a degree of consistency in the ICJ's approach to the standard of proof in contentious cases, with a view to providing the reader with an understanding of the Court's reasoning in pending, fact-intensive cases.[15] Advisory proceedings will not be analysed since "[i]n advisory proceedings there are properly speaking no parties obliged to furnish the necessary evidence, and the ordinary rules concerning the burden of proof can hardly be applied".[16] Moreover, this study addresses only the standard of proof applied to evidence "which possesses such probative force as to render the existence or non-existence of [a] fact highly probable".[17] In light of the fact that it is not for the party to produce evidence of the law under the *jura novit curia* principle, the related standard of proof will not be addressed.[18] The standard of proof for determining the plausibility of rights in provisional measures proceedings and the standard of review of expert evidence, which have recently been thoroughly studied,[19] will also not be addressed.

14 Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (2009), 129; Robert Kolb, *The International Court of Justice* (2013), 944; Benzing, *supra* note 6, at 1403. *Contra*, to the effect of supporting consistency in the case law, Joseph C. Witenberg, "La théorie des preuves devant les juridictions internationales", 56 *Recueil des cours de l'Académie de Droit International* (1936), 1, 95.

15 *E.g. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine v. Russian Federation*) or the reparation phase of *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*).

16 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, para. 44. On the role of evidence in advisory proceedings, see Benzing, *supra* note 6, at 1411–1413.

17 Vekateshwara Subramanian Mani, *International Adjudication: Procedural Aspects* (1980), 180.

18 On *jura novit curia*, see Joe Verhoeven, "Jura Novit Curia et le juge international", in Pierre-Marie Dupuy *et al.* (eds.), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat – Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 635; Friedrich Rosenfeld, "*Iura Novit Curia* in International Law", 6 *European International Arbitration Review* (2017), 132. *Contra* Luigi Ferrari Bravo, *La prova nel processo internazionale* (1958), 50–94. On the standard of proof concerning the existence of an international custom, see Luigi Fumagalli, "Evidence Before the International Court of Justice: Issues of Fact and Questions of Law in the Determination of International Custom", in N. Boschiero *et al.* (eds.), *International Courts and the Development of International Law* (2013), 137.

19 Respectively: Robert Kolb, "Digging Deeper into the 'Plausibility of Rights'-Criterion in the Provisional Measures Jurisprudence of the ICJ", 19 *The Law and Practice of International Courts and Tribunals* (2020), 365, 380–383; Makane Moïse Mbengue, "Scientific Fact-finding at the International Court of Justice: An Appraisal in the Aftermath of the Whaling Case", 29 *Leiden Journal of International Law* (2016), 529. On the latter issue, see also the

Next to this introductory section, the contribution comes in three parts. First, the source of rules on the standard of proof is studied. It is shown that neither the ICJ Statute nor the Rules of Court refer to the standard of proof. It is also argued that the standard of proof is not a general principle of law under Article 38(1)(c) of the ICJ Statute. Hence, its nature is that of a power inherent to the adjudicative function and to the Court's freedom to assess evidence.[20]

Second, the ICJ's practice vis-à-vis the standard of proof is studied. The case is made that the Court follows a flexible approach to the applicable standard of proof depending on the submission of opposing evidence and the gravity of allegations. It is demonstrated that this flexible approach consists of a two-tier analysis in cases in which all disputing parties appear, and of a single-tier analysis pursuant to the principle of equality of arms in cases that involve the non-appearance of a disputing party.[21]

Last, a few concluding remarks are made to the effect of highlighting how the Court's flexible approach is in line with general principles of procedural law and is a sensible exercise of the Court's judicial function.

2 The Absence of a Source of the Standard of Proof in Dispute Settlement before the ICJ

The ICJ Statute and the Rules of Court are silent on the standard of proof.[22] This raises many issues, since those documents aim at "inform[ing] those who

2018 Special issue of the *Journal of International Dispute Settlement* on "Experts in the International Adjudicative Process".

20 The Court has clearly upheld its freedom to weigh evidence (*Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), *Merits*, *Judgment*, *I.C.J. Reports 1986*, p. 14, 40, para. 60). See, *inter alia*, James Gerard Devaney, *Fact-Finding before the International Court of Justice* (2016), 43–51.

21 On the principle in point, see Raymundo Tullio Treves, "Equality of Arms and Inequality of Resources", in Arman Sarvarian *et al.* (eds.), *Procedural Fairness in International Courts and Tribunals* (2015), 153.

22 Brown, *supra* note 6, at 98. With specific regard to the ICJ, see Benzing, *supra* note 6, 1403; Del Mar, *supra* note 12, at 100. Practice Directions, too, do not provide any further indication. On the normative force of the Practice Directions, see Sergey M. Punzhin, "Procedural Normative System of the International Court of Justice", 30 *Leiden Journal of International Law* (2017) 661, 668–671 doi: 10.1017/S0922156517000280; Paolo Palchetti, "Making and enforcing procedural law at the International Court of Justice", 61 *QIL Zoom-out* (2019) 5, 11–14.

are responsible for the conduct of a case before the Court what steps have to be taken and when and how".[23]

Absent written law, one may wonder whether the standard of proof to be applied by the Court stems from general principles of law under Article 38(1)(c) of the ICJ Statute. However, this does not seem to be the case given the stark differences on the matter in point between common law and civil law jurisdictions, as well as within the two systems.[24]

Common law systems are strictly adversarial and thus are based on the freedom of the trier of fact to assess the probative value of the admitted evidence.[25] Common law judges apply different standards in criminal or civil matters, maintaining some degree of flexibility since "there is no absolute standard in either [criminal and civil law] case[s] [but t]he degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter".[26]

In a criminal case before a common law adjudicative body, the standard of "proof beyond reasonable doubt" applies. Namely, proof submitted by the proponent must be convincing to the point that "doubts are [to be] excluded and probability approaches certitude".[27]

In civil claims, judges in England and Wales apply the so-called "balance of evidence" standard.[28] Namely, "[i]f the evidence is such that the tribunal can

23 "Elaboration of the Rules of Court of March 11th, 1936", PCIJ Series D, third addendum to N°.2 (1936) 758.

24 Kazazi, *supra* note 5, at 323–325; Kevin M. Clermont, Emily Sherwin, "A Comparative View on the Standard of Proof", 50 *American Journal of Comparative Law* (2002), 243; Amerasinghe, *supra* note 5, at 233–234; Brown, *supra* note 6, 97–98; Jacques-Michel Grossen, "À propos du degré de la preuve dans la pratique de la Cour internationale de Justice", in M. Kohen, R. Kolb and D.L. Tehindrazanarivelo (eds.), *Perspectives of International Law in the 21st Century/Perspectives du droit international au 21e siècle. Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday* (2012), 257, 258–262. *Contra*, Moritz Brinkmann, "The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure", 9 *Uniform Law Review* (2004), 875. On differences within the borders of "common law jurisdictions" and "civil law jurisdictions", see H. Patrick Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (5th edition, 2014), 132 ff. and 180 ff.

