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TIERED STANDARDS OF PROOF BEFORE THE INTERNATIONAL COURT OF JUSTICE

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Abstract – Although the International Court of Justice is the principal judicial organ of the United Nations and is often tasked to resolve inter-state disputes concerning a wide array of subject matter, neither its rules nor jurisprudence readily disclose any consistent or even clear approach on the issue of standard of proof. We make the case that a tiered approach to standard of proof can and should be adopted, and in doing so, identify the various factors that may be relevant in understanding the court's different positions in different situations.

I. CONTEXT

Knowing what the standard of proof entails is fundamental in the resolution of legal disputes – it sets the threshold of evidence required for the party that bears the burden to prove a particular fact, and ultimately, to prevail in the dispute.[1] It has been claimed that the elucidation of a formal standard of proof is typically understood to be a distinctive common law practice.[2] However, it cannot seriously be disputed that the need to apply a discernible standard of proof is inherent in any form of judicial decision-making. This is due to the intrinsic uncertainties in appraising evidence adduced by the parties to the dispute.[3] Even in civil law jurisdictions, where the standard of proof is more loosely

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1 See for instance, Hodge Malek, Jonathan Auburn, Roderick Bagshaw, et al., *Phipson on Evidence* (2nd supp, 19th edn, Sweet & Maxwell 2019) 6-01.

2 Eduardo Valencia-Ospina, 'Evidence Before the International Court of Justice' (1999) 1 International Law Forum 202, 203; Caroline Foster, 'Burden of Proof in International Courts and Tribunals' (2010) 29 Australian Yearbook of International Law 27, 33.

3 See Lord Hoffman's description of the burden of proof and standard of proof in *B (Children), In re* [2009] AC 11 [2]:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to

defined, standards of proof are undoubtedly still applied by the courts.[4] What about international law? In particular, what happens when an international tribunal, such as the International Court of Justice ('ICJ'), which is meant to reflect both civil and common law cultures, is confronted with questions pertaining to standard of proof? Are there any clearly defined standards, bearing in mind that the world court is one of the rare bodies entrusted by sovereign states to resolve disputes that have international legal ramifications?

The United Nations Charter,[5] Statute of the International Court of Justice ('Statute'),[6] Rules of Court, and Practice Directions do not offer much help in elucidating the relevant standard of proof. For instance, the Statute only deals with issues of evidence in very broad terms, providing that the court shall make "all arrangements connected with the taking of evidence".[7] The result of this is that the court has, over time, relied on its practices and jurisprudence to develop the various rules of evidence. It considers this to fall within the category of general principles of law recognised under Article 38(1)(c) of the Statute.[8] However, these rules have spoken little about what standard of proof specifically entails.[9] Instead, as a commentator has observed, the 'level of proof required to meet the evidentiary burden in any given dispute is often opaque, and the standard employed is far from consistent across decisions'.[10] Even the ICJ itself is cognisant of this – in *Oil Platforms*, Judge Buergenthal wrote, 'the Court never spells out what the relevant standard of proof".[11] Perhaps it is the very nature of the ICJ's decisions (which often have great political consequences) that the judgements are often extremely limited in its scope, dealing only with the facts at hand.[12] But given the importance of standards of proof, there have been calls for a clearer definition of the

discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

4 Kevin M Clermont & Emily Sherwin, 'A Comparative View of Standards of Proof' (2002) 50(2) The American Journal of Comparative Law 243, 245–251.

5 Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI ('UN Charter').

6 Statute of the International Court of Justice (entered into force 24 October 1945) 33 USTS 993 ('Statute').

7 *Ibid* art 48.

8 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Merits) [2008] ICJ Rep 12 [45].

9 As Caroline Foster argues, this is one "respect in which international adjudication more closely resembles civil law proceedings than common law proceedings" Foster (n 2) 33.

10 James Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58(1) The International and Comparative Law Quarterly 163, 166. See also, Mary Ellen O'Connell, 'Rules of Evidence for the Use of Force in International Law's New Era' (2006) 100 American Society of International Law Proceedings 44, 44 'we generally know which party carries the burden … we do not know with certainty what the burden is.'

11 *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161 [41] (Separate Opinion, Judge Buergenthal).

12 This is most prominent in the principle of *non-ultra petita*, where the Court's jurisdiction is limited to the questions that are asked of it: see, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 [43].

applicable standards of proof. Prominently, in her separate opinion in *Oil Platforms*, Judge Higgins commented that the ICJ 'should make clear what standards of proof it requires to establish what sorts of facts'.[13]

In this article, we seek to make clear the standards of proof that can and should be applied by the ICJ to disputes brought before it. As a starting point, given how international law deals with a very wide range of disputes, we are of the view that a universal standard of proof that applies the same way across all disputes should not be adopted. Instead, the court should consider a range of applicable factors that would warrant the application of a more stringent or relaxed standard of proof, as the case may be. This article will look at the various factors that have been applied by the ICJ in its jurisprudence. The argument is that a tiered approach to the standard of proof – perhaps not too dissimilar from the common law's approach – may be preferable. This is in contrast to the present approach, which relies on an implied spectrum of standards of proof.

II. STANDARD OF PROOF IN INTERNATIONAL LAW AND ITS INTERACTION WITH THE BURDEN OF PROOF

It may be helpful to first disambiguate what standard of proof means, in the context of the ICJ's lexicon. Pursuant to the Statute, formal sources of international law include customary international law and the aforementioned general principles of law. Customary international law refers to obligations arising from state practice and *opinio iuris* (the belief that the practice is law).[14] While general principles of law refer to principles that are obtained from the various domestic legal systems.[15] In relying on either source of law, states to a particular dispute are expected to adduce evidence to convince the court that the rule exists generally in international law.[16] In cases where there is insufficient

[13] *Oil Platforms* (n 11) [33] (Separate Opinion, Judge Higgins).

[14] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 1969 3 [77].

[15] See *Erdemović* (Judgment) IT-96-22 (7 October 1997) [56]– [72] (Joint Separate Opinion of Judge McDonald and Judge Vohrah); ILC, "General Principles of Law: Texts and Titles of Draft Conclusions 1, 2, and 4 Provisionally Adopted by the Drafting Committee" (28 July 2021) UN Doc A/CN4/L955. See also Marcelo Vázquez-Bermúdez (Special Rapporteur), "First Report on General Principles of Law" (5 April 2019) UN Doc A/CN4/732 [231]– [253], where it was suggested that general principles of law may also be obtained from the international legal system.