25 On free assessment and exclusionary rules in common law jurisdictions, see Durward Sandifer, *Evidence before International Tribunals* (2nd edition, 1975), at 2; Tapper, *supra* note 3, at 69 ff.).

26 Lord Denning in *Bater v. Bater* [1950] 2 All E.R. 458 (C.A.), quoted in Brinkmann, *supra* note 24, at 883.

27 Heinrich Nagel, "Evidence", in *Encyclopedia Britannica: Macropaedia*, Vol. 7 (1974), 1, 2, quoted in Clermont, Sherwin, *supra* note 24, at 246.

28 Brown, *supra* note 6, at 97–98.

say: 'We think it more probable than not,' the burden is discharged, but, if the probabilities are equal, it is not".[29] That means that a party has to show that its factual allegations are more probable than the ones submitted by the other party, based on the "preponderant" probative value of proof.[30] Under specific circumstances, before judges in the United States, a slightly different standard dubbed "clear and convincing evidence" may apply, whereby the trier of fact "must believe that it is highly probable that the facts are true or exist".[31]

Differently, civil law jurisdictions are fairly liberal on the admission of evidence,[32] but limit the power of judges in assessing the probative value of proof through statutory provisions on "legal proof" (*preuve légale*). The judge must confer *prima facie* credibility to pieces of evidence falling within what may be qualified as "legal proofs", that is, the judge must consider a fact evidenced by legal proof as established unless the opposing party produces evidence to the contrary.[33]

Facts to be established without legal proof in both civil and criminal matters before civil law judges have to meet the "intimate conviction" standard.[34] The latter is not more subjective than common law standards. Indeed, civil law judges are to be "intimately convinced" on the basis of empirical rules, logical

29 Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All E.R. 372, quoted in Kazazi, *supra* note 5, at 324.

30 James P. McBaine, "Burden of Proof: Degrees of Belief", 32 *California Law Review* (1944), 242, 247. It is generally agreed that the concept of "probability" is a legal, rather than mathematical, concept, referring to "the strength of a belief in the existence of a fact (subjective probability) or [...] the degree of justification for an intuitively developed belief (inductive probability) in the existence of a fact" (Brinkmann, *supra* note 24, at 878). On the issue in point, see Dale A. Nance, *The Burdens of Proof: Discriminatory Power, Weight of Evidence, and Tenacity of Belief* (2016); Tapper, *supra* note 3, at 186 ff.

31 McBaine, *supra* note 30, at 262–263. See also J. William Strong (ed.), *McCormick on Evidence* (5th edition, 1999), para. 340.

32 Sandifer, *supra* note 25, at 3; Bettina Nunner-Krautgasser and Philipp Anzenberger, "Inadmissible Evidence: Illegally Obtained Evidence and the Limits of the Judicial Establishment of the Truth", in V. Rijavec, T. Keresteš and T. Ivanc (eds.), *Dimensions of Evidence in European Civil Procedure* (2016), 195.

33 On legal proof, see Jorg Sladić and Alan Uzelac, "Assessment of Evidence", in Rijavec, Keresteš, Ivanc (eds.), *supra* note 32, 107.

34 *E.g.*, reference to the "conviction" of the trier may be found at Article 427(1) of the French Code of Criminal Procedure, Article 116 of the Italian Code of Civil Procedure and §286(1) of the German Code of Civil Procedure. It is commonly accepted that the Spanish Code of Civil Procedure refers to intimate conviction and free assessment, though not using such language (Núria Mallandrich Miret, *Evidence in Civil Law – Spain* (2015), 11, available at <http://www.lex-localis.press/index.php/LexLocalisPress/catalog/view/39/37/149–1>).

considerations and rationality, clearly deducible from the legal reasoning of their decisions.[35]

Such striking divergences in the municipal practices regarding the standard of proof prevent it from being construed as a general principle of law.[36] However, it can be argued that, in all legal systems, a judicial assessment of the probative value of evidence entails the power to assess whether the proof supplied is sufficient to establish a given fact. Consequently, the power of an adjudicative body, including the ICJ, to decide the standard of proof to be applied in any given case may be construed as a power inherent in its function as an adjudicative organ.[37]

3 The ICJ's Practice

Most of the debate on the Court's practice on the standard of proof revolves around the language the Court has used to express whether a party has reached the degree of evidence necessary to establish a fact. In particular, the existing literature typically complains that such language is not sufficiently clear about the threshold to be met. Formulations employed by the Court – namely,

35 Brinkmann, *supra* note 24, at 879–881; Clermont, Sherwin, *supra* note 24, at 249. This has led the literature to argue that the "intimate conviction" standard of proof is similar to the "beyond reasonable doubt" one (Clermont, Sherwin, *supra* note 24, at 249, at 246). It is to be noted that literature addressing the standard of proof in investment arbitration has equated the "preponderance of evidence" standard to the civil law "intimate conviction" standard, rather than the common law standard with the same name (Frédéric Gilles Sourgens, Kabir Duggal and Ian A. Laird, *Evidence in International Investment Arbitration* (2018), 82 ff.).

36 It is to be noted that the above referenced distinction between civil law jurisdictions and common law ones is also mirrored in the way in which literature addresses the issue of the "degree of proof" required for the burden of proof to be met in international proceedings. Indeed, scholars with a civil law background seldom refer to the "standard of proof", favouring reference to the mere weighing of the probative value (Witenberg, *supra* note 14, at 86–95; Ferrari Bravo, *supra* note 18, 103–111 and 145–153; Raphaële Rivier, "La preuve devant les juridictions interétatiques à vocation universelle (CIJ et TIDM)", in H. Ruiz Fabri, J.-M. Sorel, *Le preuve devant les jurisdictions internationales* (2007), 9, 38–48: Carlo Santulli, *Droit du contentieux international* (2nd edition, 2015), 532–533). *Contra* Francesca Graziani, *Giudice e amministrazione della prova nel contenzioso internazionale. Il ruolo della Corte internazionale di giustizia* (2020), 326–338.