[16] There is, of course, another distinct source of law in the form of treaty obligations. As treaties generally require the parties to be states parties, proving the scope of the norm, while occasionally requiring recourse to things such as preparatory materials, is not as challenging as proving the existence of the norm.

evidence, the court is likely to consider that such a rule does not exist.[17] In proving the existence of these legal norms, a state may do so by referring to various sources, including UN General Assembly Resolutions,[18] domestic court decisions and domestic laws,[19] and other international conventions.[20] In this vein, leading commentators have referred to a 'standard of proof' to indicate the amount of evidence needed for the court to find that a particular international law norm exists.[21] It is worth noting that while the usage of 'standard of proof' may be relevant in this context of proving the existence of law, the burden to meet this standard does not generally lie on either party to the dispute. Instead, the principle of *jura novit curia* applies: as the ICJ explained in *Fisheries Jurisdiction*, the court, ' as an international judicial organ, is deemed to take judicial notice of international law', and 'the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the court'.[22] And if no law can be shown to exist on the matter, then the *Lotus* principle would presumably apply to the effect that 'whatever is not explicitly prohibited by international law is permitted'.[23]

For completeness, special rules may still apply to allocate the burden – that is, deviating from the principle of *jura novit curia* – such as when a state party seeks to restrict the application of an established rule.[24] One expression of this principle is the proving of a regional or local customary norm, whereby the existence of certain facts between parties may prove that a customary right exists between both parties to the dispute. This question was dealt with in the *Asylum* case,[25] where it was to be decided whether there was a regional or local custom permitting diplomatic asylum, which was applicable to

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[17] *The Case of the SS Lotus (France v Turkey)* (Merits) [1927] PCIJ Rep Ser a No 10, 28; *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Merits) [2012] ICJ Rep 99 [101]. See also ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (20 December 2018) UN Doc A/73/10.

[18] See for instance *Legality of the Threat or Use1 of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [70]; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7 [85].

[19] Statute (n 6) art 38(1)(d); *S.S. Lotus* (n 17) 28-30; *Arrest Warrant* (n 12) [58].

[20] *North Sea Continental Shelf* (n 14) [37].

[21] See for instance James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 24.

[22] *Fisheries Jurisdiction (UK v Iceland)* (Merits) [1974] ICJ Rep 3 [17]. See also, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [29].

[23] *SS Lotus* (n 17); *Nuclear Weapons* (n 18); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403. See also An Hertogen, 'Letting Lotus Bloom' (2015) 26(4) European Journal of International Law901.

[24] *The Minquiers and Ecrehos Case (France/UK)* (Merits) [1953] ICJ Rep 47 [99] (Individual Opinion, Judge Levi Carneiro).

[25] *Asylum Case (Colombia v Peru)* (Merits) [1950] ICJ Rep 266. See also *Rights of Passages over Indian Territory (Portugal v India)* (Merits) [1960] ICJ Rep 6, 39. There, Portugal had to establish that it had a customary right of passage through the territory of India.

Latin-American states. Distinguishing itself from *Fisheries Jurisdiction*, the ICJ held that the state 'which relies on a custom of this kind must prove this custom is established in such a manner that it has become binding on the other [state]'.[26] Having said that, the more common way in which standard of proof has been used is in the context of evidence required to prove a particular fact, which in some legal cultures may be better understood as burden of proof. This was the case in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*,[27] which followed the earlier ICJ decisions of *Bosnian Genocide*[28] and *Corfu Channel*[29] in dealing with the question of whether the evidence that states parties adduced could find a claim. The burden of proof in proving a fact would generally lie on the party asserting the fact, as highlighted in *Bosnian Genocide*.[30] The remainder of this article should thus be traversed with this meaning of standard of proof in mind.[31]

III. THE COURT'S JURISPRUDENCE AND THE RELEVANT STANDARD OF PROOF

A. The Different Standards of Proof Applied by the Court

The difficulty with ascertaining the standard of proof the ICJ ought to apply in any given case is that a hodgepodge of standards has been invoked in its jurisprudence. This includes the 'balance of probabilities',[32] 'beyond possibility of reasonable doubt',[33] and 'conclusive evidence',[34] just to name a few formulations. The variation in formulation may be explained by the practice of the judges of the court to apply in their respective domestic jurisdictions' standards

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[26] *Asylum Case* (n 25) 276.

[27] [2015] ICJ Rep 3 [177]– [179].

[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43 [208]– [210].

[29] *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 17.

[30] *Bosnian Genocide* (n 28) [204].

[31] To be even clearer, the standard of proof can be conceptualised as the 'quantum of evidence necessary to substantiate factual claims made by the parties': JA Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58(1) ICLQ 163. This is an external bar to determine if all the evidence adduced can prove the case. On the other hand, the quantity or weight of the evidence only goes towards showing whether this external bar has been met. Different pieces of evidence will bear differently in showing whether the external bar has been met – for instance, more weight may be placed on direct evidence compared to circumstantial evidence. But this will not have a bearing on how high the external bar is set.

[32] See for instance *Case Concerning the Land, Island and Maritime Frontier Dispute* (Merits) (El Salvador/Honduras: Nicaragua Intervening) [1992] ICJ Reports 351, 506.

[33] See for instance *South West Africa Cases (Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 511 (Joint Dissenting Opinion, Sir Percy Sender and Sir Gerald Fitzmaurice).

[34] *Corfu Channel* (n 29) 17.

which they are most familiar with.[35] In principle, there is no distinction between 'civil' and 'criminal' responsibility in international law,[36] that often gives rise to differentiated standards of proof in domestic law.[37] Yet, in proving an international wrong, there are grounds to argue that differentiated standards of evidence should apply. For instance, would it be reasonable for there to be no difference in the evidence required to prove that a state has committed an act of genocide, and the evidence required to prove that a state has failed to protect the rights of foreign investors? The ICJ surely does not think so in the application of the different standards of proof. Instead, the buffet of standards that the court has applied indicates that different situations warrant the application of different standards of proof. If we accept that differentiated standards apply in the ICJ, how does the court, then, decide which standard of proof would apply? We are of the view that the following factors can act as a guide.

B. Factors guiding the relevant standard of proof

1. Gravity of the charge

Perhaps one of the most important factors that the court will take into consideration in determining the relevant standard of proof is the gravity of the charge.[38] There are two plausible aspects to this. The first relates to whether the way in which the international wrong was committed was especially egregious; the second relates to whether the international norm is particularly important. While these two aspects may, in some cases, be intrinsically linked to each other (for instance, where the obligation not to commit genocide is violated by a state organ), there are other cases where such a difference may be relevant. The first aspect can be observed in *Corfu Channel*, where the court had to decide whether Albania could be made responsible for mines laid in the Corfu Channel that damaged English naval ships that were passing through it. The main argument, that the minefield was laid by Albania, was eventually de-emphasised by the United Kingdom ('the UK') as "no evidence in support" was

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[35] Katherine Del Mar, 'The International Court of Justice and Standards of Proof' in Bannelier, Chistakis et al.(eds), *The ICJ and the Evolution of International Law: The Lasting Impact of the Corfu Channel Case* (Routledge 2011); Stephen Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (2012) Geneva Academy of International Humanitarian Law and Human Rights <https://www.geneva-academy.ch/joomlatools-files/docman-files/Standards%20of%20Proof%20in%20Fact-Finding.pdf> accessed 31 August 2021 at 20.

[36] ILC, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (12 December 2001) UN Doc A/56/10, p 55.

[37] See Part IV.