37 Amerasinghe, *supra* note 5, at 232; Benzing, *supra* note 6, at 1403; Caroline Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (2011), 197–198; Dinah Shelton, "Form, Function and the Powers of International Courts", 9 *Chicago Journal of International Law* (2009), 537, 551.

whether evidence is "sufficient"[38] or capable of "satisfying" the Court[39] – do not determine the required degree of proof. They simply express whether the required degree of proof has been reached. The ICJ's reasoning that "[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court",[40] too, does not provide a clear explanation of the determination of the standard of proof. Building on this quotation, the following analysis first tackles situations

38 *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952*: *I.C.J. Reports 1952*, p. 176, 200; *The Minquiers and Ecrehos case, Judgment of November 17th, 1953*: *I.C.J. Reports 1953*, p. 47, 71; *Case concerning right of passage over Indian territory* (*Preliminary Objections*), *Judgment of November 26th, 1957*: *I.C.J. Reports 1957*, p. 125, 152; *Military and Paramilitary*, *supra* note 20, paras. 110, 159 and 281; *Elettronica Sicula S.P.A.* (*ELSI*), *Judgment*, *I.C.J. Reports 1989*, p. 15, para. 122; *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*), *I.C.J. Reports 1992*, p. 506, paras. 178, 181, 264, 266, 277, 304 and 349; *Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), *Judgment*, *I.C.J. Reports 1997*, p. 7, paras. 57 and 107; *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Judgment*, *I.C.J. Reports 2003*, p. 161, paras. 57–64; *Frontier Dispute* (*Benin/Niger*), *Judgment*, *I.C.J. Reports 2005*, p. 90, paras. 55 and 69; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), *Judgment*, *I.C.J. Reports 2005*, p. 168, paras. 179, 208, 246, 298, 334 and 342; *Bosnian Genocide*, *supra* note 9, para. 328; *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), *Judgment*, *I.C.J. Reports 2008*, p. 177, para. 189; *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*), *Judgment*, *I.C.J. Reports 2010*, p. 14, paras. 254 and 262; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), *Judgment*, *I.C.J. Reports 2012*, p. 624, paras. 36 and 38; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), *Judgment*, *I.C.J. Reports 2015*, p. 3, paras. 242, 250, 256, 270, 286, 321, 332, 340, 379, 397, 484 and 495 (hereinafter: '*Croatian Genocide*'); *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) *and Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), *Judgment*, *I.C.J. Reports 2015*, p. 665, para. 206; *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*), *Compensation*, *Judgment*, *I.C.J. Reports 2018*, p. 15, paras. 104–105. The Court seldom also uses the formula "adequate evidence" (*Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v. Chile*), *Judgment*, *I.C.J. Reports 2018*, p. 507, para. 116).

39 *Minquiers and Ecrehos*, *supra* note 38, at para. 52; *Case concerning Sovereignty over certain Frontier Land, Judgment of 20 June 1959*: *I.C.J. Reports 1959*, p. 209, paras. 62 and 75; *Right of passage*, *supra* note 38, at para. 75; *United States Diplomatic and Consular Staff in Tehran*, *Judgment*, *I.C.J. Reports 1980*, p. 3, para. 63; *Military and Paramilitary*, *supra* note 20, at paras. 106, 160 and 230; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *Judgment*, *I.C.J. Reports 1993*, p. 38, para. 78; *Maritime Delimitation and Territorial Questions*, *supra* note 11, para. 195; *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), *Judgment*, *I.C.J. Reports 2004*, p. 12, para. 93; *Armed Activities*, *supra* note 38, at paras. 62, 71 and 106; *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), *Compensation*, *Judgment*, *I.C.J. Reports 2012*, p. 324, para. 33; *Certain Activities* (*Compensation*), *supra* note 38, paras. 93 and 141.

40 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), *Merits*, *Judgment*, *I.C.J. Reports 2010*, p. 639, para. 54.

comprising allegations of exceptional gravity, which "require a high degree of certainty".[41] It then addresses allegations referring, on the one hand, to preliminary objections, which are "question[s] of law to be resolved *in the light of the relevant facts*",[42] and, on the other, to the merits of claims not reaching the seriousness of "charges of exceptional gravity", *i.e.* "ordinary claims". Finally, the analysis addresses the limited case law in cases of non-appearance,[43] with a view to verifying whether the Court "attain[s] the same degree of certainty as in any other case".[44]

3.1 *Standard(s) of Proof in Cases of "Charges of Exceptional Gravity"*

In cases in which allegations of exceptional gravity are involved, the Court requires proof with a "high degree of certainty".[45] This raises two discrete issues, namely the scope of the notion of "charges of exceptional gravity", and the content of the applicable standard of proof.

As to the first issue, the Court's case law has been fluctuating. In *Corfu Channel*, the "charge of exceptional gravity" was an alleged use of force by, or with the connivance of, the Albanian Government.[46] Reference to the notion of "charge of exceptional gravity" was also made in *Bosnian Genocide* and *Croatian Genocide*, where the allegations concerned the commission of acts of genocide and the failure to prevent those acts and to prosecute the perpetrators.[47] On the basis of the above, the concept of "charges of exceptional gravity" apparently

41 *Corfu Channel* (*Merits*), *supra* note 9, at 16–17.

42 *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1988*, p. 69, para. 16; emphasis added.

43 For an overview of the few cases on non-appearance, see Hans von Mangoldt and Andreas Zimmermann, "Article 53", in Zimmermann, Tams, Ollers-Frahm, Tomuschat (eds.), *supra* note 6, 1467, 1478–1479.

44 *Military and Paramilitary*, *supra* note 20, at para. 29.

45 *Corfu Channel* (*Merits*), *supra* note 9, at 16–17. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Jurisdiction and Admissibility*, *Judgment*, *I.C.J. Reports 1995*, Dissenting opinion of Judge Shahabuddeen, p. 51, 63; *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), *Judgment*, *I.C.J. Reports 2005*, Dissenting opinion of Judge Kateka, p. 361, para. 42 (hereinafter: '*Armed Activities*, Dissenting opinion of Judge Kateka').

46 *Corfu Channel* (*Merits*), *supra* note 9, at 14–15.

47 *Bosnian Genocide*, *supra* note 9, paras. 231–234; *Croatian Genocide*, *supra* note 38, at paras. 178–179. Further support for the inclusion of genocide amongst the "charges of exceptional gravity" may be found in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*), *Provisional Measures*, *Order of 23 January 2020*, *I.C.J. Reports 2020*, Declaration of Judge *ad hoc* Kress, p. 65, paras. 3–4. Literature maintains that the Court's power to apply such higher standard of proof is a fully discretionary one (Amerasinghe, *supra* note 5, at 239).

encompasses breaches of *jus cogens*.[48] This definition is also supported by the use of the word "charge",[49] which is reminiscent of "criminal law" language and suggests that this standard should be applied any time a situation might also be read through the lenses of international criminal responsibility. However, it is to be noted that after *Corfu Channel* the Court has typically treated the standard of proof for allegations of use of force differently from that required for other alleged charges of exceptional gravity.[50] Reference should be made to *Oil Platforms* and *Armed Activities*.[51]

In *Oil Platforms*, Iran claimed that the United States had used force causing the destruction of Iranian oil platforms. This fact was not disputed, since the United States "ha[d] never denied that its actions against the Iranian platforms amounted to a use of armed force".[52] However, the United States justified its actions as legitimate self-defence stemming from the alleged Iranian attacks against private United States vessels and a United States warship. Therefore, the United States had to prove that Iran had conducted an armed attack, *i.e.* a breach of the prohibition on the use of force. The Court did not refer to this allegation as a charge of exceptional gravity explicitly. Nor did the ICJ treat this allegation as a similar one. Indeed, the Court used a standard of proof different from that used in *Corfu Channel*.[53] It held that the United States' evidentiary material was "not sufficiently convinc[ing]".[54] First, it was not sufficient to demonstrate "on the balance of evidence" that Iran attacked private United States vessels.[55] Second, the proof supplied was "highly suggestive, but not conclusive" with regard to the alleged Iranian responsibility for laying mines which damaged the United States' warship.[56] Although the case could be made

48 Benzing, *supra* note 6, at 1405; Del Mar, *supra* note 12, at 115–116; Marco Roscini, "Evidentiary Issues in International Disputes Related to State Responsibility for Cyber Operations", 50 *Texas International Law Journal* (2015), 233, 254.