[38] This factor has recently been explicitly accepted as a factor to determine the standard of proof in *Armed Activities on the Territory of the Congo (Reparations)*, [2022] <https://icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf>, where the court explicitly stated at [120] that 'the standard of proof may vary from case to case and may depend on the gravity of the acts alleged'.

furnished during its final submissions.[39] But the UK had two alternative arguments: Albania had either colluded with Yugoslavia in actively laying mines in the channel, or Albania had knowingly allowed its territory to be used for acts that were contrary to the rights of other states. On the former, the UK relied on the evidence of its commander, which gave evidence from his personal knowledge that he saw mines being loaded on Yugoslav minesweepers.[40]

However, the court held that given that there was 'no personal and direct confrontation', this evidence could only be regarded as ' allegations falling short of conclusive evidence… [since a] charge of such exceptional gravity against a State would require a degree of certainty that has not been reached here'.[41] As for the latter alternative argument, the court concluded that the minelaying would not have been possible without Albania's knowledge. It pointed to Albania's continued jealous watch over its territorial waters, including the Corfu Channel, as well as the existence of expert evidence. This was done to show how it would have been infeasible for a party to lay mines in the channel without Albania observing it from the Albanian coast.[42] The court observed that they could establish the violation through inferences of fact if 'they leave no room for reasonable doubt'. The court relied on the two pieces of indirect evidence and found that Albania was responsible under international law.[43]

In comparing the arguments raised by the UK and its corresponding standards of proof, it appears that the particular act or omission that Albania claimed to have committed was the important factor which resulted in the court's different standards as applied to the different claims. The court was much more willing to find the violation of international law through slightly less conclusive proof where the violation was a less egregious omission (the failure to notify the warships of the mines). This was in contrast to where the violation concerned a more egregious act (the collusion or act of laying the mines). But it must be noted that the ICJ ultimately framed Albania's responsibility in a broad manner. The court did not distinguish responsibility for breaching the obligation not to collude in laying mines from that for breaching the obligation not to knowingly use its territory for illegal purposes. Instead, it followed the UK's submission, and found that Albania was responsible under international law for the ' explosions which occurred (in Albanian waters)', and for 'the damage and loss of human life which resulted from them'.[44] Any doubt that may have lingered as to whether a different standard of proof would be applied after the *Corfu Channel* decision, the subsequent case of *Bosnian*

[39] *Corfu Channel* (n 29) 16.
[40] *Ibid* 16.
[41] *Ibid* 17.
[42] *Ibid* 18–23.
[43] *Ibid* 23.
[44] *Ibid* 23.

Genocide supports the interpretation of *Corfu Channel* proffered above. The question before the court was whether Serbia and Montenegro could be responsible for the crimes of genocide committed during the massacre that occurred in Srebrenica. The court, in answering this question, adopted different standards of proof, dependent on whether it concerned an act or an omission. On one hand, in finding that Serbia and Montenegro failed to prevent genocide and to punish and extradite persons charged with genocide, the court adopted the standard of 'a high level of certainty'.[45] On the other hand, in finding that Serbia and Montenegro were not complicit in the commission of genocide, the court found that there must be evidence which proves 'beyond any doubt' that it had a specific intent to commit genocide.[46]

Another example where the first aspect of the charge's gravity was exemplified was the high standard of proof that was required to show bad faith in *Application of Interim Record*.[47] There, the ICJ had to consider whether Greece violated an Interim Accord entered between Greece and the former Yugoslav Republic of Macedonia by objecting to Macedonia's entrance into the NATO. Greece argued that Macedonia breached its obligation to negotiate in good faith, which was required under the Interim Accord.[48] In clarifying the standard of proof required to show that a state had acted in bad faith, the court emphasised that the proof must be supported 'not by disputable inferences but by clear and convincing evidence which compels such a conclusion'.[49] This followed the standard set out in the *Tacna–Arica Question* arbitration.[50] Here, the tribunal considered whether Chile and Peru had negotiated in good faith to carry out negotiations in holding a plebiscite to decide the question on the ownership of disputed provinces. In setting a high standard of proof – 'clear and convincing evidence' – the tribunal emphasised on the gravity of the action. It highlighted that a finding of bad faith would concern 'the honour of a Nation', and such a purpose 'should not be lightly imputed'.[51]

The second aspect of the gravity of the charge (that is, the importance of the norm) was prominently seen during the proceedings of *Bosnian Genocide*. In this case, the parties disagreed over the applicable standard of proof to be applied. Bosnia and Herzegovina, in their submissions, emphasised that, 'the standard is the balance of evidence or the balance of treaty obligations'.[52] Professor Pellet, appearing for Bosnia and Herzegovina, argued that the

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45 *Bosnian Genocide* (n 28) [210].

46 *Ibid* [422]. See also Andrea Gattini, 'Evidentiary Issues in the ICJ's *Genocide* Judgment' (2007) 5(4) Journal of International Criminal Justice 889, 893–899.

47 *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece)* (Merits) [2011] ICJ Rep 644.

48 *Ibid* [127].

49 *Ibid* [132].

50 *Tacna–Arica Question* (Chile, Peru) (1925) 2 RIAA 921.

51 *Ibid* 930.

52 *Bosnian Genocide* (n 28) [208].

ICJ was different from the International Criminal Tribunal for the Former Yugoslavia ('the ICTY'), which applies "the highest standard of proof in international litigation', that is, the standard of 'beyond reasonable doubt'.[53] On the other hand, Serbia and Montenegro argued that the standard of proof should be similar to the standard taken in the ICTY: that the evidence 'should be such as to leave no room for reasonable doubt'.[54] While the lower standard of the balance of probabilities may have gathered some sympathy in the dissenting opinion of Judge Mahiou,[55] the ICJ clearly rejected this approach. Quoting the *Corfu Channel* judgement, it repeated that ' claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive'.[56] The court emphasised that, in order for it to hold Serbia and Montenegro accountable for the claims, it must be 'fully convinced' of their veracity, given the seriousness of the charges under Article III of the Genocide Convention.[57]

This stringent standard was also applied in *Oil Platforms*, where one of the issues in contention was whether the United States ('the US') was under an armed attack by Iran which would justify its attack of the Iranian oil platforms as an exercise of self-defence. This requirement of armed attack, as highlighted in the judgement, required the US to show that Iran had used the "most grave forms of the use of force (those constituting an armed attack)" against the US.[58] One specific instance that, as the US claimed, gave rise to the right to exercise self-defence, was the mining of USS *Samuel B Roberts*. There was evidence showing moored mines in the area that the USS *Samuel B Roberts* was mined, which matched the serial numbers from other Iranian mines. The ICJ, in observing the persuasiveness of the evidence provided, nonetheless rejected the US's claims on the basis that while the evidence was 'highly suggestive', it was 'not conclusive'.[59] Notably, while disagreeing with the court's handling of the standards of proof applied in this case, Judge Burgenthal in his separate opinion makes the point that the court decided to apply a high standard of 'conclusive evidence', instead of ' highly suggestive' evidence.[60]

The cases that applied a high standard of proof due to the gravity of the norm may be contrasted with *Certain Norwegian Loans*.[61] There, neither the alleged way in which the norm was violated, nor the alleged norm, was an exceptionally grave one. The case concerned a claim by France exercising

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[53] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Oral Proceedings) 2006/03, 43.
[54] *Bosnian Genocide* (n 28) [208].
[55] *Ibid* [78] (Dissenting Opinion, Judge Mahiou).
[56] *Ibid* [209].
[57] *Ibid*.
[58] *Oil Platforms* (n 11) [51].
[59] *Ibid* [71].
[60] *Ibid* [44] (Separate Opinion, Judge Burgenthal).
[61] *(France v Norway)* (Preliminary Objections) [1957] ICJ Rep 9.

diplomatic protection for its own nationals against Norway. This was done on the grounds that the Norwegian loans did not pay the French bondholders the amounts that were due to them. Norway claimed that the claim was inadmissible because France did not previously exhaust all local remedies. In the main judgement, the ICJ concluded there was no jurisdiction to hear the case, and therefore, the argument that France failed to exhaust all local remedies was moot.[62] Nonetheless, Judge Lauterpacht took on this issue in his separate opinion. He explained that there existed legislation which on its face deprives the private claimants of a remedy. Hence, it was for Norway to meet the burden of proof to show that there was still a possibility for France to obtain effective remedies in Norway's domestic courts. However, the standard of proof would be considerably low, in that the 'the degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting'.[63]

2. Engagement of the court's declarative functions

Another factor that the ICJ would likely look at is whether the dispute concerns a declarative or a determinative function.[64] The declarative function refers to the court's ascertainment of a fact (such as in defining a boundary, since the court in defining a boundary is merely declaring the boundaries which had already existed).[65] Its determinative function refers to the court's determination of whether an illegal act was performed (such as deciding whether a state may be made responsible for the wrongful act of its agents).[66] When the court exercises its declarative functions compared to its determinative function, it generally applies a lower standard of proof. A clear example is the *Sovereignty Over Pulau Ligitan and Pulau Sipadan*,[67] where the court had to decide whether sovereignty over the disputed islands belonged to Indonesia or Malaysia. Judge Oda described the case a 'rather weak' one in that neither party had made a strong showing in support of its claim to title to the (disputed) islands". He, however, noted that the court nonetheless came to a 'reasonable decision' on the question of sovereignty over the islands.[68] This was consistent with the court's decision in *Land, Island and Maritime Frontier Dispute*,[69] where it had to determine the boundary line between El Salvador

[62] *Ibid* [27] (Separate Opinion, Judge Sir Hersch Lauterpacht).

[63] *Ibid* [34] (Separate Opinion, Judge Sir Hersch Lauterpacht). Note, however, that in that very same judgement, on another issue concerning the existence of the court's jurisdiction, Judge Lauterpacht considered that there would be a different standard of proof which applies – that 'the Court will not uphold its jurisdiction unless the intention to confer it has been proved *beyond reasonable doubt*' (emphasis added).

[64] Wilkinson (n 35) 20.

[65] See for instance *North Sea Continental Shelf* (n 14) [18]. The court held that '(d)elimitation is a process is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area'.

[66] Wilkinson (n 35) 20; Del Mar (n 35) [7.2].

[67] *(Indonesia/Malaysia)* (Merits) [2002] ICJ Rep 625.

[68] *Ibid* 687 (Declaration, Judge Oda).

[69] *Land, Island and Maritime Frontier Dispute* (n 32).

and Honduras. The court acknowledged that there was 'no great abundance of evidence either way' in determining the interprovincial boundary of the fourth sector that justified the drawing the line of *uti possidetis juris*. However, it still drew the boundary 'on a balance of probabilities'.[70]

In comparison, in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*,[71] the court had to determine whether there was sufficient evidence based on a tacit legal agreement to show the establishment of a permanent maritime boundary. It held that such evidence 'must be compelling', since the establishment of such boundaries 'is a matter of grave importance and agreement is not easily to be presumed'.[72] Judge Sebutinde and Vice President Sepulveda-Amor in their Dissenting Opinion and Declaration respectively in the subsequent case of *Maritime Dispute* have interpreted this to mean that the court applies a 'stringent standard of proof' while establishing a permanent maritime boundary on the basis of a tacit agreement.[73] Similarly, in the recent case of *Maritime Delimitation in the Indian Ocean*, the court observed that, there is a 'a high threshold for proof that a maritime boundary has been established by acquiescence or tacit agreement'.[74] But it is suggested that the type of agreement sought to be relied upon (whether tacit or express) does not shift or change the standard of proof required for the court to declare the states' boundaries. Rather, such considerations would only impact the probative value of the evidence – since silence may often be equivocal, less probative value can be placed on a state's silence to show agreement of a state's boundaries.

3. Nature of the claim

Another factor is the nature of the claim brought before the ICJ. This was seen in *Ahmadou Sadio Diallo*,[75] where Guinea brought a claim on behalf of its national against the Democratic Republic of Congo ('the DRC'). Guinea asserted that its national was illegally arrested, imprisoned, and expelled by the DRC. It also claimed that its national's legal interest in certain companies was unlawfully interfered with.[76] The court found that the DRC violated certain human rights obligations owed to the national, which gave rise to an obligation to compensate the national for these violations.[77] It also found both material and non-material injury to be compensable by the DRC for the

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[70] *Ibid* [248].
[71] *Nicaragua v Honduras* (Merits) [2007] ICJ Rep 659.
[72] *Ibid* [253].
[73] *Maritime Dispute (Peru v Chile)* (Merits) [2014] ICJ Rep 3 [6] (Dissenting Opinion, Judge Sebutinde), [4] (Declaration, Vice President Sepúlveda-Amor).
[74] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* [2021] <https://icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-00-EN.pdf> [52].
[75] *Republic of Guinea v Democratic Republic of the Congo* (Merits) [2010] ICJ Rep 639.
[76] *Ibid* [20].
[77] *Ibid* [165].

violations of human rights obligations. In granting compensation between the parties, the court appeared to apply a relatively low standard of proof. In terms of non-material injury, the court said it was ' reasonable to conclude' that there was causation between the non-material injury and the DRC's wrongful conduct, and that the existence of non-material damage could be established 'without specific evidence'.[78] In terms of the material injury, while Guinea adduced little evidence in support of the various heads claimed (loss of personal property, remuneration, and potential earnings), the court granted compensation to the sum of US$10,000 on an equitable basis.[79] This was on the basis that the national had lived for over thirty years in the territory of the DRC, and would have accumulated some personal property.[80]

However, as Judge Mampuya highlighted, through a string of cases from other international courts such as the European Court of Human Rights and Inter-American Court of Human Rights ('the IACHR'), that there are grounds to apply a much more stringent standard. For non-material injury, Judge Mampuya opined that, given the large amount of compensation given, it would possess an 'exemplary, if not punitive, character'. He also mentioned that the ICJ should have enforced a higher standard of proof, that of 'sufficient proof' or 'proof to the satisfaction of the Court'.[81] This was also the case for material injury – it was insufficient to simply rely on equitable principles to find a head of compensation, if there was insufficient evidence produced. The standard of proof, as Judge Mampuya highlighted, should have been that of 'sufficient proof'.[82] Unlike international human rights courts such as the IACHR that were conceived out of systematic human rights violations and enabled individuals to benefit from a 'sort of irrefutable presumption' that there was some damage caused,[83] there is no such historical backdrop to the ICJ that warrants such application of a flexible standard of proof.[84]

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[78] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 324 [21].

[79] *Ibid* [33].

[80] *Ibid* [33].

[81] *Ibid* [15], [27] (Separate Opinion, Judge Mampuya).

[82] *Ibid* [27] (Separate Opinion, Judge Mampuya).

[83] *Ibid* [32] (Separate Opinion, Judge Mampuya).