49 According to Law's dictionary, "charge", which is a synonym to "indictment", means "[a] formal accusation of a crime, usually made at the police station after interrogation" (Law, Martin, *supra* note 3).

50 On evidentiary issues concerning demonstration of uses of force, see Mary Ellen O'Connell, "Rules of Evidence for the Use of Force in International Law's New Era", 100 *ASIL Proceedings* (2006), 44; James A. Green, "Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice", 58 *International and Comparative Law Quarterly* (2009), 163.

51 See also the consideration on the *Military and Paramilitary Activities* below, Section 3.3.

52 *Oil Platforms*, *supra* note 38, at para. 45.

53 *Oil Platforms*, Separate opinion of Judge Higgins, *supra* note 1, paras. 32–33; Separate opinion of Judge Buergenthal, *I.C.J. Reports 2003*, p. 274, para. 44.

54 *Oil Platforms*, *supra* note 38, at para. 76.

55 *Ibid.*, at paras. 57–64. The Court also affirmed that it did "not have to attribute responsibility for firing the missile on the basis of a balance of evidence" (*ibid.*, para. 57).

56 *Ibid.*, at para. 71. See also *ibid.*, at para. 72.

that the Court's finding that the activities against private vessels could not amount to an armed attack might justify the application of a standard lower than the "high degree of certainty",[57] such a line of reasoning does not explain the use of a lower standard with regard to the alleged armed attack against the United States' warship.

The *Armed Activities* case raises similar issues. Congo's claims and Uganda's counter-claims concerned alleged direct and indirect uses of force. Thus, such allegations may qualify as "charges of exceptional gravity". However, the Court neither used such a formulation to describe the allocations, nor employed the *Corfu Channel* standard, as highlighted by Judge Kateka.[58] Indeed, the Court referred to evidence being not "convincing",[59] "credible"[60] or "conclusive".[61]

These two cases thus raise doubts as to the contours of the notion of "charges of exceptional gravity", with special regard to allegations of use of force.

As to the *quantum* of the standard, the case law shows that the Court follows a two-tier approach. First, the Court assesses whether the opposing party has produced evidence for its challenges. In the negative, non-opposed facts are considered as established by virtue of being "undisputed". To name a few examples, in *Corfu Channel*, the Court determined that Albania had not consented to naval operations by the British Navy in the Corfu Channel since the United Kingdom had not produced evidence to the contrary.[62] In *Croatian Genocide*, the Court adopted the reconstruction of the facts of the case by the International Criminal Tribunal for the former Yugoslavia on the sole basis that Serbia had not produced evidentiary material challenging it.[63] This first tier recalls the *prima facie* standard of proof.

The Court's stance changes when the proof supplied by one party is opposed by the other. Here, the second stage of the two-tier approach comes into play,

57 *Ibid.*, at para. 64, referring to damages to United States vessels as "incidents".

58 This construction is also supported by Judge Kateka's Dissenting opinion, according to which it is the standard of proof for "charges of exceptional gravity" that should have been applied (*Armed Activities*, Dissenting opinion of Judge Kateka, *supra* note 45, at para. 43).

59 *Armed Activities*, *supra* note 38, at paras. 83, 91 and 210.

60 *Ibid.*, para. 211. The two formulas were used as synonyms with regard to alleged acts of looting, plundering and exploitation of the natural resources of Congo by Ugandan forces, thus suggesting that they refer to the same standard of proof (*ibid.*, paras. 237, 242 and 250).

61 *Armed Activities*, *supra* note 38, at para. 303.

62 *Corfu Channel* (*Merits*), *supra* note 9, at 33.

63 *Croatian Genocide*, *supra* note 38, at para. 270. See also *Armed Activities*, where the Court considered meeting the burden of proof concerning the fact that Uganda established and exercised authority in the province of Ituri, due to the fact that the Respondent did not challenge evidence put forward by the Claimant to that effect (*Armed Activities*, *supra* note 38, at para. 176).

whereby the Court assesses the probative value of each specific piece of evidence, as follows.

In *Corfu Channel*, the Court found for Albania because the United Kingdom provided witness testimony indicating that mines similar to the ones employed in the minefield were loaded on two Yugoslav vessels, but did not demonstrate that those same vessels actually laid those mines. The Court considered the relevant witness statement to fall short of "conclusive evidence",[64] finding that it failed to "leave *no room* for reasonable doubt" regarding the issue in point.[65]

In *Bosnian Genocide*, the Court held that the allegations had to be "proved by evidence that is fully conclusive".[66] It then referred to the need to be "fully convinced" of the occurrence of acts of genocide,[67] and noted that "proof at a high level of certainty" was required as to the lack of prevention of the criminal acts and the prosecution of their perpetrators.[68] In the case at hand, the Court found for Respondent. Although the Claimant provided proof of the strong financial, military, and political bonds between Serbia and the perpetrators of the acts of genocide, the Court deemed that this was not sufficient to demonstrate that such forces acted as *de jure* organs of Serbia,[69] or under its direction or control.[70]

The standard applied in *Bosnian Genocide* was also applied in *Croatian Genocide*, given the many similarities in the allegations of the respective Claimants.[71] In *Croatian Genocide*, the Court again found for Respondent. Although a pattern of conduct amounting to genocide was amply proven,[72] this was not sufficient to demonstrate the *mens rea* element as the "only reasonable inference".[73]

In light of these cases, it could be argued that the Court is "fully convinced" of the occurrence of a fact substantiating a "charge of exceptional gravity"

64 *Corfu Channel* (*Merits*), *supra* note 9, at 16–17.

65 *Ibid.*, at 18; emphasis in text.

66 *Bosnian Genocide*, *supra* note 9, para. 209.

67 *Ibid.*

68 *Ibid.*, at para. 210. It has been argued that the difference in the two formulas used by the Court hints to different standards for breaches of the ban on genocide, and failure to prevent genocide (Benzing, *supra* note 6, at 1404; Del Mar, *supra* note 12, at 115; Andrea Gattini, "Evidentiary Issues in the ICJ's *Genocide* Judgment", 5 *Journal of International Criminal Justice* (2007), 889, 898).

69 *Bosnian Genocide*, *supra* note 9, paras. 394–395.

70 *Ibid.*, at paras. 396–412.

71 *Croatian Genocide*, *supra* note 38, at paras. 178–179. On evidentiary issues in the *Croatian Genocide* case, see Andrea Gattini and Tommaso Cortesi, "Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case", 28 *Leiden Journal of International Law* (2015), 899.

72 *Croatian Genocide*, *supra* note 38, at para. 401.

73 *Ibid.*, para. 428. See also paras. 148 and 407–408.

when probability approaches certainty.[74] In this sense, the second stage of the ICJ two-tier approach in cases of "charges of exceptional gravity" recalls the common law "proof beyond reasonable doubt" standard.[75]

3.2 *Standard(s) of Proof in Preliminary Matters and the Merits Stage of Ordinary Claims*

The second cluster of instances in which the flexible approach of the Court to the standard of proof may be ascertained concerns preliminary proceedings and the merits of ordinary claims.

As to preliminary proceedings, the case law consistently shows that the Court applies a *prima facie* standard as the first stage of a two-tier approach to determine whether the parties have established facts relevant for jurisdictional purposes.[76] These facts include nationality of individuals in cases of diplomatic protection, the existence of a dispute, and the parties' conduct conferring jurisdiction upon the Court.[77]

Reference may be made to *Interhandel* and *ELSI*, where the respective Claimants produced certificates concerning the nationality of corporations.[78] The Court considered that the certificates met the burden of proof since they were not challenged by the respective Respondents.[79] The same occurred

74 Graziani, *supra* note 36, at 333–338. On the basis of the ICJ decision on Nicaragua's request to intervene in *Frontier Dispute*, and in particular with regard to the Court asserting that "it is for a State seeking to intervene to demonstrate convincingly what it asserts" (*Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*), *Application to intervene*, *Judgment, I.C.J. Reports 1990*, p. 92, para. 61), it has been argued that such higher standard of proof applies to demonstrating the interest to intervene in proceedings (Gérard Niyungeko, *La preuve devant les juridictions internationales* (2005), 431–432).

75 Amerasinghe, *supra* note 5, at 236; Brown, *supra* note 6, at 99; Kazazi, *supra* note 5, at 346.

76 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. Pakistan*), *Jurisdiction and Admissibility*, *Judgment, I.C.J. Reports 2016*, p. 552, para. 41 ("[w]hile it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists"). *Contra*, *Spanish Fisheries Jurisdiction case* (*Fisheries Jurisdiction* (*Spain v. Canada*), *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, para. 38).

77 Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015* (online edition, 2017), at para. 257.

78 I.C.J. Pleadings, *Interhandel Case* (*Switzerland v. United States of America*), Memorial submitted by the Federal Government of Switzerland, p. 78, 79 para. 3 and 147; I.C.J. Pleadings, *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*), Vol. I, Memorial of the United States of America, p. 42, 45 and Annex 7 (not reproduced).

79 *Interhandel Case*, *Judgment of March 21st, 1959*: *I.C.J. Reports 1959*, p. 6, 16; *ELSI*, *supra* note 38, at para. 49. *Mutatis mutandis*, the same consideration may be made with regard to the nationality of ships in proceedings before the International Tribunal for the Law

in *Diallo*, where the Court established the Guinean nationality of Mr. Diallo based on the fact that the Respondent, the Democratic Republic of the Congo, had not challenged the relevant evidence regarding nationality presented by the Claimant.[80]

Further elements supporting the application of a *prima facie* standard of proof to jurisdictional matters may also be found whenever the Court, absent challenges by the Respondent, upholds its jurisdiction,[81] establishes that diplomatic exchanges between the parties have occurred,[82] or finds that a treaty has entered into force.[83] To the same effect, dissenting opinions noting that ICJ jurisdiction has to be "establish[ed] positively, and not merely on prima facie or provisional grounds"[84] indicate that the majority had applied a *prima facie* standard to preliminary matters.

of the Sea. See, *inter alia*, the *Norstar Case*, where the Tribunal did not discuss the issue of the Panamanian flag of the vessel in light of the fact that Italy had not raised the point (*M/V "Norstar"* (*Panama v. Italy*), *Preliminary Objections*, *Judgment*, *ITLOS Reports 2016*, p. 44).

80 *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2007*, p. 582, para. 41. The Court also considered "not disputed" the nationality of Mr. Diallo's company, *Africom-Zaire* (*ibid.*, at para. 106). Similarly, *Avena*, *supra* note 39, at para. 57. One may identify elements to that effect also in the *Jadhav* decision, a dispute between India and Pakistan concerning the detention and trial of Mr. Jadhav, as the Court found for India on Mr. Jadhav's nationality due to Pakistan's failure to provide evidence supporting its challenge to the issue in point (*Jadhav* (*India v. Pakistan*), *Judgment*, *I.C.J. Reports 2019*, p. 418, para. 56). It is to be noted that India did not produce any evidence concerning the Indian nationality of Mr. Jadhav. Pakistan raised the issue as one of failure to discharge the burden of proof, but did not produce any evidence supporting its challenge. India reacted by highlighting that Pakistan itself referred to Mr. Jadhav as an Indian national. See *ibid.*, at paras. 52–53, paras. 243–270 of the Counter-Memorial of the Islamic Republic of Pakistan and paras. 100–101 of the Reply of the Republic of India.

81 *Pulp Mills*, *supra* note 38, paras. 48–49; *Certain Activities* (*Merits*), *supra* note 38, paras. 54–55; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v. Nicaragua*) and *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica v. Nicaragua*), *Judgment*, *I.C.J. Reports 2018*, p. 139, paras. 45–46.

82 *Fisheries Jurisdiction* (*Spain v. Canada*), *Jurisdiction of the Court*, *Judgment*, *I.C.J. Reports 1998*, Separate opinion of Judge Oda, p. 474, paras. 17–20; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (*Nicaragua v. Colombia*), *Preliminary Objections*, *Judgment*, *I.C.J. Reports 2016*, p. 3, para. 100.

83 *Border and Transborder Armed Activities*, *supra* note 42, at para. 16.

84 *Ambatielos case* (*merits: obligation to arbitrate*), *Judgment of May 19th, 1953*, *I.C.J. Reports 1953*, Dissenting opinion by Sir Arnold McNair, President, and Judges Basdevant, Klaestad and Read, p. 25. See also *South West Africa Cases* (*Ethiopia v. South Africa; Liberia v. South Africa*), *Preliminary Objections*, *Judgment of 21 December 1962*, *I.C.J. Reports 1962*, Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, p. 465, 473–474; *Appeal Relating to the Jurisdiction of the ICAO Council*, *Judgment*, *I.C.J. Reports 1972*,

Turning to the merits phase, the Court considers "undisputed" facts evidenced by one party, which the other party has not rebutted, as satisfying the standard of proof. There are many examples to this effect. Just to name a few, in *Pedra Branca/Pulau*, the Court considered that the Claimant had proven its allegation that the Sultanate of Johor exercised sovereignty over the disputed island, since the Respondent had not challenged the evidence thereof.[85] In *Diallo*, the Court considered that Africom-Zaire was founded by Mr. Diallo because the Respondent had not produced opposing evidence.[86] In *Certain Questions*, the Court determined that Djibouti had fully executed a letter rogatory on the basis of the fact that France had not challenged this fact with contrary evidence.[87]

Whenever the proponent's evidence is opposed by evidence produced by the other party – *i.e.* the second stage of the two-tier approach comes into play – the language used by the Court to express the standard of proof fluctuates. Earlier ICJ decisions used formulations suggesting the use of a probabilistic test.[88] More recent case law has seen the Court referring to the fact that proof produced by the parties was "convincing"[89] or "clear".[90]

Dissenting opinion of Judge Nagendra Singh, pp. 164, 171–172. Against a *prima facie* standard in jurisdictional matters, see Amerasinghe, *supra* note 5, at 258–259; Kazazi, *supra* note 5, at 340.