[84] Recently, the court held that 'the standard of proof required to establish responsibility is higher than in the present phase on reparation, which calls for some flexibility': *Armed Activities on the Territory of the Congo* (n 38) [124]. While this may indicate that a lower standard could always be adopted for claims for reparation in contrast to establishing responsibility for the same claim, some caution must be had before drawing such a generalisation. Pertinently, it reached this conclusion based on three case-specific factors. First, it noted (at [123]) that there are many difficulties in examination compensation claims for violations of obligations under the *jus in bello* and *jus ad bellum* committed in the context of an international armed conflict, which entailed that applying a high standard of proof to quantify the damage may 'thwart any reparation'. Secondly, it noted (at [123]) the International Criminal Court's observations regarding the disputing parties that the victim state 'were not always in a position to furnish documentary evidence in support of all the harm alleged'. Thirdly, it observed (at [124]) that there was already 'a large amount of evidence has been destroyed or

In certain claims where the nature of the substantive obligation cannot be easily proven, there have been indications that the ICJ will adopt a lower standard of proof. Judge Greenwood noted in his separate opinion in *Pulp Mills on the River Uruguay*, that the standard of proof to be adopted in proving the violation of environmental obligations is that of the balance of probabilities' or 'balance or evidence'.[85] One reason for adopting a lower standard of proof in this context was the 'nature of environmental disputes'. This made the application of a higher standard of proof having the 'effect of making it all but impossible for a State to discharge the burden of proof'.[86] As is the case with Judge Sebutinde and Vice President Sepulveda-Amor's Dissenting Opinion and Declaration in *Maritime Dispute (Peru v Chile)*. It was asserted that the fact that it would be difficult to prove the particular case should not weigh on the standard of proof. Rather, it should only go towards readjusting the probative value of the evidence provided. The main judgement of *Pulp Mills on the Uruguay* appears to be more aligned with this reasoning: the court observed that despite the voluminous evidence and complex nature of the evidence provided by both parties, it would nevertheless give 'careful consideration to all the evidence placed before it', 'determine which facts must be considered relevant', and 'assess their probative value', to 'draw conclusions from them as appropriate'.[87]

4. When procedural mechanisms of the court are engaged

Article 41 of the Statute empowers the ICJ to grant provisional measures 'to preserve the respective rights of either party'.[88] In granting provisional measures, the court has indicated that a lower standard of proof would suffice. For example, in the *Legality of Use of Force* cases involving the former Yugoslavia and various states including Belgium, Canada, France, and Germany,[89] the court found that a *prima facie* case was sufficient to estab-

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rendered inaccessible over the years since the armed conflict'. If these factors are absent, it may not be entirely appropriate to take such a lax approach to proving the reparation to be made to the victim state. It must be borne in mind that the court in this case (at [106]) only decided to award compensation in the form of a global sum even without sufficient certainty as to the scale of the damage but ultimately warned that this approach is 'exceptional' and adopted only where 'the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury'.

85 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14 [26] (Separate Opinion, Judge Greenwood).

86 *Ibid* [26] (Separate Opinion, Judge Greenwood).

87 *Ibid* [168].

88 Statute (n 6) art 41.

89 *Legality of Use of Force (Serbia and Montenegro v Belgium) (Serbia and Montenegro v Canada) (Serbia and Montenegro v France) (Serbia and Montenegro v Germany) (Serbia and Montenegro v Italy) (Serbia and Montenegro v Netherlands) (Serbia and Montenegro v Portugal) (Yugoslavia v Spain) (Serbia and Montenegro v UK)*, Orders of 2 June 1999.

lish jurisdiction for it to grant provisional measures.[90] This is the case even if the case concerns a particularly grave norm, as clarified in the recent Order on Provisional Measures in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar)*.[91] This case concerned the question of whether the court could grant provisional measures against Myanmar in relation to an alleged genocide that was committed on the Rohingyas. The court, in granting the provisional measures sought by the Gambia, clarified that, notwithstanding the serious nature of genocide, the standard of proof required to prove that the court has jurisdiction remains only a *prima facie* case. This is because the court is not (yet)ascertaining whether any violations of the Genocide Convention had occurred.[92] What the court is required to do at the stage of making an order on provisional measures is only to establish whether the acts complained of ' are capable of falling within the provisions of the Genocide Convention'.[93] Moreover, this lower standard appears to apply to all aspects of the case. Both Myanmar and Gambia were parties to the Genocide Convention, but Myanmar had made a reservation to Article VIII that allowed contracting parties to 'call upon the competent organs of the United Nations to take such action' in relation to certain acts in the Genocide Convention.[94] The court found that this reservation 'did not appear' to deprive Gambia to seize the court under Article IX of the Genocide Convention. It similarly applied the standard of 'prima facie standing' in favour of Gambia.[95] While Vice President Xue disagreed with the court's analysis of *erga omnes partes* as affording standing to a state to bring a claim,[96] she nonetheless indicated that provisional measures should be granted.[97]

A similar approach is adopted when a state chooses not to appear before the court. In *Nicaragua*, the US decided not to appear during the merits stage after the court found that it had jurisdiction over the case.[98] Due to the US's non-appearance, the court had to apply Article 53 of the Statute and determine the standard of proof that would be applicable to the case. Article 53 provides that the court is bound to 'satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law'. In interpreting the term 'satisfy itself', a higher standard of proof seems to be applicable: the court held that the facts on which any findings are based on must be supported by 'convincing evidence', so far as the nature of

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[90] See for instance, *Legality of Use of Force (Yugoslavia v USA)* (Order) [1999] ICJ Rep 916 [20].
[91] (Order) [2020] ICJ Rep 3.
[92] *Ibid* [30].
[93] *Ibid* [30].
[94] *Ibid* [34].
[95] *Ibid* [36], [39] - [42].
[96] *Ibid* [5] (Separate Opinion, Vice President Xue).
[97] *Ibid* [9] (Separate Opinion, Vice President Xue).
[98] *Military and Paramilitary Activities in and Against Nicaragua* (n 22) [24].

the case permits.[99] However, it is arguable that it may be simply the case that 'convincing evidence' is required in the specific context of the *Nicaragua*. This concerned the question of whether the US had violated the principle of non-intervention or unlawfully used force in the territory of Nicaragua, both of which are of significant gravity. Amarasinghe argues that under Article 53, 'no lesser or higher standard is impliedly laid down'.[100] This approach is reasonable in our view – it cannot be the case that a higher standard of proof is applied to an applicant in proving its case, simply because the respondent chooses not to appear before the court.

C. Circumstantial Evidence and Adverse Inferences

Before we mount our proposal properly, it may be apposite to make some observations on the interplay between the standard of proof and circumstantial evidence, and adverse inferences, given the occasional (but contentious) invocation of these evidentiary principles in international law and how they link to what we have seen so far.

Circumstantial evidence broadly refers to evidence that establishes facts and circumstances from which inferences can be drawn to reach a conclusion, and it is put in contrast to direct evidence.[101] For example, in *Bosnian Genocide*, the ICJ relied on two pieces of circumstantial evidence to prove that Serbia and Montenegro violated its obligation to prevent the Srebrenica genocide.[102] These were the international concerns about what appeared likely to occur in Srebrenica (where the genocide occurred), as well as President Milošević's similar observations about the situation in Srebrenica.[103] Likewise, in *Corfu Channel*, the ICJ also referred to Albania's continued jealous watch over its territorial waters, and the existence of expert evidence to show how it would have been infeasible for a party to lay mines in the channel without Albania observing it from the Albanian coast.[104] In relying on circumstantial evidence, the court held that the UK would be allowed a more liberal recourse to inferences. This was allowed specifically since the facts occurred within the 'exclusive territorial control' exercised by Albania, and direct proof of Albania's knowledge could not be easily furnished.[105]

The ICJ's usage of circumstantial evidence in *Corfu Channel* may give the impression that different standards of proof would apply for a state's usage of

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[99] *Ibid* [29]. See also, Chester Brown, *A Common Law of International Adjudication* (2007, OUP) 100.

[100] Chittaranjan Amerasinghe, *Evidence in International Litigation* (Brill Nijhoff 2005), 245.

[101] Sharngan Aravindakshan, 'Cyberattacks: A Look at Evidentiary Thresholds in International Law' (2021) 59(1) Indian Journal of International Law 285.

[102] *Bosnian Genocide* (n 28) [438].

[103] *Ibid*.

[104] *Corfu Channel* (n 29) 18–23.

[105] *Ibid* 18.

circumstantial evidence. The court found that the proof required to show that Albania had knowledge of mine-laying could be 'drawn from inferences of fact, provided that they leave no room for reasonable doubt'.[106] However, we are of the view that the court's reliance on circumstantial evidence has no bearing on the applicable standard of proof. Instead, the usage of circumstantial evidence would only affect the weight of evidence in meeting the requisite standard of proof.[107] The court observed that indirect evidence must be regarded 'as of special weight' where it is based on a series of facts linked together and logically leading to a single conclusion.[108] Further, when the UK sought to rely on both direct and circumstantial evidence in *Corfu Channel* to show that Yugoslavia and Albania colluded to lay the mines, the court applied the more stringent requirement of 'conclusive evidence' to find that such collusion could not be made out.[109] Whether the evidence relied upon was direct or circumstantial evidence was unlikely to have affected the standard of proof applied by the court.

As to adverse inferences, if the court has insufficient evidence before it, the court has various powers under the Statute and the Rules of Court to gather the necessary evidence.[110] These include the power to request public international organisations to present evidence,[111] call upon agents of the state to produce any document or supply any explanations,[112] and to entrust any individual body, bureau, commission, or other organisation to carry out an enquiry or give an expert opinion.[113] However, unlike domestic legal systems, the court does not have the power to compel evidence to be produced. Instead, the court may take 'formal note' of the party's refusal under Article 49 of the Statute. Also, if the party has exclusive control over the evidence, the court

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[106] *Ibid*.

[107] See also Hans-Georg Dederer & Tassilo Singer, 'Adverse Cyber Operations: Casuality, Attribution, Evidence, and Due Diligence' (2019) 95 International Law Studies 430, 453, where the authors similarly remarked that the passages on indirect evidence in *Corfu Channel* 'does not imply that the Court opted for the highest standard of proof (beyond a reasonable doubt) if only circumstantial evidence is available. Rather, we suggest that the Court applied the highest standard of proof because of the serious allegation by the United Kingdom'. Note, however, that we depart from the authors in our assessment of the highest standard of proof, which is not 'beyond reasonable doubt', but 'conclusive evidence': see Part IV. See also *Rockwell International Systems v Government of the Islamic Republic of Iran* [1989] 23 Iran-US Claims Tribunal Reports 150, 188, where the tribunal noted that where the difficulty of proof is the result of the respondent's failure to raise objections, 'a lower standard of proofis acceptable'.

[108] *Corfu Channel* (n 29) 18.

[109] *Ibid* 17.

[110] See Michael Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13(1) Chicago Journal of International Law 123, 127.

[111] Statute (n 6) art 34(2).

[112] *Ibid* art 49.

[113] *Ibid* art 50.

has indicated that it may draw adverse inferences from its refusal.[114] For example, even though the court in *Bosnian Genocide* refused to compel Bosnia and Herzegovina's request for certain unedited copies of documents from Serbia and Montenegro, it noted the possibility that it 'may be free to draw certain its own conclusions' from Serbia and Montenegro's refusal to adduce these documents.[115] In drawing adverse inferences, the court may choose to treat it as a part of circumstantial evidence, in its assessment of whether the burden of proof has been discharged.[116] As part of the evidence that would be before the court, adverse inferences would not affect the standard of proof. However, it would merely affect the evidence available for the other party to meet the requisite standard of proof. It has also been suggested that the court may choose to treat adverse inferences as a license to resort to circumstantial evidence where direct evidence would otherwise be preferred.[117] While this has arguably been the way by which the ICJ uses adverse inferences, it would likewise not bear upon the standard of proof that a party has to meet, but would only affect the weight which the court will ascribe to the evidence before it.[118]

IV. THE CASE FOR TIERED STANDARDS OF PROOF

As seen from above, the ICJ has in its jurisprudence invoked a variety of standards of proof, depending on the context. What we can discern is that these standards of proof lie on a spectrum, with low standards of proof (such as *prima facie* case) on one end of the spectrum, and very high standards of proof lying on the other (such as fully conclusive evidence). Although there are some indicative factors that may point towards a higher or lower standard of proof, in our view, the better way forward is a clearer elucidation of how and

[114] Chen Siyuan, 'Re-Assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying its Discretion to Exclude Evidence' (2015) 13(1) International Commentary on Evidence 1, 20. See also Chittharanjan Amerasinghe, 'The Bosnia Genocide Case' (2008) 21(2) Leiden Journal of International Law 411, 422.

[115] *Bosnian Genocide* (n 28) [206].

[116] See Vera van Houtte, 'Adverse Inferences in International Arbitration' in Teresa Giovannini and Alexis Mourre (eds) *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies* (International Chamber of Commerce 2009), 197–198; Alexander Sevan Bedrosyan, 'Adverse Inferences in International Arbitration: Toothless or Terrifying?' (2016) 38(1) University of Pennsylvania Journal of International Law 241, 247.

[117] Scharf and Day (n 110) 127–128.

[118] In *Bosnian Genocide*, it was also suggested by Bosnia & Herzegovina that adverse inferences may be used to reverse the burden of proof: *Bosnian Genocide* (n 28) [205]. The court seemed to have rejected this line of reasoning, especially since it had highlighted the principle of *actori incumbit probatio* just one paragraph prior, but only commented that it would "draw its own conclusions" from the refusal to produce the evidence: [206]. For the *actori incumbit probation* principle, see Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Martinus Nijhoff 1996) 116–117. The alternative, which is that the 'burden of proof' does not shift, but the 'burden of production' (or loosely speaking 'evidentiary burden') shifts, is unlikely to be accepted by the court. The court has implicitly rejected the notion of an 'evidentiary burden' in the earlier decision of *Avena and other Mexican Nationals (Mexico v USA)* [2004] ICJ Rep 128 [56]– [57]; [2] (Declaration, Vice-President Ranjeva).

when standards of proof are tiered. Otherwise, the court may unconsciously apply inconsistent standards both internally and externally.