85 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*), *Judgment, I.C.J. Reports 2008*, p. 12, para. 52.

86 *Diallo*, *supra* note 40, at para. 106. As to the absence of evidence, see Memorial of Republic of Guinea, para. 2.2.

87 *Certain Questions*, *supra* note 38, at para. 118.

88 *E.g. Land, Island and Maritime Frontier Dispute*, *supra* note 38, at para. 248; *Sovereignty over Pedra Branca/Pulau*, *supra* note 85, at paras. 72 and 120; *Military and Paramilitary*, *supra* note 20, at para. 158.

89 *E.g. Fisheries case*, *Judgment of December 18th, 1951*: *I.C.J. Reports 1951*, pp. 116, 138; *Land, Island and Maritime Frontier Dispute*, *supra* note 38, at paras. 198 and 297; *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria: Equatorial Guinea intervening*), *Judgment, I.C.J. Reports 2002*, p. 303, para. 207; *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), *Judgment, I.C.J. Reports 2009*, p. 61, para. 138; *Pulp Mills*, *supra* note 38, at paras. 189 and 228; *Application of the Interim Accord of 13 September 1995* (*the former Yugoslav Republic of Macedonia v. Greece*), *Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, para. 132, quoting with approval *Tacna-Arica* (*Tacna-Arica Question* (*Chile/Peru*) (1925), 2 *Reports of International Arbitral Awards* 921, 930), and 142; *Certain Activities* (*Merits*), *supra* note 38, at para. 119.

90 *E.g. Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *supra* note 82, at para. 73; *Certain Activities* (*Compensation*), *supra* note 38, at para. 76; *Pulp Mills*, *supra* note 38, at paras. 188, 225 and 228.

It could be argued that the above formulations do not point towards different standards.[91] Indeed, the Court shifts from one formulation to the other when dealing with different cases addressing the same issue. For example, the Court has referred to the existence of a dispute as being demonstrated beyond any doubt,[92] in a "more likely" manner[93] and in a "clear" manner.[94] In proceedings concerning land and maritime boundaries, the Court has referred to delimitations as being evidenced "in all probability",[95] "clearly"[96] or in a "convincing" manner.[97]

Fluctuations also occur within the same decision. In *Border and Transborder Armed Actions*, the Court stressed that the intention to confer jurisdiction was to be established by "preponderant" evidence.[98] However, later in the same judgment, the Court referred to evidence being "clear".[99] In the *Caribbean Sea* case, the Court referred to evidence "clearly indicat[ing]" the existence of a dispute, then required demonstration by "substantive evidence",[100] and last referred to "plausibility" as the criterion for establishing facts.[101] In *Sovereignty Over Certain Frontier Land*, the Court affirmed that mistakes in the text of the 1843 Boundary Convention attributing sovereignty over certain areas to Belgium had to be proven by "convincing evidence",[102] but later referred to such

91 *Contra*, Amerasinghe, *supra* note 5, at 239–242; Benzing, *supra* note 6, at 1403; Brown, *supra* note 6, at 99–100; Ruth Teitelbaum, "Recent Fact-Finding Developments at the International Court of Justice", 6 *The Law and Practice of International Courts and Tribunals* (2007), 119, 127.

92 *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, para. 87.

93 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia v. Russian Federation*), *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, para. 37.

94 *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *Judgment, I.C.J. Reports 2012*, p. 422, para. 26. The Court also required "clear" evidence for preliminary issues in *Immunities and Criminal Proceedings* (*Equatorial Guinea v. France*), *Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, para. 150; and *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*), *Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 7, para. 113.

95 *Land, Island and Maritime Frontier Dispute*, *supra* note 38, at para. 121.

96 *Frontier Dispute* (*Benin/Niger*), *supra* note 38, at para. 138.

97 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), *Judgment, I.C.J. Reports 2007*, p. 659, para. 159.

98 *Border and Transborder Armed Actions*, *supra* note 42, at para. 16.

99 *Ibid.*, at para. 89.

100 *Ibid.*, at para. 93.

101 *Ibid.*, at para. 95.

102 *Sovereignty over certain Frontier Land*, *supra* note 39, at 222.

mistakes as not being proven in a "plausible" manner.[103] In *Land, Island and Maritime Frontier Dispute*, a Chamber of the Court assessed the factual nature of some features for the purposes of establishing the baseline on "a high degree of probabilities",[104] then established facts "on a balance of probabilities"[105] and concluded that the proof supplied was not "convincing".[106] Last, in the *Whaling* case, the Court held that Australia's evidence "suggested" that the sample size catch under the JARPA II was larger than the ones necessary for achieving the purposes of the programme,[107] then assessed the facts before it to be plausible on the basis of the evidence.[108] This suggests the use of a probabilistic approach. However, Judge Xue in her Separate opinion suggested that the Court assessed whether proof submitted by Australia was "convincing".[109]

The above fluctuations in the language used by the Court for the second stage of the two-tier approach in preliminary matters and in the merits stage of ordinary claims indicates that the Court uses various formulations for the same standard, rather than that the Court uses radically different standards even in the same decision. As to the content of this second stage of analysis, it may be qualified as one requiring the conviction of the Court by high probability. According to the literature, this suggests the application of a "clear and convincing evidence", rather than "preponderance of evidence", standard.[110]

3.3 *Standard of Proof in Cases of Non-appearance*

The Court does not follow the two-tier approach in cases of non-appearance by a party. In these cases, the Court must satisfy itself that "the claim is well founded in fact and law" under Article 53 of the ICJ Statute.[111] It is commonly agreed that such a provision does not determine the standard of proof that the Court must apply.[112] The ICJ itself has affirmed that in cases of non-appearance

103 *Ibid.*, at 224 and 226.

104 *Land, Island and Maritime Frontier Dispute*, *supra* note 38, at para. 155.

105 *Ibid.*, at para. 248.

106 *Ibid.*, at paras. 198 and 297.