In *Oil Platforms*, while the court required 'conclusive' evidence to prove that the USS *Samuel B Roberts* was mined by Iran,[119] it also said it needed to assess on a 'balance of evidence' in attributing a missile attack to a state.[120] Then, as Green observes,[121] in *Armed Activities on the Territory of Congo*,[122] the court, in answering the same question (whether there was an armed attack), applied different standards across the judgement. At one point, the court found that there was a need to provide 'conclusive evidence' to show that support was provided to armed rebel groups.[123] At another, it wrote that the evidence that 'suggests' that a state created an armed group would suffice to attribute the actions of the armed group to the state.[124]

This confusion in the standards to be applied was similar to the court's decision in *Corfu Channel*, where the court used as many as three expressions to describe the standard of proof necessary to prove that Albania and Yugoslavia had colluded to lay mines in the channel. These included: 'decisive legal proof',[125] 'conclusive evidence',[126] and a 'degree of certainty'.[127] While these standards may have been used interchangeably, it has been observed that such creative vocabulary came at the cost of predictability in the court's approach.[128] In fact, when the court subsequently relied on *Corfu Channel* in *Bosnian Genocide*, it too departed from the phrasing used in *Corfu Channel*. Instead, it found that charges of exceptional gravity must be proved by 'fully conclusive evidence'.[129]

Relatedly, placing the standards of a proof on a spectrum based on the existence of various factors does not help in finding out what evidence would suffice to meet the necessary standard of proof.[130] What does it mean by 'no

[119] *Oil Platforms* (n 11) [71].
[120] *Ibid* [57].
[121] James Green (n 10) 174. See also Jeffrey Dunoff and Mark Pollack, 'International Judicial Performances and the Performance of International Courts' in Theresa Squatrito, Oran Young, Geir Ulfstein, and Andreas Føllesdal (eds), *The Performance of International Courts and Tribunals* (CUP 2018) 271.
[122] [2005] ICJ Rep 168.
[123] *Ibid* [303].
[124] *Ibid* [159]– [161].
[125] *Corfu Channel* (n 29) 16.
[126] *Ibid* 17.
[127] *Ibid* 17.
[128] Advaya Hari Singh, 'A Clear Standard of Proof in Disputes Before the ICJ: Are We There Yet?' (*CILJ Blog*, 5 March 2021) <http://cilj.co.uk/2021/03/05/a-clear-standard-of-proof-in-disputes-before-the-icj-are-we-there-yet/> accessed 11 September 2021.
[129] *Bosnian Genocide* (n 28) [209].
[130] This has been described as an 'open-ended, discretionary evidentiary framework': Simone Halink, 'All Things Considered: How the International Court of Justice delegated its

room for reasonable doubt', the standard that was used in *Corfu Channel*?[131] Does this differ from the question of whether the court is "fully convinced", the standard that was used in *Bosnian Genocide*?[132] How about the standard that was used in *Nicaragua*, that requires the evidence to be 'more realistic and consistent with the probabilities'?[133] What about the standard of 'beyond reasonable doubt' in *Oil Platforms*?[134] And how does 'balance of probabilities'[135] and evidence to the 'satisfaction of the Court'[136] relate to each other, or to other standards of proof?

The problem with setting out a spectrum of standards, and not explaining how these standards relate to each other, is that while we may generally be able to see in broad strokes where these standards differ (for instance, 'fully conclusive evidence' is by any account a more stringent test than 'balance of probabilities'), the differences between these standards become much more elusive once we start comparing tests that are more similarly worded (say, 'fully conclusive evidence' and 'beyond reasonable doubt'). In practical terms, it becomes harder for litigants to be able to predict whether the evidence they have in hand is sufficient to discharge the burden of proof. A tribunal that is meant to resolve inter-state disputes ought to be guided by – and provide – more clarity on something as fundamental as standard of proof.[137]

One way of resolving this conundrum is to set out standards of proof that apply to particular norms. However, this lacks normative conviction in explaining why a particular standard should be taken because it purely relies on the discrete areas of international law to settle the question of the relevant standard of proof. Explaining that a state alleging that another state has violated its obligation to prevent genocide must satisfy a high standard of proof is unconvincing, without the underlying explanation that such a grave finding would hurt the honour of the state to a significant extent, and may have huge political ramifications. A recent exemplification of this point is the court's finding in the *Chagos Archipelago Advisory Opinion*, that the UK's continued administration

fact-assessment to the United Nations in the *Armed Activities* Case' (2007) 40(13) NYUJ International Law and Politics 13, 25.

[131] *Corfu Channel* (n 29) 23.

[132] *Bosnian Genocide* (n 28) [209].

[133] *Military and Paramilitary Activities in and Against Nicaragua* (n 22) [158].

[134] *Oil Platforms* (n 11) [56] (Separate Opinion, Judge Kooijmans). See also *Southwest Africa Cases (Liberia v South Africa)* (n 33) 511 (Joint Dissenting Opinion, Judge Sir Percy Spender and Judge Sir Gerald Fitzmaurice).

[135] *Case Concerning the Land, Island and Maritime Frontier Dispute* (Merits) (El Salvador/Honduras: Nicaragua Intervening) [1992] ICJ Rep 351, 506.

[136] *Ahmadou Sadio Diallo* (Compensation) (n 78) [27] (Separate Opinion, Judge Mampuya).

[137] A solution that has been suggested in Ruth Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice' (2007) 6(1) The Law and Practice of International Courts and Tribunals 119, 128, is for the ICJ to indicate at the outset what standard of proof is required by the litigants. However, this approach does not help resolve potential litigants which have yet to seise the jurisdiction of the court and are assessing their prospects to bring a case before the court.

over the Chagos Archipelago was illegal.[138] The UN General Assembly subsequently adopted a resolution (116 in favour, 6 against) demanding that the UK unconditionally withdraw its colonial administration.[139] Questions were subsequently posed in the UK's Parliament on the government's adherence to the rule of law due to its refusal to effect the court's judgement.[140]

Instead, we think a tiered approach to the standards of proof may be desirable, as is the case in domestic law in common law jurisdictions. Under the common law, there are two basic default standards of proof depending on whether the case is a civil or criminal one. A higher standard of 'beyond reasonable doubt' is applied where the case in question is a criminal one.[141] On the other hand, a lower standard of 'balance of probabilities' is adopted where it involves civil cases.[142] Some jurisdictions build on this basic dichotomy, in that there are certain principles that may alter the standard of proof, such as where especially inequitable conduct such as fraud is alleged.[143]

It is suggested that the ICJ should adopt standards of proof that are not unlike these common law standards. In order of increasing stringency, they are: (1) proof on a *prima facie* case; (2) the balance of probabilities; (3) clear and convincing evidence; (4) beyond reasonable doubt; and in exceptional circumstances, (5) fully conclusive evidence.[144] Indeed, the court's jurisprudence may be reasonably categorised into these broad categories. The requirement now is greater clarity in delineating and unifying the court's inconsistent ways of spelling out the standard of proof needed to be met.

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[138] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95.

[139] UNGA Res 73/295 (2019) UN Doc A/RES/73/295.

[140] Hansard HC vol 662 col 579WH-587WH (3 July 2019).