107 *Whaling in the Antarctic* (*Australia v. Japan: New Zealand intervening*), *Judgment*, *I.C.J. Reports 2014*, p. 226, paras. 196, 212 and 225. The formula "evidence suggests" may also be found in *Oil Platforms*, *supra* note 38, at para. 71; *Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *supra* note 82, at para. 76; *Jadhav*, *supra* note 80, at para. 140.

108 *Whaling in the Antarctic*, *supra* note 107, at para. 206.

109 *Whaling in the Antarctic* (*Australia v. Japan: New Zealand intervening*), *Judgment*, *I.C.J. Reports 2014*, Separate opinion of Judge Xue, p. 420, para. 14.

110 Grossen, *supra* note 24, at 266.

111 For a commentary on Article 53, see Mangoldt, Zimmermann, *supra* note 43.

112 *Ibid.*, at 1491; Alessandra Zanobetti, *La non comparizione davanti alla Corte internazionale di giustizia* (1996), 175 ff.; Shiping Liao, "Fact-Finding in Non-Appearance

it has to "attain the same degree of certainty as in any other case".[113] However, the adversarial nature of inter-state litigation[114] obviously implies that the non-appearance of a party impacts the test applied by the Court to consider whether a given fact has been established.

The limited *in absentia* case law clearly supports this contention. Reference to undisputed facts is nowhere to be found in decisions of this kind. It is thus not sufficient for the Claimant to provide minimum evidence in support of a fact for the Court to be satisfied. Indeed, were facts to be established on the basis of the absence of opposing evidence, the impossibility of the evidence being rebutted by the other party would put it at a dire disadvantage with regard to the equality of arms. This would contravene the intention of Article 53.[115] Thus, the application of a *prima facie* standard of proof is excluded.

The language used by the Court in qualifying the standard of proof ranges from the Court being "convinced",[116] evidence being "clear" in establishing facts,[117] or facts being "likely" to have occurred.[118] Such language is consistent with that applied in the second stage of the above two-tier approach followed in cases in which all disputing parties appear. It can thus be argued that in

Before International Courts and Tribunals" (2018), available at SSRN: https://ssrn.com/abstract=3187971, 16 ff. *Contra*, Eduardo Valencia-Ospina, "Evidence before the International Court of Justice", 1 *International law Forum du droit international* (1999), 202, 204. The Court itself has stressed that "Article 53 [...] does not compel the Court to examine [the appearing party's submissions] accuracy in all their details; for this might in certain unopposed cases prove impossible in practice" (*Corfu Channel Case, Judgment of December 15th, 1949: I.C.J. Reports 1949*, p. 244, 248 (hereinafter: '*Corfu Channel* (*Compensation*)')).

113 *Military and Paramilitary*, *supra* note 20, at para. 29.

114 Robert Kolb, "General principles of procedural law", in Zimmermann, Tams, Ollers-Frahm, Tomuschat, *supra* note 6, 963, 969.

115 In this sense, see the reasoning in *Corfu Channel* (*Compensation*), *supra* note 112, at 248; *Military and Paramilitary*, *supra* note 20, at paras. 30–31.

116 *Corfu Channel* (*Compensation*), *supra* note 112, at 248; *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, para. 77; *United States Diplomatic and Consular Staff*, *supra* note 39, at para. 11. See also the *South China Sea Arbitration*, referring to "clear evidence" being "more convincing" (*The South China Sea Arbitration* (*The Republic of Philippines v. The People's Republic of China*), PCA Case No. 2013-19, Award, 12 July 2016, para. 377).

117 *Nottebohm Case* (*second phase*), *Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4, 26; *Nuclear Tests* (*Australia v. France*), *Judgment, I.C.J. Reports 1974*, p. 253, paras. 26, 27 and 51; *Aegean Sea*, *supra* note 116, at paras. 31 and 64; *United States Diplomatic and Consular Staff*, *supra* note 39, at 47, 48, 71 and 82; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, para. 236.

118 *Aegean Sea*, *supra* note 116, at para. 105.

cases of non-appearance the Court applies the same "clear and convincing evidence" standard it applies in cases in which all parties appear.

A certain degree of consistency in the standard of proof applied by the Court may also be seen with regard to the difficulties arising from the notion of "charges of exceptional gravity". The relevant example is the *Military and Paramilitary Activities* case, which parallels the *Oil Platforms* and *Armed Activities* cases insofar as the Court did not explicitly qualify the alleged uses of force by the United States, or the alleged use of force by Nicaragua that would have justified the United States' action as legitimate self-defence, as "charges of exceptional gravity". Nor did the Court address the standard of proof on the basis of *Corfu Channel*. Instead, the Court referred to the demonstration of facts by "convincing evidence",[119] or to facts being established although no "concrete" or "full" evidence was submitted.[120] Such language suggests the application of a "clear and convincing evidence" standard, rather than the application of the "proof beyond reasonable doubt" standard.[121] It is unfortunately unclear whether the Court considered the allegations to be ordinary claims, or whether it considered the United States' allegations as "charges of exceptional gravity", but applied a standard different from that of *Corfu Channel*.

4 Concluding Remarks

Having established that the power to determine the standard of proof to be applied in any given case is a power inherent to the Court's judicial function, it has been demonstrated in this article that the ICJ has employed this inherent power with a satisfactory degree of consistency that permits the delineation of its contours.

It has been shown that the Court follows a two-tier approach to the standard of proof in cases in which all the disputing parties appear. It has been inferred from the Court's general practice that the factual framework it relies upon in

119 *Military and Paramilitary*, *supra* note 20, para. 29. On evidentiary issues in the instant case, see in general Keith Highet, "Evidence, The Court, and the Nicaragua Case", 81 *American Journal of International Law* (1987), 1.

120 *Ibid.*, at paras. 151–152.

121 It is to be noted that the Court referred to *Corfu Channel* recalling that hearsay evidence "can be regarded only as allegations falling short of conclusive evidence" (*ibid.*, at para. 68, quoting *Corfu Channel* (*Merits*), *supra* note 9, at 17). Such reference appears however related to the limited probative value of hearsay evidence in general.

order to decide a case comprises "undisputed facts",[122] which are those facts for which the opposing party does not produce contrary evidence. It is argued that this approach amounts to the application of a *prima facie* standard of proof.[123]

It has been shown that, if evidence opposing a fact is produced, the Court applies a standard which varies according to the severity of the allegations made by the parties. For example, in cases of "charges of exceptional gravity", *i.e.*, alleged breaches of *jus cogens*, the Court requires proof to a high degree of certainty. In any other case, *i.e.* establishing facts relating to preliminary matters or allegations not of an "exceptional gravity" in the merits, the Court must be convinced of the high probability of the occurrence of a fact. These two standards may be respectively equated to the "proof beyond reasonable doubt" and "clear and convincing evidence" standards.