[141] See for instance *Phipson on Evidence* (n 1) [6-09]; Miiko Kumar, Stephen Odgers, and Elisabeth Peden, *Uniform Evidence Law: Commentary and Materials* (2018, 6th edn, Thomson Reuters) [15.60]; Chen Siyuan and Lionel Leo, *Law of Evidence in Singapore* (2019, 2nd edn, Sweet & Maxwell) [3.001]– [3.034].

[142] *Phipson on Evidence* (n 1) [6-56]; *Uniform Evidence Law* (n 141) [15.40]; *Law of Evidence in Singapore* (n 141) [3.001]– [3.034].

[143] For instance, in Pennsylvania and other states in the US, where a middle standard of proof, such as proof that is 'clear and convincing' is required to prove civil fraud: *Robert Boehm v River Source Life Insurance* (2015) PA Super 120, 117 A 3d 308. Note, however, that in other common law jurisdictions such as the UK and Singapore, the standard of proof that is required to prove fraud does not change – instead, the standard remains the balance of probabilities, but more cogent evidence may be required to overcome the unlikelihood of what is alleged: see for instance *H (Minors), In re* [1996] AC 563; *Gimpex Ltd v Unity Holdings Business* [2015] 2 SLR 686.

[144] Cf Chester Brown, *A Common Law of International Adjudication* (2007, OUP) 98–101, where he suggests five standards: '*prima facie* case', 'beyond reasonable doubt', 'proof in a convincing manner', 'preponderance of evidence' and 'sufficient proof'. See also Foster (n 2)60, where she suggests three standards: 'beyond reasonable doubt', 'balance of probabilities' and 'conclusive proof'.

The lowest standard of proof, which is observed mostly in the granting of provisional measures, is that of proving a *prima facie* case. As explained in *Jadhav*[145] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar)*, the *prima facie* standard asks whether the evidence is 'capable of' proving a particular fact.[146] As Judge Greenwood similarly emphasised in his separate opinion in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, the threshold of the *prima facie* case is 'set quite low'.[147]

Lying above it is the 'balance of probabilities' or 'preponderance of evidence' standard, which is generally seen to be the default position before considering the various factors. This would clearly include the standard laid out in *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)*,[148] and would also encompass the standard of proof elucidated by Judge Lauterpacht in his separate opinion in *Certain Norwegian Loans*,[149] and the 'balance of evidence' suggested in *Oil Platforms*.[150]

The 'clear and convincing' standard, as was applied in the *Applicationof Interim Record*[151] represents a slightly higher standard, which maps to the higher standard of proof required in a civil case where bad faith has been alleged by a state.

The higher standard of 'beyond reasonable doubt' should encompass cases where grave breaches are alleged. This would encompass the 'no room for reasonable doubt' standard as applied in *Corfu Channel* in proving that Albania did not notify the warships of the mines,[152] and the standard of 'proof at a high level of certainty' in *Bosnian Genocide* in proving that a state had failed to prevent the commission of genocide.[153]

There may also be exceptionally grave situations where an even higher standard of proof of 'fully conclusive evidence' may be warranted.[154] These

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[145] *Jadhav (India v Pakistan)* (Order) [2017] ICJ Rep 231.

[146] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v Myanmar)* (n 96) [30]; *Ibid* [30].

[147] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) 323 (Separate Opinion, Judge Greenwood).

[148] *Land, Island and Maritime Frontier Dispute* (n 32).

[149] *Certain Norwegian Loans* (n 61) 34 (Separate Opinion, Judge Sir Hersch Lauterpacht).

[150] *Oil Platforms* (n 11) [57].

[151] *Application of the Interim Accord* (n 47) [132].

[152] *Corfu Channel* (n 29) 18.

[153] *Bosnian Genocide* (n 28) [210].

[154] The 'beyond any doubt' standard is more frequently invoked in international criminal law, where the UN Secretary-General indicated that the *nullum crimen sine lege* principle requires that the international tribunal 'apply rules of international humanitarian law which are beyond

include situations such as where the court required 'conclusive' evidence in *Oil Platforms* to prove that Iran mined US ships;[155] where it also required 'conclusive evidence' in *Corfu Channel* to prove that Albania had colluded with Yugoslavia to lay mines in the Corfu Channel;[156] and where it applied the 'beyond any doubt' standard in *Bosnian Genocide* to prove that there was a specific intent to commit genocide.

One concern that may arise is whether such a tiered approach to the standards of proof may lead to the creation of an unprincipled hierarchy of international law norms. The argument goes, that by virtue of the ICJ's indication of different standards of proof in the context of different norms, this would unwittingly indicate that certain norms may be more important than others, without sound jurisprudential grounds to do so. However, the approach currently borne out from existing jurisprudence is also not free from such considerations, and hierarchies have been impliedly drawn through the adjudication of cases before the ICJ. As Judge Greenwood observed in *Pulp Mills*, the acknowledgement by the court in *Bosnian Genocide* that grave charges require a 'high level of certainty' implies that a lower standard of proof may be acceptable for other less grave allegations.[157] Judge Greenwood, thus concluded that while environmental obligations are 'undoubtedly serious', they are 'not of the same character' as genocide, and a lower standard of proof would be warranted.[158] Indeed, such hierarchies are not inherently problematic. This is if the court makes it clear where such hierarchies are merely drawn for the purposes of discerning a standard of proof and ensures that such considerations do not bleed into other areas of law. For example, if the court applies the 'beyond reasonable doubt' standard to cases apart from the violation of *jus cogens* norms such as the prohibition on the use of force and genocide,[159] then it must make clear that deciding the standard of proof in those cases is not an indication of whether the legal norm is *jus cogens* or not.

V. CONCLUSION

Despite Judge Higgins' calls to do so almost two decades ago, the ICJ's continued resistance to clarify and set clear indications as to when it would apply certain standards of proof have been a significant hindrance to the stability and clarity of the law, both of which are arguably key values in upholding

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any doubt part of customary law'. See "Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)" (3 May 1993) UN Doc S/25704, [34].

155 *Oil Platforms* (n 11) [71].

156 *Corfu Channel* (n 29) 17.

157 *Pulp Mills* (n 90) [25] (Separate Opinion, Judge Greenwood).

158 *Ibid*.

159 See for instance, Diana Contreras-Garduno & Igancio Alvarez-Rio, 'A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on *Jus Cogens*' (2016) 14 Revista do Instituto Brasilerio de Direitos Humanos 113.

the rule of law.[160] But as we have sought to argue, there are good reasons to adopt a tiered approach to the standard of proof in international law. This approach is far desirable than the current approach of leaving breadcrumbs in various decisions as to the standards that would apply. This, in turn leaves the legal observer with the unenviable task of seeking to make sense of the court's jurisprudence and trying to elucidate and predict factors and scenarios in which the court would apply certain standards. These standards are then left unexplained on a putative spectrum of standards of proof. The court, at different times, applies standards that seem to be indistinguishable with each other, with slight difference in the terminology used, but with no indication as to how these standards relate to each other. Ultimately, the court already has the ingredients in its jurisprudence to clarify the relevant standard of proof that should apply to cases that come before it. It is not as if the court has never discussed about the applicable standard of proof to be applied in its jurisprudence – it only needs to classify and rearrange all these varying standards into intelligible categories to inject the much-needed clarity in this area of the law.

[160] Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 39.