In cases of the default of appearance by a party, it has been argued that the Court conducts a single-tier analysis, which is similar to the second stage of the approach followed in cases in which all parties appear. This is in line with Article 53 of the ICJ Statute and with the fundamental principle of equality of arms; the Court may not consider facts to be proven simply due to the failure by the opponent to produce opposing evidence when it had no opportunity to do so. The Court's case law concerning preliminary issues and allegations of no "exceptional gravity" in the merits shows a high degree of consistency in applying the "clear and convincing evidence" standard, whereas the only case of non-appearance arguably involving charges of alleged exceptional gravity, *Military and Paramilitary Activities*, raises issues. Indeed, in *Military and Paramilitary Activities*, the Court apparently applied the "clear and convincing evidence" standard, rather than "proof beyond reasonable doubt". However, even in this case, the Court's practice shows a "degree of consistency in the inconsistency", since the same issues concerning the qualification of alleged uses of force as charges of exceptional gravity are raised by the *Oil Platforms* and *Armed Activities* decisions.

In the light of the above, the case may be made that, notwithstanding the accuracy of Judge Higgins' opinion that the Court should "make clear what standards of proof it requires to establish what sorts of facts",[124] the ICJ's

122 Amerasinghe, *supra* note 5, at 88; Brown, *supra* note 6, at 94; Kolb, *supra* note 10, at 822; Malcolm N. Shaw, *supra* note 77, para. 257; Sandifer, *supra* note 25, at 14–15.

123 It is to be noted that applying a *prima facie* standard of proof to jurisdictional matters is different from demonstrating a *prima facie* jurisdiction. See Jonathan I. Charney, "Compromissory Clauses and the Jurisdiction of the International Court of Justice", 81 *American Journal of International Law* (1987), 855, 865–869.

124 *Oil Platforms*, Separate opinion of Judge Higgins, *supra* note 1, at para. 33.

practice provides sufficient elements to potential parties for understanding the basics of the "discretionary and subject to human judgment"[125] activity constituted by the ICJ handling the standard of proof. The flexible use by the ICJ of the above three standards arguably amounts to a sensible use of the Court's inherent power of determining "the burden of proof [depending] on the *subject-matter* and the *nature* of each dispute",[126] preventing "the degree of burden of proof [from being] so stringent as to render the proof unduly exacting".[127] Such a flexible approach also fully conforms to the idea that the ICJ Statute and practice "must be construed in such a way as to hold a middle course between [the common law and civil law] systems, and [they] could not be read exclusively in the spirit of the Anglo-Saxon system".[128]

Indeed, the *prima facie* standard of proof is reminiscent of a civil law-like approach to proof, under which non-opposed evidence is given *prima facie* credibility similar to what occurs with legal proof. Its application as the first stage of the two-tier approach to the standard of proof applied in cases in which all disputing parties appear is in line with the Court's position on the application of the *forum prorogatum* principle[129] and the expansive approach to interpretation of compromissory clauses.[130] It also represents a sensible use of judicial economy[131] balanced with the principle of equality of arms. Indeed, it can be argued that a party that participates in proceedings and decides to refrain from rebutting the other party's evidence is implicitly accepting those facts. Conversely, in cases of non-appearance, the Court has refrained from applying this standard due to the fact that the absent party has no opportunity to rebut the evidence presented.

125 Kazazi, *supra* note 5, at 325; Bernard Hanotiau, "Satisfying the Burden of Proof: The Viewpoint of a 'Civil Law' Lawyer", 10 *Arbitration International* (1994) 341, 341. On the cognitive process, and thus "internal" aspects, of the evaluation of evidence and standard of proof, see Ho Hock Lai, *A Philosophy of Evidence Law: Justice in the Search for Truth* (2008), 185 ff.

126 *Diallo*, *supra* note 40, at para. 54; emphasis added.

127 *Case of Certain Norwegian Loans*, *Judgment of July 6th, 1957*: *I.C.J. Reports 1957*, Separate opinion of Judge Lauterpacht, pp. 34, 39.

128 *Acts and Documents concerning the Organization of the Court*, PCIJ Series D, No. 2, Addendum, 1926, 202.

129 Kolb, *supra* note 114, 992.

130 Charney, *supra* note 123.

131 On judicial, or procedural, economy, see, *inter alia*, Kolb, *supra* note 114, at 978 ff.; Arman Sarvarian, "Procedural Economy at the International Court of Justice", 18 *The Law and Practice of International Courts and Tribunals* (2019), 74.

The "clear and convincing evidence" and "proof beyond reasonable doubt" standards applied in cases of opposing evidence are reminiscent of common law systems and appear to be in line with the ICJ's substantive approach to issues of evidence.[132] Furthermore, flexibility as to the standard of proof to be applied to a given case is fully consistent with the freedom enjoyed by the Court in assessing the weight of evidence.[133]

So far, the Court has sensibly applied its discretion with a view to "proceed[ing] with greater caution [… i]n dealing with sovereign States rather than with individuals".[134] It has avoided both acting in a frivolous manner, and constraining itself with "overly sophisticated rules, overly detailed provisions [which] can create many more problems than solve them, and therefore […] may become an obstacle in the search for justice and the proper adjudication of a case".[135] This has guaranteed for the ICJ a high, near-uncontested authority[136] in the finding of facts, with the beneficial side effect of enhancing the Court's capacity of fostering amiable settlement of disputes in the post-judgment phase.[137]

Obviously, some issues concerning the standard of proof still remain open. Most prominently, the question of whether "charges of exceptional gravity" require the use of a higher standard of proof is to be more precisely curtailed. However, it can be argued that future decisions, such as those in the pending *Rohingya Genocide* and *Ukraine v. Russia* cases,[138] will provide further guidance and may contribute to the consistency in the Court's case law.

132 *Supra*, text at note 125.

133 Niyungeko, *supra* note 74, at 440–441.

134 Sandifer, *supra* note 25, 170.

135 Manfred Lachs, "The Revised Procedure of the International Court of Justice", in Frits Kalshoven *et al.* (eds.), *Essays on the development of the international legal order: in memory of Haro F. van Panhuys* (1980), 21, 47.

136 *E.g.*, even in the *Military and Paramilitary Activities* case, the United States did not challenge findings of fact by the Court, rather stressing its incorrect application of international law (James P. Rowles, "Nicaragua versus the United States: Issues of Law and Policy", 20 *International Lawyer* (1986), 1245, 1248; Paul Lewis, "World Court Supports Nicaragua After U.S. Rejected Judges' Role", *The New York Times*, 28 June 1986).

137 On the issue in point, see Attila M. Tanzi, "Adjudication at the Service of Diplomacy: The *Enrica Lexie* Case", *Journal of International Dispute Settlement* (2021), 448.

138 In *Ukraine v. Russia*, the potential charge of exceptional gravity is constituted by the Ukrainian claim that Russia has committed acts of terrorism "though its proxies", including bombings of civilians, and egregious forms of discrimination including "[p]erpetrating and tolerating a campaign of disappearances and murders of Crimean Tatars" (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Ukraine*

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v. Russian Federation), Ukrainian Application instituting proceedings, paras. 134 and 137). In the *Rohingya Genocide* case, the issue obviously revolves around genocide allegations.